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WOOD'S

COLLYER

ON

THE LAW OF PARTNERSHIP.

WITH AN

APPENDIX OF FORMS

BY

JOHN COLLYER,

OF LINCOLN'S INN, ESQ., BARRISTER AT LAW.

WITH ADDITIONS FROM LINDLEY AND OTHER ENGLISH AUTHORS,

AND

FULL AMERICAN NOTES AND REFERENCES TO AMERICAN CASES,

BY H. G. WOOD,

AUTHOR OF "THE LAW OF NUISANCES," "THE LAW OF MASTER AND SERVANT," "THE LAW OF FIRE INSURANCE," ETC., ETC.

Vol. I.

JOHN B. LIVINGSTON

ALBANY, N. Y.
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PREFACE.

No excuse for offering this work to the profession is necessary. It has always been regarded not only as a standard, but also as one of the most authoritative and masterly legal text-books ever published, and has been cited by our courts, with approbation, in hundreds of cases. Other works upon the subject have been written, both in this country and England, but none of them have ever covered the topic involved, so exhaustively, or presented the principles upon which the law of partnership rests, so clearly and logically, as has been done by Mr. COLLYER in this work.

In the preparation of this edition I have embodied in the text and notes all that is valuable in Lindley, Dixon, Bissett and Gow, indicating what is taken from each, and, in addition, have given quite full American notes. There are some portions of the original text that might, perhaps, have been omitted with propriety, but, so far as my experience goes, I have found that the profession generally prefer that the pruning knife shall not be used upon works of such excellence as Mr. COLLYER'S, therefore I have given the text entire, with the single exception of the chapter upon Practice in Bankruptcy. I have divided the text into sections, with head-lines, and done all that could be to facilitate ready reference. The index is very full, and the table of cases embraces many thousands more than are cited in the original work.

Confident that the work will be found valuable to the profession, I submit it to their criticism.

H. G. WOOD.

ALBANY, *July* 4, 1878.

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TREATISE ON PARTNERSHIP.

CHAPTER I.

OF THE CONTRACT.

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Of the formation of the contract.

SECTION 1. The law of partnership rests on a foundation composed of three materials: the common law, the law of merchants, and the Roman law.[1] Thus, by the common law, a partner has no power to

[1] Partnerships have been variously defined.

"A mutual participation in profit and loss." Tindal, C. J., in Green v. Busley, 2 Bing. N. C. 108. See also definition by Patterson, J., in Bond v. Pittard, 3 M. & W. 357.

Mr. Lindley, without attempting to define the term himself, gives the following:

La société est un contrat, par lequel deux ou plusieurs personnes conviennent de mettre quelque chose en commun, dans la vue de partager le bénéfice qui pourra en résulter. Code Civil, § 1832.

La société est une convention entre deux ou plusieurs personnes, par laquelle ils mettent en commun entre eux ou tous leurs biens ou une partie, ou quelque commerce, quelque ouvrage, ou quelque autre affaire, pour partager tous ce qu'ils pourront avoir de gain ou souffrir de perte de ce qu'ils auront mis en société. Domat, les Lois Civiles, liv. i. tit. 8, § 1.

Les actes par lesquels les hommes se procurent de l'utilité les uns aux autres sont ou simples ou composés. Ceux que j'appelle actes simples sont ou gratuits ou utiles de part et d'autre. Les actes utiles de part et d'autre ou laissent les interêts des parties separés ou les réunissent.

Les actes qui réunissent les interêts des contractans mettent en commun pour leur advantage mutuel, ou leurs actions ou leurs biens, ou les actions d'un coté et les biens de l'autre. Tout cela s'appelle en générale contract de société; et l'on y comprend les sociétés contractés pour la guerre, comme celle qui est commune parmi nous, et qu'on appelle Amirauté c'est à dire, l'union de plusieurs vaisseaux de particuliers pour se défendre les uns les autres dans leur route contre les Pirates ou autres qui pourraient les attaquer. Grot. Le Droit

bind his copartner by deed. By the law of merchants he has a power to bind his copartner by a bill of exchange; again, by the law of mer-

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de la Guerre et de la Paix, liv. ii. chap. 12, §§ 1, 2, 3, et 4, éd. Barbeyrac.

Partnership is a contract of two or more competent persons to place their money, effects, labor and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. 3 Kent's Comm. 23.

Le contract de société est un contrat par lequel deux ou plusieurs personnes mettent, ou s'obligent de mettre en commun quelque chose, pour faire en commun un profit honnête dont ils s'obligent reciproquement de se rendre compte. Pothier, traité du Contrat de Société, § 1. There is a useful English edition of this work by O. D. Tudor, Esq.

Societas est contractus de conferendis bona fide rebus aut operis, animo lucri quod honestum sit ac licitum in commune faciendi. Pothier, Pand. lib. xvii. tit. 2, § 1, art. 1.

Ein Vertrag durch welchen mehrere Personen ihr Vermögen oder Gewerbe oder auch ihre Arbeiten und Bemühungen ganz oder zum Theil zur Erlangung eines gemeinschaftlichen Endzwecks vereinigen, wird ein Gesellschaftsvertrag genannt. Allgem. Landsrecht für die Preuss. Staat. Th. i. Tit. 3, § 169.

Le contract de société se fait lorsque deux ou plusieurs personnes mettent en commun leur argent, leurs biens, ou leur travail, à la charge de partager entr'eux le gain et de supporter les pertes qui en arriveront, chacun à proportion de ce qu'il contribue du sien. Pufendorf, Le Droit de la Nat. et des Gens, éd. Barbeyrac, liv. v. chap. 8, § 1.

When two or more persons join money, or goods, or labor, or all of these together, and agree to give each other a common claim upon such joint stock, this is partnership. Inst. of Nat. Law, bk. i, c. 13, § 9.

Partnership, often called copartnership, is usually defined to be a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them. Story on Partn., § 2.

Verbinden sich mehrere zur Erreichung eines ihnen gemeinschaftlichen Endzwecks so wird diess ein Gesellschaftsvertrag (*societas* Mascopei, Magenschaft) genannt. Geschieht diese Verbindung zu eigennützigen Zwecken, so nennt man sie *societas quæstuaria*, oder *negotiatoria* sonst aber *non quæstuaria*. Thibaut, System des Pandekten Rechts, § 467, edition 9. This division of partnerships into partnerships having gain for their object, and other partnerships, is noticed by most German writers on the civil law. An association not having gain for its object is not a partnership according to the law of England, although the contrary is assumed in the Joint Stock Act of 1856, one section of which (§ 4) speaks of "partnerships having gain for their object."

Societas est contractus, quo inter aliquos res aut operæ communicantur, lucri in commune faciendi gratia. Vinn. Inst. iii. 26.

[*8.] *Societas est contractus jurisgentium, bonæ fidei, concensu constans, semper re honesta, de lucri et damni communione. Voet. Comm. ad Pand. lib. xvii. tit. 2, Pro Socio, § 1.

Partnership is a voluntary contract between two or more persons for joining together their money, goods, labor and skill, or either or all of them, upon an agreement that the gain or loss shall be divided proportionably between them, and having for its object the advancement and protection of fair and open trade. Watson on Partn. p. 1. This definition is copied by Gow in his work on Partnership.

"The combination by two or more persons of capital, or labor, or skill for the purpose of business for their common benefit." Parsons on Part. 6.

Mr. Watson, in his work on Partnership, defines the relation as above stated, and then proceeds to say:

Partnership in the civil law. — In Justinian's Institutes, partnerships are divided into two kinds; the one general, where the partners had all their effects and concerns in common, and the other special, for carrying on a particular branch of business, as the buying and selling of slaves, of oil, of wine, or of corn. Just. lib. 3, tit. 26. The modern civil law-writers have, in some degree, varied their mode of considering partnerships with relation to the nature of the contract itself. Grotius believes it to be a mixed contract. Puff., b.

chants, there is no survivorship in the partnership stock. On the other hand, though there be no survivorship in the stock, yet by the Roman

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5, ch. 8, § 1. But Puffendorff (b. 5, ch. 2, § 10) says, that in partnership, though one contributes money and work, another only money, yet it does not seem to be a mixed contract; for a contract does not become mixed from the different performances, but from agreements in matters of a different nature by one and the same covenant; and he defines a partnership to be merely "the relation of persons agreeing to join stock or labor, and divide the profits." *Contractus societatis est, quo duo pluresve inter se pecuniam, res, aut operas conferunt, eo fine, ut quod inde redit lucri inter singulos pro ratâ dividatur.* Puff., lib. 5, ch. 8; Waugh v. Carver, 2 H. Bl. 224.

The French law.—The French distinguished three kinds of mercantile society: ordinary society, called also collective and general; society in commendam, or commandity; and anonymous society, called also momentary and secret. The first was where several merchants acted alike in the affairs of the society, and did all under their collective names, which were public and known to everybody. Society in commendam, &c., was that between two persons, one of whom only put his money into stock, without doing any other office of a copartner; the other, who was called the complementary of the society, dispatching all the business under his own name. This society was very useful to the state; inasmuch as all kinds of persons, even nobles and professional men, might contract it, and thus make their money of service to the public; and those who had no fortune of their own to trade withal, hereby found means of establishing themselves in the world, and of making their industry and address serviceable.

Anonymous society was that where all the members were employed, each particularly in the common interest, and each was accountable for profits, &c., to the rest, but without the public being informed thereof; so that the seller had only an action against the particular buyer, no other name appearing. It was called momentary, because frequently made on particular occasions, and ceasing with them; as in the making a purchase, the selling any commodity, &c. Of this they distinguished four kinds: society by participation, which was usually formed by letters from one city to another, where merchandise was to be bought or sold; the second was, when two or three persons went together to fairs to buy goods; the third, when two or three agreed to buy up the whole of some commodity, in any country, to sell it again at their own price; and the fourth was, when three or four persons made a journey together to buy and sell the same commodity. Besides merchants, people of quality, &c., were admitted into these anonymous societies.

The common law.—The common law permits every species of mercantile association, sanctioned by justice and sound policy. The first great division of partnerships with us is into public and private. The former are usually called companies or societies; they generally consist of many members, and are instituted to carry on some important undertaking, for which the capital and exertions of a few individuals would be insufficient. Of these some are incorporated by letters patent, or act of parliament, such as the East India Company, the Bank of England, &c.; others are not, such as most of the fire and life insurance companies.

Unincorporated.—The laws respecting these companies or societies, when not confirmed by public authority, are the same as in common partnerships; but the articles of agreement between the parties are usually very different. The capital is generally divided into a certain number of shares, whereof each partner may hold one or more, but restricted to a certain number. Any partner can transfer his share also, under certain limitations; but no partner acts personally in the affairs of the company, the execution of their business being intrusted to officers, for whom the whole company are responsible, though the superintendency of such officers is frequently committed to directors chosen from the body at large; and in such companies the death of partners has no effect on the trading company.

Incorporated.—There are likewise trading companies established by public authority. The king, by his charter, may constitute fraternities or companies, for the management of foreign or domestic trade. Com. Dig. Trade (B.) Since trade cannot be maintained or increased

law the surviving partners have the right to carry on the business by themselves, in exclusion of the children or representatives of the de-

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without order and government (Com. Dig. Trade D.), therefore the king may erect *gildam mercatoriam* for the advantage of trade (8 co. 125, a.); and none but the king can erect a society for trade or public trading company. Skinner, 224. But the king, by his charter, cannot make a total restraint of trade, for such a patent would be void. 8 Mod. 132.

A charter is necessary to enable a company to hold lands, to have a common seal, and enjoy the other privileges of a corporation; but a charter is sometimes procured merely to limit the risk of the partners; for, in every private company, the partners are liable for the debts without limitation; in incorporated societies they are only liable for their shares in the stock of the society. Sometimes trading companies are authorized by act of parliament; but this high authority is only necessary to confer exclusive privileges.

Not any of the public trading companies incorporated by charter or legislative acts in this country, are to be considered as partnerships within any of the legal principles applicable to partnerships formed by the voluntary agreement of individuals. For in such public companies, where a trade is to be carried on under the corporate name in joint stock there are express provisions that the members are not liable, on account of the joint trade, in their individual capacities, nor one of them for the debts or engagements contracted by others; but only for their respective shares or interest in the joint stock, and that upon trade, and contracts carried on or made in the corporate character. Therefore, if one or more persons enter into such a society, and become sharers of the property and joint stock, yet such a joining together does not constitute partnership, according to the custom of merchants, nor within the principles of law established respecting joint traders.

Private partnerships. — A private partnership is understood to consist of two or three dealers, or not many more, trading under a firm. This is the form of association by far the most beneficial to commerce, and happily the most usual in England. And although such a private partnership may not be supported oftentimes by so large a capital as the great public companies, yet it is managed with more facility, and frequently with a greater degree of skill, prudence and economy.

How formed. — To constitute such a partnership no charter or license is necessary, the bare consent of the partners, fixed and certified by acts or contracts, being wholly sufficient. So that if two or more merchants join together in general trade, or for the performance of any particular branch of business, with mutual interests in the profit and loss, they are in every respect to be considered as partners.

Under the Romans, the social contract or partnership needed no other solemnity but the consent of parties, without any writing at all; and Barbeyrac, in his notes on Puffendorff, observes, that a partnership is contracted sometimes *tacitly*; where, for example, a thing being bought in common is not divided, but the parties interested, without explaining themselves further, enjoy it equally, each sharing in the profit that arises, and contributing his own proportional part in the necessary expenses for its maintenance. By the common law, if there be no articles of copartnership between two or more persons, who agree between themselves to take jointly the profits and bear equally the loss in any trade, it constitutes a partnership between them with respect to strangers or the world, and they must be considered as partners; for, by the Law Merchant, which is part of the common law (Co. Lit. 11 b., 2 Roll. Abr. 114), they are recognized and treated as partners, whether there was an *express* agreement entered into by the parties or not, provided they appear ostensibly to the world as joint traders. Between the parties themselves the question may be, what shares they shall divide, but the world at large only look to see who are or are not liable, as partners, for debts and defaults.

Who are and who are not partners. Consent necessary. — Partnership being a voluntary contract, where the consent of the parties engaging therein is necessary for its formation, those persons who hold any thing in common, independently of their own free will, cannot be deemed partners; and of this

ceased partner. But merchants were always considered as subject to the jurisdiction of the common law.[1] And accordingly it is in the discretion of the judges to determine how far the law of merchants shall be permitted to control the law of the land. Thus, although in the words of Hobart, C. J., "the custom of merchants is part of the common law of this kingdom, of which the judges ought to take notice; and if any doubt arise to them about their custom, they may send for

latter class are *donees* and the *legatees* of one and the same thing; or those who, through other causes, chance to hold something between them which is not divided, or is to be possessed in common without any mutual agreement. It is not enough to form a partnership that two or more persons hold any thing in common among them; for the mere circumstance of having something in common among many, not implying the reciprocal choice of the parties, cannot link them together in partnership. The free choice of the persons contracting is so essentially necessary to the constituting of a partnership, that even the executors and representatives of partners themselves do not, in their capacity of executors or representatives, succeed to the state and condition of partners. Ward v. Thompson, 22 How. (U. S.) 330; Gregory v. Dodge, 14 Wend. (N. Y.) 593; Lamb v. Grover, 47 Barb. (N. Y.) 317; Jones v. O'Farrel, 1 Nev. 354; McIllvane v. Armsfield, 5 La. An. 302; Briggs v. Vanderbilt, 19 Barb. (N. Y.) 222; Knowlton v. Reed, 38 Me. 246; Dwinel v. Stone, 30 id. 384; Freeman v. Bloomfield, 43 Me 391; Satter v. Ham, 31 N. Y. 321; Gray v. Gibson, 6 Mich. 300.

A person who holds himself out as a partner to be so considered. — If a person suffers his name to be used in a business, and holds himself out as a partner, he is to be so considered, whatever the agreement may be between him and the other partners. Thus in Younge v. Axtell and another (at Guildhall Sittings after Hil. 24 Geo. cor. Lord Mansfield, cited by Mr. Sergeant Le Blanc from MSS. notes), which was an action to recover £600 and upwards for coals sold and delivered by the plaintiff, a coal merchant, an agreement between the defendants was given in evidence, stating that the defendant, Mrs. Axtell, had lately carried on the coal trade, and that the other defendant did the same; that Mrs. Axtell was to bring what customers she could into the business, and that the other was to pay her an annuity, and also two shillings for every chaldron that should be sold to those persons who had been her customers, or were of her recommending. The plaintiff also proved that bills were made out for goods sold to her customers in their joint names, and the question was, whether Mrs. Axtell was liable for the debt? Lord Mansfield said, "He "should have rather thought on the "agreement only, that Mrs. Axtell "would be liable, not on account of the "annuity, but the other payment, as that "would be increased in proportion as "she increased the business. However, "as she suffered her name to be used in "the business, and held herself out as a "partner, she was certainly liable, "though the plaintiff did not at the "time of dealing know that she was a "partner, or that her name was used." And the jury accordingly found a verdict for the plaintiff. Stearns v. Haven, 14 Vt. 540; Buckingham v. Burgess, 3 McLean (U. S.) 364; Mershon v. Hobensack, 22 N. J. L. 372; Bowie v. Maddox, 29 Ga. 285; Fisher v. Bowles, 20 Ill. 396; Crozier v. Kirker, 4 Tex. 252; Kellogg v. Griswold, 12 Vt. 291; Craige v. Warren, 3 Phil. (Penn.) 298; Sherrod v. Langdon, 21 Iowa, 518; Furber v. Carter, 11 Humph. (Tenn.) 271; Gumbrel v. Abrams, 20 La. An. 568.

Persons who share profit and loss partners. — If two or more persons agree between themselves to take jointly the profits, and bear equally the loss, in any trade, it shall be deemed a partnership in general, with respect to strangers and all the world; because such strangers, or third persons, give credit and trust to the general profits of the trade, and consequently to both, or all the persons participating or concerned in it, as if they were partners." Loury v. Brooks, 2 McCord (S. C.) 421; Cumpston v. McNair, 1 Wend. (N. Y.) 457; Brown v. Robbins, 3 N. H. 64; Miller v. Price, 20 Wis. 117; Wilson v. Soper, 13 B. Mon. (Ky.) 411.

[1] Beawes, 38.

the merchants to know their custom, as they may send for the civilians to know their law:"[1] yet, on the other hand, Lord Holt says, "we take notice of the laws of merchants that are general, not of those that are particular usages."[2] And again, in a case where it was contended that, according to the use of merchants, a partner ought to be allowed to bind his copartners by deed, the Court of King's Bench held the contrary, Lord Kenyon observing, that the law of merchants was part of the law of the land; that in mercantile transactions, in drawing and accepting bills of exchange, it was never doubted that one partner might bind the rest. But the power of binding each other by deed was then for the first time insisted on; and the consequences of permitting such a power to exist would be highly dangerous to the public interests.[3] There may be a partnership in the purchase and sale of lands,[4] and it may exist, and be proved by parol;[5] although Story, J.,[6] held otherwise in a case decided by him, which was followed by the courts in several States.[7] But, as previously stated, the rule seems to be established by the weight of authority that such a partnership may exist by parol.[8]

Partners inter se.

SEC. 2. Persons engaged in trade together may be viewed in the situation either of partners as between themselves, or partners *quoad* third persons. Partnership as between the parties themselves is a voluntary contract between two or more persons for joining together their money, goods, labor, and skill, or any or all of them, under an understanding that there shall be a communion of profit between them, and for the purpose of carrying on a legal trade, business, or adventure.[9] A learned

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[1] Winch, 24.

[2] Luthelier's case, 2 Salk. 443.

[3] Harrison v. Jackson, 7 T. R. 210.

[4] Chester v. Dickinson, 54 N. Y. 1.

[5] Chester v. Dickinson, 52 Barb. (N.Y.) 349, affd. 54 N. Y. 1; Bunnell v. Taintor, 4 Conn. 568.

[6] Smith v. Burnham, 3 Sum. (U. S.) 435.

[7] Bird v. Morrison, 12 Wis. 137; Pecot v. Armelin, 21 La. An. 678; Patterson v. Ware, 10 Ala. 447; Henderson v. Hudson, 1 Munf (Va.) 615.

[8] Jones v. McMichael, 12 Rich. (S. C.) 176; Fall River Whaling Co. v. Borden, 10 Cush. (Mass.) 458; Julio v. Ingalls, 1 Allen (Mass.), 41; Smith v. Tarlton, 2 Barb. Ch. (N. Y.) 336; Storer v. Flack, 41 Barb. (N. Y.) 162; Haupf v. Howard, 3 Jones' Eq. (N. C.) 440.

[9] *Intention of parties controls.* — A partnership *inter se* results from the intention of the parties, to be gathered from the contract if there be one, or if not, from their relation to and dealings with the property and each other. A mere community of interest in property does not create the relation, but it must be evident that the parties intended to create it and must be voluntary. The intent of the parties as expressed in the contract, if there be one, or if there is no contract, as gathered from the transaction itself, and their manner of dealing with the common property will control, so far as the rights of the parties themselves are concerned, for, being the creation of a contract express or implied, the parties as between themselves, cannot be made to assume a relation toward each other which they

writer has observed that, under the Romans, the social contract or partnership needed no other solemnity but the consent of the parties, without any writing at all; and that, according to the civilians, a part-

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have expressly contracted not to assume, or which it was their evident intent not to assume. In the absence of a contract this intent is to be gathered from the acts of the parties, and the character of the transaction. If the parties deal with property in which they have a joint interest as partners, each sharing the profit arising from it, and paying his own proportion of the expenses for its maintenance, although no agreement in fact exists between them, they are partners *inter se*, their intent being gathered from their acts. But if an agreement exists, this is the only evidence of the real status of the parties as to each other. Coulter v. Thomas, 25 Vt. 73; Robbins v. Laswell, 27 Ill. 365; Stevens v. Faucett, 24 id. 483; Phillips v. Phillips, 49 id. 437; Niehoff v. Dudley, 40 id. 406; Lintner v. Milliken, 47 id. 178; Clark v. Reed, 11 Pick. (Mass.) 446; Hazard v. Hazard, 1 Story (U. S.), 371; Salter v. Ham, 31 N. Y. 321; Robbins v. Laswell, 27 Ill. 365.

Must be joint interest in profits.—In order to constitute a partnership *inter se* there must be a joint interest in the profits of the business as profits, and a mere agreement to divide gross earnings is not sufficient to create that relationship to the business. Thus in one case it was held that an agreement between two persons that each should run an independent line of stages to different points, and each bear the expense of his own line, and divide the gross earnings between them periodically, did not constitute those persons partners *inter se*, however it might be as to third persons, and an action brought by one against the other upon the contract was held maintainable. Pattison v. Blanchard, 5 N. Y. 186; Merrick v. Gordon, 20 id. 93; Same principle, Heimstreet v. Howland, 5 Den. (N. Y.) 68; Ensign v. Wands, 1 Johns. Cas. (N. Y.) 171; Catskill Bank v. Gray, 14 Barb. (N. Y.) 471.

Community of interest does not create.—A mere community of interest in property, real or personal, does not make the owners partners. In order to create that relation there must be a joint venture and an agreement to share the profits and loss, and in the absence of such a mutual agreement, they are mere tenants in common of the property. Porter v. McClure, 15 Wend. (N Y.) 187; Mumford v. Nicholls, 20 Johns. (N. Y.) 611; Lamb v. Grover, 47 Barb. (N. Y.) 317; Cummings v. Mills, 1 Daly (N. Y. C. P.) 520; Moss v. Jerome, 10 Bosw. (N. Y.) 220; Merrick v. Gordon, 20 N. Y. 93; Perrine v. Hankinson, 11 N. J. L. 181; Dillard v. Scroggs, 36 Ala. 670; Blue v. Leathers, 15 Ill. 31; Stoallings v. Baker, 15 Mo. 481; Austin v. Thomson, 45 N. H. 113; Heckert v. Fegley, 6 W. & S. (Penn.) 139; Bowman v. Bailey, 10 Vt. 170; Ward v. Bodeman, 1 Mo. App. Rep. 272. "In every partnership," says Domat, tit. 8, dig., lib. 17, tit. 2, lex 31, "there is a community of interest, but every community of interest does not create a partnership." There must be a joint ownership of the partnership funds, or a joint right of control over them, and also an agreement to share the profits and losses arising therefrom. Chase v. Barrett, 4 Paige (N. Y.), 148; Ward v. Valette, 7 Ohio St. 172; Felichy v. Hamilton, 1 Wash. (U. S. C. C.) 491; Berthold v. Goldsmith, 24 How. (U. S.) 436; Bowman v. Bailey, 10 Vt. 170; Woodard v. Cowing, 41 Me. 9; Vanderburgh v. Hall, 20 Wend. (N. Y.) 71; Ferguson v. Alcorn, 1 B. Mon. Ky. 160; Buckner v. Lee, 8 Ga. 288; Chandler v. Brainard, 14 Pick. (Mass.) 1285; Brigham v. Dana, 29 Vt. 1; Beecham v. Dodd, 3 Harr. (Del.) 485; Putnam v. Wise, 1 Hill (N. Y.), 231; Meagher v. Cox, 1 Ala. 156; Emanuel v. Draughn, 14 Ala. 306; Merrick v. Gordon, 20 N. Y. 93; Burckle v. Eckhardt, 1 Den. (N. Y.) 341; Mears v. James, 2 Nev. 342; Bucknam v. Barnum, 15 Conn. 72; Conklin v. Barton, 43 Barb. (N. Y.) 436; Ambler v. Bradley, 6 Vt. 119; Loury v. Brooks, 2 McCord (S. C.) 218; Everitt v. Chapman, 6 Conn. 347; Martin v. Tidwell, 36 Ga. 332; Chapline v. Conant, 5 W. Va. 507; Loomis v. Marshall, 12 Conn. 86; Allen v. Davis, 13 Ark. 28; Niehoff v. Dudley, 41 Ill. 406; Brown v. Robbins, 3 N. H. 64; Winship v. Bank of U. S., 5 Pet. (U. S.) 529; Cumpston v. McNair, 1 Wend. (N. Y.) 457; Purviance v. McClintle, 6 S. & R. (Penn.) 209; Scott v. Colmerensel, 7 J. J. Mar. (Ky.) 416. Thus, where A advanced to B a certain sum with which to carry on business, and agreed to share the losses of the business with him, but was to have

nership is contracted sometimes tacitly, where, for example, a thing being bought in common is not divided, but the parties interested, without explaining themselves farther, enjoy it equally, each sharing

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no share of the profits, it was held that they were not partners *inter se*, whatever might be A's liability to third persons. Moss v. Jerome, 10 Bosw. (N.Y.) 220. Both incidents must concur, or a partnership *inter se* does not exist, and the act of one will not bind the other. Holmes v. United Ins. Co., 2 Johns. Cas. (N. Y.) 329; Moss v. Jerome, *ante*. But the rule is otherwise, if the parties specially agree to become partners, although they do not share in the profits on the one hand, Mandeville v. Mandeville, 25 Ga. 243, or in the losses on the other, Ex parte Langdale, 18 Ves. 301; Niehoff v. Dudley, 40 Ill. 406, as the intention of the parties controls, Gray v. Gibson, 6 Mich, 300; Salter v. Hume, 31 N. Y. 321 Mary v. Coombs, 15 Ind. 469; Stearns v. Fawcett, 24 Ill. 483. Thus, an agreement between A and B that A shall work B's farm upon shares, and divide the produce, does not constitute them partners *inter se* or as to third persons. Putnam v. Wise, 1 Hill (N.Y.), 234, nor are the owners of real estate who contract with mechanics to build a mill or other building upon their land, partners *inter se*, but either party, paying more than his share of the expense of construction, may recover such excess of the other owner in assumpsit. Porter v. McClure, 15 Wend. (N. Y.) 187. Nor does a mere division of profits constitute the relationship. Thus an agreement between A and B that A shall advance certain sums to B and erect a store for him, and receive in lieu of rent and interest a proportion of the profits from B's business, does not render them partners *inter se*. Pinckney v. Keyler, 4 E. D. S. (N.Y. C.P.) 467; Merrick v. Gordon, 20 N.Y. 93; Rice v Austin, 17 Mass. 197; Lamb v. Grover, *ante;* Newman v. Bean, 21 N.H. 93. In such cases there is no joint interest in the property nor right to a share of the profits, as profits resulting from a joint venture in which both are interested, nor any right of control over the property or business, all of which are, in the absence of a special contract, necessary elements to create a partnership between the parties. Thus it is that a person, rendering services for which he is to be paid a proportional share of the profits of the business, is a mere servant of the owner of the goods, and not a partner in the business. He has no interest in, or control over, the property or business from which the profits arise, nor interest in the profits as profits, but only as a measure of compensation. Ogden v. Astor, 4 Sandf. (N.Y.) 311; Brockway v. Burnap, 16 Barb. (N. Y.) 307; Heimstreet v. Howland, 5 Den. (N.Y.) 68; Ross v. Drinker, 2 Hall (N.Y.) 415; Hodges v. Daws, 6 Ala. 215; Gallop v. Newman, 7 Pick. (Mass.) 28; Baxter v. Rodman, 3 id. 435; Ferguson v. Alcorn, 1 B. Mon. (Ky.) 160; Atherton v. Tilden, 44 N. H. 452; Hanna v. Flint, 14 Cal. 73; Mason v. Hackett, 4 Nev. 420; Reed v. Murphy, 2 Greene (Iowa), 574; Boardman v. Keeler, 2 Vt. 67; Chapline v. Conant, 3 W. Va. 507; Parker v. Fergus, 43 Ill. 437; Hallet v. Disbau, 14 La. An. 529; Smith v. Perry, 29 N. J. L. 74; Morgan v. Stearns, 41 Vt. 397; Berthold v. Gold-Smith, 24 How. (U. S.) 536; Conklin v. Barton, 43 Barb. (N. Y.) 435; Shropshire v. Shepperd, 3 Ala. 733. Thus, when A, the owner of a certain quartz mill, leased land adjacent thereto and contracted to crush ore for his tenants and run it into the amalgamating works on the leased land, at a certain fixed price, and agreed to supply the tenants' works with motive power at a certain price, it was held that they were not partners. Mears v. James, 2 Nev. 342; Polk v. Buchanon, 5 Sneed (Tenn.), 74. A joint purchase of goods by two or more persons does not make them partners *inter se* unless there is an agreement to sell them again for their joint benefit. Woodward v. Cowing, 41 Me. 9; Brady v. Calhoun, 1 Penn. St. 140. Nor a joint interest in a patent. Parkhurst v. Kinsman, 1 Blatchf. (U. S.) 488; Hermanns v. Duvigneaud, 10 La. An. 114. Nor an agreement by which one person furnishes a farm and the other labor and implements to work it, the crop to be equally divided. Blue v. Leathers, 15 Ill. 31. Nor where one party furnishes a saw-mill, and the other logs and labor, the lumber when sawed to be equally divided between them. Stoallings v. Baker, 15 Mo. 481. Nor an agreement by a landlord to take a share of the profits of a business in lieu of rent. Perrine v. Hankinson, 21 N. J. L 181; Dillard v. Scroggs, 36 Ala. 670. Nor a share in the proceeds of a whaling voyage in lieu of wages. Coffin v. Jenkins, 3 Story (U. S.), 108. An arrangement between two firms to

in the profit that arises, and contributing his own proportional part in the necessary expenses for its maintenance.[1] The same observations are applicable to the law of England. To constitute a private unincorporated partnership, no contract in writing is necessary: the acts and words of the parties are alone sufficient for that purpose.[2]

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share commission on sales of goods forwarded by one to the other does not create the relation of partners between them. Pomeroy v. Sigerson, 22 Mo. 177. An arrangement between two persons that one shall furnish a house and pay the butcher's bills, and that the other will pay the balance of the family expenses, does not create a partnership in any sense. Austin v. Thomson, 45 N. H. 113; Same principle, Johnson v. Miller, 16 Ohio, 431; Heckert v. Fegley, 6 W. & S. (Penn.) 137; Strong v. Place, 4 Robt. (N. Y.) 385. Nor where one person furnishes a boat and the other sails it, and the profits are equally divided, Bowman v. Bailey, 10 Vt. 170; or one person furnishes hides and the other tans them, and the profits are divided, Fawcett v. Osborn, 32 Ill. 411; or where a mail contractor agrees with another that if he will perform one-half the service he shall have one-half the pay, Wilkinson v. Jett, 7 Leigh (Va.), 115; or where two wool dealers agree to furnish each a certain quantity of wool to be sold to a certain person, and to jointly share the profit and loss of the transaction. Snell v. DeLand, 43 Ill. 323. And so generally, in all cases, in order to establish a partnership *inter se* a mere participation in the profits and losses of a venture will not be sufficient to establish a partnership, unless such is the intention of the parties. But as to third persons, by operation of law, a partnership may arise even against the intention of the parties. Hazard v. Hazard, *ante;* 1 Story (U. S.), 371. "A partnership," says Mr. Dixon, in his very excellent work on Partnership, "is an association of persons standing to one another in the relation of principals. If the relationship is that of master and servant no partnership exists, although the servant be paid wages in proportion to the profits, or out of the profits themselves, or even be liable to bear a share of the losses, or gain with his master as principal in a contract with third persons." And he cites Stacker v. Brocklebank, 3 Man. & G. 250; Andrews v. Pugh, 21 L. J. Ch. 58; Reg. v. Wantley, 21 L. J. M. C. 44; Reg. v. MacDonald, 31 id. 67; Mair v. Glennie, 4 M. & S. 240; Wilkinson v. Frasier, 4 Esp. 182; Dry v. Boswell, 1 Camp. 279, all of which conforms with the doctrine held in this country. Upon the second point stated by him, that a person who really occupies the position of a servant, does not become a partner by joining in contracts with third persons as principal, he cites numerous cases, but they do not affect the question of the liability of such servant to third persons as a partner, and bear entirely upon the question of partnership *inter se*, and in that respect holding the rule adopted in this country, that the intention of the parties controls. Harrington v. Charchenard, 29 L. J. Ch. 54; Goddard v. Hodge, 3 Try. 20; Rawlinson v. Clarke, 15 M. & H. 292; Saville v. Robinson, 47 R. 720; Hesketh v. Blanchard, 4 Esp. 144; Waugh v. Carver, 2 H. Bl. 235; Stravy v. Haverly, 3 Bing. 304; Dunell v. Moon, 4 Camp. 166; Cheap v. Crammond, 4 B. & Ald. 663; Gouthworth v. Duckworth, East, 421; Helme v. Smith, 7 Bing. 709; Green v. Briggs, 6 Hare, 395; Holderness v. Shackels, 8 B. & C. 612; Alexander v. Sims, 5 De G. M. & G. 57; Courtney v. Wagstaff, 16 C. B. (N. S.) 124; Hoare v. Dawes, Doug. 371; Pott v. Eyton, 3 C. B. 32; Gibson v. Supton, 7 Bing. 297; Coope v. Eyre, 1 H. Bl. 37. There need not be a participation in profits or losses. Ex parte Chuck, 8 Bing. 467; Gilpin v. Enderby, B. & Ald. 954; Enderby v. Gilpin, 5 Moo. 571; Bond v. Pittard, 3 M. & W. 357; Wilson v. Really, 8 Jur. (N. S.) 397. An agreement to share the profits and losses or the mere sale of a particular parcel, does not create a partnership, Jestons v. Brooke, Camp. 793; Elkin v. Baker, 11 C.B. (N.S.) 526; nor by letting it to hire, although the rule is otherwise if they join in using it in the prosecution of a joint enterprise for their mutual benefit or advantage. Lake v. Craddock, 3 P. Wms. 158; Morris v. Barrett, 3 Y. & J. 384; Jeffreys v. Small, 1 Vern. 217; Crawshay v. Maule, 1 Swans. 495.

[1] Wats. Partn. 5, citing Barbeyrac's notes to Puffendorf. See also Dig. lib. 17, tit. 2, s. 4; and Dig. lib. 22, tit. 7, s. 2; also Voet. Comm. lib. 17, tit. 2, s. 1.

[2] Peacock v. Peacock, 16 Ves. 49;

Ostensible, nominal, and dormant partners.

SEC. 3. An *ostensible* partner is he whose name appears to the world as that of a partner. A *nominal* partner is an ostensible partner having no interest in the firm. A *dormant* partner is he whose name and transactions as a partner are professedly concealed from the world. When they are actually *unknown* to the world he is, more strictly

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Featherstonhaugh v. Fenwick, 17 id. 298; Alderson v. Clay, 1 Stark. 405.

A contract of or for a partnership need not be in writing. York v. Clemens, 41 Iowa, 95; Holmes v. McCray, 51 Ind. 358; Buffum v. Buffum, 49 Me. 108; Buckner v. Ries, 34 Mo. 357. And even though it is a partnership in lands, or for the buying and selling of lands, it may be by, and may consequently be proved by parol. Dale v. Hamilton, 5 Hare, 367; Chester v. Dickinson, 54 N.Y. Although common prudence suggests the propriety of reducing such contracts to writing, particularly when the business is to be extensive or long continued, and in *all* cases where the contract is for a partnership to commence in the future, unless it contemplates a consummation within a year, *it must* be in writing or it is void under the Statute of Frauds. Williams v. Jones, 5 B. & C. 108.

How proved. — A partnership may be proved in several ways, but a different class of proof is required to establish a partnership, *in fact*, from that required to prove a *quasi* partnership. *As between the parties*, the relation may be established by proof of a distinct contract of partnership, either written or verbal; *or by an agreement to share profits and loss; or an agreement to share profits, as such, or*, such a state of things as is sufficient to establish a *quasi* partnership. As to last proposition see Peacock v. Peacock, 2 Camp. 45, in which the defendant, a law stationer, upon his son coming of age, told him that he should have a share in the business, and held him out to the world as his copartner, and the son acted as such for several years. There never was any agreement or understanding between them as to what share the son should have. The father and son having quarreled, the father turned him out and took another partner. The defendant denied the existence of any partnership. Lord Ellenborough said, "The fiftieth part of the evidence adduced would have been sufficient to establish a partnership *as between these parties and the rest of the world. This being established, the presumption of law is, that they are partners inter se*. Such presumption might have been repelled * * but in the present case, the presumption of law, instead of being repelled, is confirmed." This case undoubtedly involves the true rule in such cases, and *prima facie*, a partnership *inter se* is established by proof that establishes a *quasi* partnership. As we have treated of the class of evidence essential to establish a partnership *in fact* in a subsequent note, we will here confine our inquiry to the class of evidence requisite to establish a *quasi* partnership. This may be done by showing that they shared in the profits of the business, *as such*, Lintner v. Milliken, 47 Ill. 178; Niehoff v. Dudley, 40 id. 406; or that they have held themselves out to the world as partners, as, by placing a sign over the door of their store or place of business with their names thereon as partners, Williams v. Keats, 2 Stark. 290, by issuing cards, circulars, letter-heads or advertisements containing their names, Ex Parte Matthews, 3 V. & B. 125; Lake v. Argyle, 6 Ad. & El. Q. B. 477; Reynell v. Lewis, 15 M. & W. 517; Norton v. Seymour, 3 C. B. 792; Young v. Axtell, 2 H. Bl. 292, or running carts with their names painted thereon. Thus, in Stables v. Ely, 1 C. & P. 614, the plaintiff brought an action for an injury to his carriage by reason of its being run against by a cart. The defense was that the defendant did not own the cart, but that it belonged to another person, and was, at the time when the accident occurred, being driven by such other person's servant. The defendant's name was on the cart, and he had formerly been a partner with the owner, and their names were over the door of their old place of business. Abbott, C. J., held that, as the defendant, by permitting his name to remain on the cart and over the door of the house of business, held himself out to the world as the owner of the cart and the master of the driver of it, he was responsible for the negligence of

speaking, a *secret* partner. But, as the law, with perhaps one exception relative to notice of retirement, is equally applicable to partners of both kinds, we shall use the word dormant as applied to both.[1] A

such driver (*quere?*) By any writing signed by the names of all the persons sought to be charged containing statements or matter tending to establish the relation, as letters, Heyhoe v. Burge, 9 C. B. 431, bills to customers, invoices, circulars, letter-heads, notes, bills of exchange, etc., Norton v. Seymour, *ante;* Young v. Axtell, *ante*, receipts, releases, deeds, etc., Gibbons v. Wilcox, 2 Starkie, 42; Hickman v. Cox, 18 C. B. 617; Waugh v. Carver, 2 H. Bl. 135; Barry v. Nisham, 3 C. B. 641, or admissions made by *all* the persons sought to be charged, Sangster v. Mazarredo, 2 Starkie, 161; Grant v. Jackson, Peake, 268, King v. Ham, 4 Mo. 275; Anderson v. Levan, 1 W. & S. (Penn.) 334; Gilbert v. Whidden, 20 Me. 367; Bry v. Weston, 16 Me. 261; Widdefield v. Widdefield, 2 Binn. (Penn.) 245; Field v. Tenney, 47 N. H. 513; and generally by any evidence tending to establish a joint interest in the property, or that they so dealt with, and conducted in reference to it as to induce a belief that they were partners therein. Weaver v. Prentice, 1 Esp. 369; Tredman v. Bourne, 6 M. & W. 461. By books of account, letters, admissions, or the evidence of clerks, servants, agents, or persons dealing with them as partners; as, in the case of attorneys or solicitors, that they took a joint retainer. Fall River Whaling Co. v. Borden, 10 Cush. (Mass.) 458; Webster v. Bray, 7 Hare, 159; Robinson v. Anderson, 20 Beav. 98. But in order to make the evidence of persons who have formerly dealt with them as partners, admissible to establish a partnership, it must also appear that it was done with the knowledge and consent of those sought to be charged. Tabb v. Gist, 1 Brock. (U. S.) 33.

[1] When persons are partners *in fact*, that is, *inter se*, they are liable to third persons for the debts of the firm, whether known as partners or not. Pratt v. Langdon, 12 Allen (Mass.), 544; Richardson v. Farmer, 36 Mo. 35; Everitt v. Chapman, 6 Conn. 347; Griffith v. Buffum, 22 Vt. 181; Church v. Sparrow, 5 Wend. (N. Y.) 223; Hadfield v. Jamieson, 2 Munf. (Va.) 66; Braches v. Anderson, 14 Mo. 441; Brooks v. Washington, 8 Gratt. (Va.) 248; Nichols v Chearis, 4 Sneed (Tenn.), 229; Biglow v. Elliott, 1 Cliff. (U. S.) 28; Watson v. Owens, 1 Rich. (S. C.) 111; Dennett v. Chick, 2 Me. 191; Brozel v. Poyntz, 3 B. Monr. (Ky.) 178.

But, when no partnership, *in fact*, exists, the mere fact that the profits of a business are shared, although admissible as evidence tending to show a partnership in fact, is not of itself sufficient to establish the relation. It should appear either that the parties sought to be charged as partners stood toward each other in the relation of principal and agent acting by the authority of each, or that they have so conducted in reference to the business as to estop them from denying that they were partners. Eastman v. Clark, 53 N. H. 276; Benedict v. Hettrick, 35 N.Y. Superior Court, 405; Campbell v. Dent, 54 Mo. 325. A mere participation in profits does not make the parties partners, *quoad*. There must also exist an interest in the profits, *as such*, that is, the person sought to be charged as a partner by reason of his participation in the profits, must have an interest that can be enforced out of the profits themselves, rather than by an action at law for a sum to be measured by such proportional share of the profits. His interest must specifically attach to the profits, and if he has no such interest, there is no partnership in any sense. Pillsbury v. Pillsbury, 20 N. H. 90; Newman v. Bean, 21 id. 93; Eastman v. Clark, 53 id. 276; Austin v. Thomson, 45 id. 113; McArthur v. Ladd, 5 Ohio, 514; Bowman v. Bailey, 10 Vt. 170; Mohawk R. R. Co. v. Niles, 3 Hill (N. Y.), 162; Amber v. Bradley, 6 Vt. 119; Berthold v. Goldsmith, 24 How. (U. S.) 536; Dunham v. Rogers, 1 Penn. St. 255; Good v. McCartney, 10 Tex. 193; Hanna v. Flint, 14 Cal. 73; Pomeroy v. Sigerson, 22 Mo. 177; Brundred v. Muzzey, 25 N. J. 268; Emmons v. Westfield Bank, 97 Mass. 230; Rice v. Austin, 17 id. 197; Chapline v. Conant, 3 W. Va. 507; Lamb v. Grover, 47 Barb. (N. Y.) 317; Coffin v. Jenkins, 3 Story (U. S.) 108; Parkhurst v. Kinsman, 1 Blatch. (U. S.) 488; Steallings v. Baker, 15 Mo. 481; Holmes v. Old Colony R. R. Co., 5 Gray (Mass.) 58; Blue v. Leathers, 15 Ill. 31; Bull v. Schuberth, 2 Md. 38; Ellsworth v. Tartt, 26 Ala. 763; Conklin v. Barton, 43 Barb. (N. Y.) 435; Heckert v. Fegley, 6 W. & S. (Penn.) 139; Braley v.

dormant partner is one who shares in the profits of a business, but is not known as a member of the firm. Indeed, it seems that it is not necessary that he should be a partner in fact; it is sufficient if he advances a portion of the capital, to be returned to him out of the profits of the business,[1] or which is to be returned to him in any event, if the interest for its use depends upon the profits, or rather upon the accidents of trade.[2] "It seems to me," said Baldwin, J., in Winship v. Bank of United States, 5 Pet. (U. S.) 573, in speaking of the difference between a dormant and an ostensible partner, "to be this: when the names of the partners do or do not appear in their accounts, their

Goddard, 49 Me. 115; Boardman v. Keeler, 2 Vt. 67; Johnson v. Miller, 16 Ohio 431; Brockway v. Burnap, 16 Barb. (N. Y.) 139; Wilkinson v. Jett, 7 Leigh (Va.), 115; Heimstreet v. Howland, 5 Den. (N.Y.) 68; Dwinel v. Stone, 30 Me. 384; Oliver v. Gray, 4 Ark. 425; Knowlton v. Reed, 38 Me. 246; Snell v. DeLand, 43 Ill. 323. To constitute a community of profits in a partnership, a party must have a specific interest in the profits themselves, as profits, in contradistinction to a stipulated portion of the profits as a compensation for his services, or other benefit conferred, as the loan of money, rent of premises, etc.; therefore, where A entered into an agreement with B, by which A was to furnish a full supply of wool for B's factory, for two years, and B was to manufacture such wool into cloths, in a good and workmanlike manner, and to devote the entire use of the factory to such purpose, for such term, and A was to have 55 per cent of the net proceeds of the sales of the cloths, and B 45 per cent; in the manufacture of satinets, A was to pay 55 per cent and B 45 per cent of the cost of the warp; the expense of insurance was to be borne by A and B, in the same ratio as their interest in the profits of the cloths; and the loss by fire was to be divided between them according to the loss sustained by each; in an action by C against A and B, as partners, for work and labor done in the factory, it was held that B had only a percentage on the avails of the cloth as compensation for his services and materials furnished, and that they were not partners. Loomis v. Marshall, 12 Conn. 69. In a Vermont case, one party owned a mill, and another worked it, under an agreement that he should have one-half the gross earnings, and they were held not partners. Ambler v. Bradley, 6 Vt. 119. In Miller v. Bartlett, 15 S. & R. (Penn.) 137, one party furnished capital and a building in which to prosecute the business, and the other furnished his own services, for which he was to receive a certain salary and seven per cent of the profits after deducting salary and rent. The court held that they were not partners. See also Perrine v. Hankinson, 11 N.J. 181; McArthur v. Ladd, 5 Ham. (Ohio) 511; Muzzy v. Whitney, 10 Johns. (N.Y.) 226. In Pott v. Eyton, 3 C. B. 32, the defendant Eyton was concerned in a colliery and the defendant Jones kept a shop for supplying the workmen at the colliery. Eyton built the shop. Licenses to sell tea and other articles were taken in his name, and he paid for the goods supplied to the shop. Jones managed the business at the shop. Eyton received first seven and afterward five per cent on the account of all sales to the workmen, and Jones had all the rest of the profits from whatever source derived. They were held not to be partners. Lord Eldon in Ex parte Hamper, 17 Ves. 412, said, "It is clearly settled, though I regret it, that if a man stipulates that, as a reward of his labor, he shall have, not a specific interest in the business, but a given sum of money even in proportion to a given quantum of the profits, that will not make him a partner; but if he agrees for a part of the profits, as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner, and as to them, no stipulation can protect him from liability." Ex parte Watson, 19 Ves. 461; Ex parte Langdale, 18 id. 300; Ex parte Rawlandson, 1 Rosc. 89; Pott v. Eyton, 3 C. B. 32.

[1] Jones v. Fegley, 4 Phila. (Penn.) 1; U. S. Bank v. Binney, 5 Mass. (U. S.) 176; Mitchell v. Dale, 2 H. & G. (Md.) 159.

[2] Ex parte Mills, 6 Moak's Eng. Rep. 496.

advertisements, or their paper; when the business is carried on in the name of all, it is open; but if any are kept back, it is dormant; that the knowledge which the public may have, is not the test, when it is acquired from the declarations of the acting, avowed partners; it may enable them to reach the dormant one, if the transaction is one in which he had an interest, but does not alter its nature. The partnership remains dormant as to all whose names do not appear in its transactions." A dormant partner, when discovered, is liable for the debts of the firm the same as an ostensible one.[1] It has been held in England in several cases, prior to the statute providing therefor, that a mere loan, for the use of which the lender is to receive a share of the profits of the business in which it is employed, does not constitute him a *quasi* partner.[2] And the same rule has been adopted in Pennsylvania,[3] Minnesota,[4] Ohio[5] and in Illinois.[6] But, while the rule, that a person who shares in the profits of a business is, upon principles of policy, a *quasi* partner, may have been predicated upon the *dicta* rather than upon the actual judgment of the court in Grace v. Smith, 2 Wm. Bl. 998, yet it is generally admittted that the rule is so well settled, that something more than judicial legislation is required to change it. In New York the common law rule is strictly adhered to; and such may be said to be the rule generally prevailing in this country. Dormant partners are liable to the same extent, for the debts of the firm, as an ostensible partner,[7] but they are not necessary partners to an action brought in favor of or against the firm,[8] although they may be joined either as plaintiffs or defendants.[9] A dormant partner, upon retiring from the firm, is not required to give notice thereof, except to those who knew of his connction with the firm, because, being unknown as a partner, no one can be said to have trusted it upon the faith of his

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[1] Robinson v. Wilkinson, 3 Price, 538; North v. Bloss, 30 N. Y. 374; Bank, &c. v. St. John, 25 Ala. 566; Waite v. Dodge, 34 Vt. 181; Kelly v. Hurlbut, 5 Cow. (N. Y.) 534; Mitchell v. Dale, 2 Har. & G. (Md.) 159; Hazard v. Hazard, 1 Story (U. S.), 371.

[2] Cox v. Hickman, 8 H. L. Cas.; Bullen v. Sharp, L.R., 1 C. P. 86.

[3] Hart v. Kelley, 83 Penn. St. 286.

[4] Delaney v. Timberlake, 21 Minn. 383.

[5] Harvey v. Childs, 28 Ohio St. 319.

[6] Smith v. Knight, 71 Ill. 148.

[7] Mitchell v. Dale, 2 Har. & G. (Md.) 172; Richardson v. Farmer, 36 Mo. 35.

[8] Lapham v. Green, 9 Vt. 407; Platt v. Helen, 23 Wend. (N. Y.) 456; Brown v. Birdsall, 29 Barb. (N. Y.) 549; Cookingham v. Lasher, 2 Keyes (N.Y.), 454; Hume v. Savory, 49 Barb. (N. Y.) 403; Waite v. Dodge, 34 Vt. 181; Hatch v. Woods, 43 N. H. 633.

[9] Hilliker v. Loop, 5 Vt. 116; Waite v. Dodge, 34 Vt. 183; Reynolds v. Bowlsby, 2 Ad. & El. (J. B.) 45; Beach v. Hayward, 10 Ohio 455; Hopkins v. Kent, 17 Md. 72; North v. Bloss, 30 N.Y. 374. When judgment is rendered against a firm in which dormant partners are interested, although they are not made parties to the action, execution may be levied upon the partnership property. Van Valen v. Russell, 13 Barb. (N. Y.) 590.

credit.[1] Where the name of the firm does not necessarily indicate who composes it, the persons who are united as partners under it, are not to be treated as dormant partners on that account, particularly when their interest is generally known. Thus, it has been held, that persons doing business under the name of "The Citizens Bank," are not dormant partners, and are required to give notice upon retiring from the firm to relieve themselves from liability.[2] There can be no dormant partners in the purchase and sale of lands.[3] A dormant partner may be made a bankrupt with the rest of the firm[4] or on his own petition;[5] or he may be omitted from the proceedings.[6]

Rights of partners to enforce partnership claims.

SEC. 4. The contract of partnership, as existing between the parties themselves, gives them a right of action in their character of partners against third persons.[7] It also enables any one of them to file his bill in equity against the others for a dissolution of the partnership, a sale

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[1] Armstrong v. Hussey, 12 S. & R. (Penn.) 315; Grosvenor v. Lloyd, 1 Metc. (Mass.) 19; Davis v. Allen, 3 N. Y. 168; Kelly v. Hurlburt, 3 Cow. (N. Y.) 534.

[2] Shaumburgh v. Ruggles, 83 Penn. St. 148; Goddard v. Pratt, 16 Pick. (Mass.) 428.

[3] Pitts v. Waugh, 4 Mass. 425.

[4] Ex parte Lodge, 1 Ves., Jr., 166.

[5] Ex parte Hamper, 17 Ves., Jr., 403.

[6] Ex parte Benfield, 5 Ves. 424.

[7] But where an action is brought by partners as such, they must prove the partnership, and failing to do so, cannot recover. Clark v. Kensell, Wright (Ohio), 480; Burrows v. Hannegan, 1 McLean (U. S.), 315; Ege v. Kyle, 2 Watts (Penn.), 222; Bowell v. Dunning, 5 Harr. (Del.) 231. And generally, where two or more persons join in an action, a joint interest in the subject-matter of the action must be established. Woodworth v. Fuller, 24 Ill. 109. But, unless the partnership or joint interest is denied, it need not be proved in the first instance. Bull v. Crosby, 4 Ala. 575; Shepherd v. Frys, 3 Gratt. (Va.) 442; Hauser v. Smith, 13 Ind. 532. It is competent, however, for the defendant, under the general issue, to show, if he can, that the plaintiffs were not partners when the cause of action accrued. Starke v. Keenan, 11 Ala. 818.

In actions against third persons *all* the partners must be joined as plaintiffs, and a failure to join them all is fatal to a recovery. Snodgrass v. Broadwell, 2 Litt. (Ky.) 353; Gallott v. Mc Cluskey, 18 La. An. 269; Dob v. Halsey, 16 Johns. (N. Y.) 34; Codman v. Cunningham, 16 Ala. 448. Although the partnership is dissolved (Wright v. Williamson, 3 N. J. L. 978), or the claim has been assigned to one of the partners. Russell v. Swan, 16 Mass. 314; Gaither v. Caldwell, 1 Dev. & B. (N. C.) Eq. 504; DeGratt v. Darby, 7 Rich. (S. C.) 118. But a dormant partner need not be joined as plaintiff. Clark v. Miller, 4 Wend. (N. Y.) 628. Curtis v. Belknap, 21 Vt. 433; Wood v. O'Kelly, 8 Cush. (Mass.) 406; Rogers v. Kirchline, 36 Penn. St. 393; Clarkson v. Carter, 3 Cow. (N. Y.) 84.

The death of a partner, after suit brought, does not abate the action. The death should be suggested, and the survivors can proceed with the action. Bryne v. Schwing, 6 B. Monr. (Ky.) 199. And a surviving partner may bring an action in his own name, "as surviving partner of, etc., deceased." Copes v. Fultz, 9 Miss. 628; Andrews v. Brown, 21 Ala. 474. In most of the States copartners must sue in their individual names, and cannot sue in the firm name. Smith v. Canfield, 8 Mich. 493; Bentley v. Smith, 3 Cai. (N. Y.) 170; Porter v. Cresson, 10 S. & R. (Penn.) 257; Marshall v. Hall, 8 Yerg. (Tenn.) 101; Burns v. Hall, 3 N. J. 984; Pate v. Bacon, 6 Munf. (Va.) 219. But in some of the States action may be brought in the firm name. Abernathy v. Latimore, 19 Ohio, 286; Bernard v. Parvin, 1 Morr. (Iowa) 309.

of the partnership effects, and a division of the proceeds amongst the partners.[1]

Who are liable as partners to third persons.

SEC. 5. Persons become liable as partners to third persons, either by contracting the legal relation of partners *inter se*, or by holding themselves out to the world as partners.[2] For, not only he who is actually a partner, but he who lends his name and credit to the firm, is liable for the debts and engagements of the body. No restriction of liability, except in the case of statutory partnerships, is permitted to any of the partners; all are liable not only to the extent of their interest in the joint stock, but also to the whole extent of their separate property.

Contract must be voluntary.

SEC. 6. The contract must be voluntary. No stranger can be introduced into a firm as a partner without the concurrence of the whole firm.[3] Upon this principle, it has been held that, where there is no

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[1] One partner cannot sue another upon any matter relating to or growing out of partnership transactions, Sprout v. Crowley, 30 Wis. 187; Stanton v. Buckner, 24 La. An. 391; Leidy v. Messinger, 71 Penn. St. 177; Curry v. Burnett, 36 Ind. 103, except upon an express promise or agreement, Sprout v. Crowley, *ante*, nor can a partnership, as such, sue a copartner or a firm of which one of its copartners is a member. Green v. Chapman, 27 Vt. 236; Portland Bank v. Hyde, 1 Me. 196.

[2] In France, anonymous partnerships (which closely resemble such of our trading companies as are corporations, strictly so called) are not legally constituted, unless their establishment be specially authorized by the king. But trading partnerships may be constituted either *en nom collectif*, or *en commandite*, at the discretion of the interested parties. A partnership is denominated a partnership *en nom collectif*, when every partner, as between himself and strangers to the society, is liable, without limitation, for all its debts and engagements. It takes the name of a partnership *en commandite*, when it subsists between one or more partners liable without limitation, and one or more partners liable to a limited extent. If there be more than one partner liable without limitation, the partnership is, at one and the same time, a partnership *en nom collectif*, as to the two or more who are so liable, and a partnership *en commandite*, as to those whose liability is qualified. See further, Parl. Hist. 1825, p. 709; and see code de Commerce, arts. 22, 24. Partnerships may now be limited in England by charter. See Stat. 1 Vict. 73.

If one holds himself out as a partner, that does not make him a partner in fact, nor render him liable as such, except to those who are thereby led to believe that he is a partner, and who give credits to the supposed firm under that belief. A person who knows that he is not a partner cannot charge him as such. Wood v. Pennell, 51 Me. 52; Benedict v. Davis, 2 McLean (U. S.), 347; Buckingham v. Burgess, 3 id. 364; Widdifield v. Widdifield, 2 Binn. (Penn.) 242; Bryer v. Weston, 16 Me. 261; Field v. Tenney, 47 N. H. 513; Gilbert v. Whidden, 20 Me. 367; Stearns v. Haven, 14 Vt. 540; Crozier v. Kirker, 4 Tex. 252; Bowie v. Maddox, 29 Ga. 285; Monahon v. Hohensack, 22 N. J. L. 372; Gumbel v. Abrams, 20 La. An. 568.

The holding out must be such as to justify an inference that the creditor had knowledge of it, or the representations must be made to him. A person who had no knowledge of such holding out cannot charge one who was not a partner in fact. Buckingham v. Burgess, *ante*; Irvin v. Conklin, 36 Barb. (N. Y.) 64.

[3] In the case of Sir Charles Raymond (cited 2 Rose, 255), a banker in the city, a Mr. Fletcher, agreed with Sir Charles that he should be interested so far as to

partnership agreement, a person filing a bill against others as his co-partners must give some evidence that he has been accepted by

receive a share of the profits of the business, and which share he had a right to draw out from the firm of Raymond & Co. But it was held, that he was no partner in that partnership, had no demand against it, had no account in it, and that he must be satisfied with a share of the profits arising and given to Sir Charles Raymond. So, where, upon the dissolution of partnership between A and B, father and son, it was agreed that, until the son should be provided for, the father should allow him a third of the profits, and the affairs of the firm should finally be adjusted by arbitration; and afterward, before any adjustment, the father entered into a new partnership with C; Lord Eldon held clearly, that, until such provision for B and such adjustment, B was a partner with A as to a third of his interest, but not a partner with A and C. Mason v. Connell, 1 Whart. (Penn.) 381; Kingman v. Spurr, 7 Pick. (Mass.) 235; Pierce v. Whitley, 37 Ala. 172; Matthewson v. Clark, 6 How. (U. S.) 122; Murray v. Bogert, 14 Johns. (N. Y.) 318; Griswold v. Waddington, 15 id. 82; Channell v. Fassett, 16 Ohio, 166.

The consent of the parties being an essential element in a contract of partnership, and the *delectus personæ*, being an indispensable incident thereof, it would seem to follow that no person incapable of giving consent, as an infant, married woman, etc., can enter into the relation. But, while a married woman, *at common law*, is incapable of becoming a partner, yet no such disability exists in an infant. He may be a partner, and be entitled to all the benefits of the partnership, although not liable for its losses, if he chooses to take advantage of his infancy and avoid the contract when he becomes of age, and notifies his disaffirmance thereof after becoming of age. Bissell on Partnership, 3. But, if after becoming of age he affirms the partnership, he becomes liable for all the debts of the firm created during his minority, to the same extent as though he had been of full age during the whole period. Miller v. Sims, 2 Hill (S. C.), 479. A stranger cannot be introduced into a firm without the consent of *all* the partners, unless the partnership articles provide for such a contingency. Therefore, a creditor of one partner levying upon and selling his entire interest in the firm or a purchaser thereof, from the partner himself or at sheriff's sale, only acquire the right to compel an account by the remaining partner; they acquire no right of control over the property, nor any right to interfere with its management except through the interposition of the courts. McConnell v. Hector, 3 B. & P. 114; Madenville v. Keener, 8 Watts & S. (Penn.) 67; Mason v. Connell, *ante;* Kingman v. Spurr, *ante;* Murray v. Bogert, *ante.* On an execution against a partner for his separate debt, his undivided moiety or interest in all the property of the partnership may be levied upon and sold, and when the goods are so taken in execution, the partnership in the goods seized is at an end, and the vendee becomes the tenant in common with the other partner. Nicholl v. Mumford, 4 Johns. Ch. (N.Y.) 522; Moodey v. Payne, 2 id. 548. The sale does not transfer any part of the joint property to the vendee, so as to entitle him to take it from the other partners; for that would be to place him in a better situation than the partner himself. But it gives him, properly speaking, a right in equity to call for an account, and thus to entitle himself to the interest of the partner in the property, which, upon settlement, shall be ascertained to exist. Mather v. Smith, 16 Johns. (N.Y.) 106; Shaver v. White, 6 Munf. 114; Murray v. Murray, 5 Johns. Ch. (N. Y.) 70; Marquand v. N. Y. Manuf. Co., 17 Johns. (N. Y.) 525; Skipp v. Harwood, 2 Swanst. 586, n.; Waters v. Taylor, 2 Ves. & B. 299.

Nor do the personal representatives of a deceased partner succeed to his rights in the firm, unless by express agreement between the representative and the other partners. Delaney v. Dutcher, 23 Minn. 373. Or, unless the partnership articles provide for such a contingency, in which case the representatives of the deceased partner may, if they so elect, succeed to all the rights and liabilities of a partner in the concern. Delaney v. Dutcher, *ante;* Louisiana Bank v. Kenner, 1 La. An. 384; Gratz v. Bayard, 11 S. & R. (Penn.) 41; Cutler v. Cochran, 13 La. 484; Franklin v. Robinson, 1 Johns. Ch. (N. Y.) 157; Scholfield v. Eichelberger, 7 Pet. (U. S.) 586. And where a continuance of the partnership is so provided for, unless the representatives of the deceased part-

them as a partner.[1] Thus, in an Illinois case[2] two persons purchased a mill and house, which they commenced to remove, but before the removal was completed one of them died. It was held that the mere declaration of the deceased that they had bought the house in partnership did not, of itself, afford satisfactory evidence of the existence of a partnership in fact, as his declaration was perfectly consistent with a mere tenancy in common, and that, in the absence of other evidence, a partnership would not be established.

Equity will not compel the admission of a stranger to the firm.

SEC. 7. Nor will a court of equity supply any apparent defect in a partnership agreement, in order to defeat or qualify this principle. By articles between A and B, it was agreed that A should take B into partnership for nine years, if B should so long live; but if he lived to the end of the nine years, the partnership should continue for any further time not exceeding twenty-one years, as B should desire, on giving notice to continue it. It was provided that, notwithstanding the death of A, it should be carried on by his representatives; and that, even if B should give that notice, he should not have it in his option to pay off the representatives of A and carry it on himself, but with them. A and B having both died, a bill was filed by the widow and representatives of B against the representatives of A for an account, and for liberty to carry on the trade with the defendants; and it was contended, on behalf of the plaintiffs, that the provision which had been made for the representatives of one party, negatived the idea that the parties intended that this should be a general partnership, subject to the ordinary consequences of dissolution; and, therefore, in the absence of any express provision for the representatives of the other party, the provision which had been made ought to be considered mutual. But the Master of the Rolls held, that, on the face of the articles, the plaintiff was not entitled to a decree to carry on the partnership. And he added that, on general principles, it would be of ill consequence to say, that, in articles of partnership in trade, where no provision for the death of either is made, they might subsist for the benefit of an executor, who may not have skill therein.[3]

Executors or representatives of deceased partners, rights of.

SEC. 8. It appears, therefore, that the *delectus personæ*, as it is

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ner express their dissent, a continuation of the partnership will be presumed. Alsop v. Mather, 8 Conn. 587; Louisiana Bank v. Kenner, *ante*.

[1] Bray v. Fromont, 6 Madd. 5. See Brown v. De Tastet, Jac. 284.

[2] Gregory v. Martin, 78 Ill. 38.

[3] Pearce v. Chamberlain, 2 Ves. 33.

called, is so essentially necessary to the constitution of a partnership, that even the executors and representatives of partners themselves do not, in their capacity of executors or representatives, succeed to the state and condition of partners.[1] The civilians carried this doctrine so far, as not to permit it to be *stipulated* that the heirs or executors of partners should themselves be partners.[2] But, in this respect, our law is otherwise.

When one who is not a partner in fact may be charged as such.

SEC. 9. A person, though he be not accepted or known as a partner

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[1] 2 Ves. 34.

No stranger can be introduced into the firm, without the consent of all the partners. Putnam v. Wise, 1 Hill (N. Y.), 234; Kingman v. Spurr, 7 Pick. (Mass.) 235; Murray v. Bogert, 14 Johns. (N. Y.) 318; Gilmore v. Black, 11 Me. 488; Griswold v. Waddington, 15 Johns. (N. Y.) 82 Matthewson v. Clark, 6 How. (U. S.) 122; Maddewell v. Keever, 8 W. & S. (Penn.) 63; Marquand v. N. Y. Manf. Co., 17 Johns. (N. Y.) 525; McConnell v. Hector, 3 B. & P. 113; Pearce v. Chamberlain, 2 Ves., Sr., 33. But assent may be implied from the *acts* of the parties, Pierce v. Whittey, 39 Ala. 172; Mason v. Connell, 1 Whart. (Penn.) 381; and, although by the civil law a provision in the contract itself, for the substitution of new partners, is held void, yet, by the common law, such a provision is valid. Kingman v. Spurr, *ante;* Cochran v. Perry, 8 W. & S. (Penn.) 262.

By the common law a provision in the articles of partnership, for the continuance of the rights of partnership in the representatives of a deceased partner, for their benefit, is not questioned; and it has been expressly sustained. 3 Kent's Comm. (1840) p. 56; 1 Swans. 514, in note; Pearn v. Chamberlain, 2 Ves. 33; Balman v. Shore, 9 id. 500; Warner v. Cunningham, 3 Dow's Part. Cas. 76; Gow. on Part. 76, 271. A partnership may be continued, if it be made a condition at the formation between the survivors and the representatives of the deceased partner; Scholefield v. Eichelberger, 7 Pet. 586; Franklin v. Robinson, 1 Johns. Ch. (N. Y.) 157; Bradford v. Kemperley, 3 Johns. 431; Norris v. Ogden's Heirs, 11 Mart. Louis. Rep. 455; Stevenson v. Shields, 7 id. 435; Cutler v. Cochran, 13 id. 484; Louisiana Bank v. Kenner, 1 id. 384. and an action lies for its breach, Byrd v. Fox, 8 Mo. 574; and in certain cases a court of equity might decree a specific performance of the provision, Freeman v. Smith, 2 Wall. (U. S.) 160; although generally, a court of equity will not compel a specific performance of a contract for a partnership, but leaves the party to their remedy at law; Sheffield Gas Co. v. Harrison, 17 Beav. 294; Hercy v. Birch, 9 Ves. 5; Maxwell v. The Port Tenant Co., 24 Beav. 495; as such a decree would generally be fruitless, besides being impolitic. In a comparatively recent English case (Stocker v. Widderburn, 3 K. & J. 393) the plaintiff obtained a patent and it was agreed between him and the defendants that a company should be formed by them for the purpose of working the patent. For certain reasons the defendant refused to carry out the agreement. To a bill brought to compel a specific performance the defendants demurred, and the court sustained the demurrer upon the ground that, under the circumstances, it had not the power to compel complete performance on both sides. The party's redress in such a case will generally be ample at law. But, where parties have agreed to execute articles of agreement, for a partnership for a term, and have actually entered upon a joint adventure under the agreement, if any of the parties afterward refuse to execute the agreement, specific performance in *that* respect will be decreed. Edwards v. Curling, 8 Beav. 129; Stocker v. Widderburn, *ante;* Buxton v. Lister, 3 Atk. 385; Wilkinson v. Torkington, 2 You. & C. 726. While a new member cannot be admitted into a firm without the consent of all the members, yet, a person who in any manner has become possessed of the interest of one partner in the firm, may, after the partnership has expired, resort to a court of equity to compel an accounting, and for the payment of his share of the profits. Matthewson v. Clark, 6 How. (U. S.) 122.

[2] Domat, lib. 1, tit. 8, s. 2. See note 1, ante.

by the members of a firm generally, may, to some purposes, at least to purposes of detriment to himself, become a partner by means of an agreement with individual members, under which the latter are constituted his trustees, as, where he is represented in the firm by another person. Thus, in Goddard v. Hodges,[1] the plaintiff, as solicitor to an undertaking for building a bridge over the Thames, brought his action against the chairman of the company to recover the amount of advertisements and the expenses of a journey for furtherance of the undertaking. The defense was, that the plaintiff was a partner in the undertaking; he having prevailed upon a person of the name of Fall to allow him to take ten shares in Fall's name. It appeared that the plaintiff told Fall that, as solicitor of the company, he could not take shares himself, but that, if Fall would allow him to use his name, he would pay the deposit and every thing required. Fall consented to this, and, in consequence of this agreement, registered his name as a shareholder, and the plaintiff afterward brought him a receipt for ten shares, for which Fall was never called upon to pay any thing. It appeared, also, that £200 had been paid on account of these shares. Upon this evidence, the Court of Exchequer directed the plaintiff to be nonsuited; Lord Lyndhurst, C. B., and Bayley, B., both considering him as a partner in the undertaking, independently of the question of fraud in his taking the benefit of these shares contrary to the rules. Lord Lyndhurst said that the plaintiff stood in the situation of being liable for the debts of the concern; that the claim here was for a debt against the company, and that, therefore, on the ordinary principle, that one partner cannot recover against another at law, because he would be liable to contribute, the plaintiff must fail in the action; that Fall was a mere agent, and the case was really the same as if Goddard's name was actually in the books of the company as a member. And Bayley, B., said that, though the plaintiff did not think fit to be entered in the books of the company as an *ostensible* partner, the question was, whether he was not a *real* partner. The shares were taken in Fall's name, but Goddard paid all the calls. Then, as between Fall and Goddard who would be entitled to any benefit? Would not every thing received by Fall on such shares be received by him to Goddard's use? If a loss happened, ought Fall, as between him and Goddard, to contribute to bear it? It would be most unjust if he were. The substance of the case was that Fall

[1] 1 Cromp. & M. 33; 3 Tyr. 209.

should be the nominal, and Goddard the real partner; but that was the same, as far as related to all other persons, as if the plaintiff had been the ostensible partner. The concealing that he was the real partner could make no difference either in justice or in law.

But, with great deference to the opinions of the very learned judges by whom this case was decided, it is difficult to reconcile this decision with all the principles on which the contract of partnership is founded. The assumption, that Goddard was the real partner in these shares, appears to be far too strong. It is true that, by his agreement with Fall, he was entitled to the benefit of the profits of the shares standing in Fall's name, but there were many other substantial rights as a partner which he could not acquire by such agreement, and, if so, it was foreign to the question in this action to advert to the equities subsisting between him and Fall. In truth, there seems to have been no substantial distinction between this agreement, and that where a person contracts with one of several partners to share in that partner's profits—a contract which it is clear does not render the person so contracting a partner in the concern. There might, no doubt, be equitable reasons why the plaintiff in his character of solicitor ought not to have entered into the agreement in question, but those reasons would be equally cogent whether the agreement rendered him a partner or not.

Number of partners.

SEC. 10. There is no restriction as to the number of persons who may carry on business in copartnership,[1] and whether the number is great or small, they are liable to all the laws affecting private partnership.

Who may be partners.

SEC. 11. Any person of sound mind, and not under any legal restraint, may enter into a contract of partnership. It is clear, however, that, if a person signing a partnership agreement were, at the time, in a state of intoxication, evidence of this fact would be admissible to avoid the agreement; for, in the words of Lord Ellenborough, such a person has no agreeing mind.[2]

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[1] In Manning v. Gasharie, 27 Ind. 399, it was held that the mere fact that persons joined as the purchasers of goods were organized as a joint-stock company, did not, unless they were incorporated, strip them of the character of partners, and that, although a large firm, they would mainly be subject to the rules and regulations governing that relation. Boisegard v. Wall, 1 S. & M. (Miss.) 404; Kramer v. Arthurs, 7 Penn. St. 165; Skinner v. Dayton, 19 Johns. (N. Y.) 513; Dennis v. Kennedy, 19 Barb. (N. Y.) 517; Townsend v. Gowey, 19 Wend. (N. Y.) 424; Wells v. Gates, 18 Barb. (N. Y.) 554; Cross v. Jackson, 5 Hill (N. Y.), 478.

[2] Pitt v. Smith, 3 Camp. 83; and see Fenton v. Holloway, 1 Stark. 126; Lightfoot v. Heron, 3 You. & Col. 586.

Infants.

SEC. 12. An *infant* may enter into a contract of partnership, as into any other trading contract which may possibly turn out to be for his benefit. And this contract may be avoided by him, upon coming of age, though the person with whom he contracts will be bound by all the consequences.[1] It seems to follow from this doctrine that a father may place out his infant son as a partner, without incurring any responsibility as a partner himself, provided he himself receives no advantage or emolument from the connection, and is not in there ceipt of any of the profits in trust for his son. In a case before the Court of King's Bench in Dublin, it appeared that A B, on the formation of a partnership, invested a sum of money in the firm for his infant son; and it was stipulated, in a letter written by the other partners of the house, that they should correctly account with A B, as the trustee of his son, for one-third profit of his son's capital, or any loss that might accrue, and should be governed and directed by his advice in all matters relative to the business. It was held, that this letter did not constitute A B a partner, the jury having found that the money was not invested by A B for his own benefit, and that he had not reserved to himself the power of drawing out the principal or profits as trustee for his son.[2] At the trial of this case, at *Nisi Prius*, Burton, J., directed the jury that, if a person deposit £1,000 in a partnership concern as a capital for an infant son, and reserve no power over either it or the profits, he does not thereby make himself liable as a partner; otherwise, if he embark it in his son's name, reserving to himself a power of drawing profits or calling the partners

[1] Holt v. Ward, Str. 939; Warwick v. Bruce, 2 M. & S. 205. But see *post*, Book 4, chap. 1, art. 3.

An infant may be a partner, though indebted and insolvent; his father may release to him all claim to his services, and this may be inferred from the fact of his becoming a partner. Penn v. Whitehead, 17 Gratt. (Va.) 503; Goode v. Harrison, 5 B. & Ald. 159; Holmes v. Blagg, 1 Moore, 446; Jonau v. Fellows, 2 Rob. (Va.) 518.

In Kemp v. Cook, 18 Md. 138, it was held a fraud for an infant to become a partner, for, by so doing, he holds himself out to the world as of full age.

Where an infant becomes a partner, if he disaffirms the contracts, he must give up the property or pay the debts. He cannot be permitted to retain the property and repudiate his contracts. Kitchen v. Lee, 11 Paige's Ch. (N.Y.) 108. If a minor retires from a firm before he becomes of age, and after becoming of age he takes no profits and does not concur in carrying on the business, he cannot be said to have ratified his previous contracts, because he has not expressly disaffirmed them. Dana v. Stearns, 3 Cush. (Mass.) 373. Where a minor entered into a partnership with a person of full age, which was dissolved before the person became of age, and, upon the dissolution, assigned all his interest in the concern to his copartner for a certain sum, for which the copartner gave his note together with a mortgage on the stock, it was held that the mortgage was valid as to goods purchased after the date of the mortgage. Barnard v. Eaton, 2 Cush. (Mass.) 302.

[2] Barklie v. Scott, 1 Huds. & Bro. 83.

to account, or having the profits paid to him as a trustee, although he may be liable afterward to account for them.

Alien friends.

SEC. 13. As an *alien ami* may be a trader, and sue in personal actions,[1] it follows that he may be, to all intents and purposes, a partner. But a person domiciled in a foreign country at war with this country, and *à fortiori*, an alien enemy, cannot be a partner—at least, he cannot sue in this country for a debt due to the firm. "The reason," said Rooke, J., "of the disability of a person resident in an enemy's country is, that the fruits of the action may not be remitted to a hostile country, and so furnish resources against this country.[2]

[1] Co. Litt. 129, b.

[2] M'Connell v. Hector, 3 B. & P. 113; and see Albretcht v. Susman, 2 Ves. & B. 323; O'Mealey v. Wilson, 1 Camp. 482, and the cases mentioned in the note.

A partnership existing between citizens of different nations is dissolved immediately upon the breaking out of a war between such nations (Griswold v. Waddington, 16 Johns. (N. Y.) 438; The William Bayley, 5 Wall. [U. S.] 377), as all commercial intercourse with the inhabitants of the enemy's territory is unlawful during war. Woods v. Wilder, 43 N. Y. 164; 3 Am. Rep. 684; Mrs. Alexander's Cotton, 2 Wall. (U. S.) 414; White v. Bromley, 2 How. (U. S.) 249; Scholfield v. Eichelberger, 7 Pet. (U. S.) 586

The rule with its exceptions was well stated by Rapallo, J., in Woods v. Wilder, *ante*. He said, "The rule prohibiting contracts with the enemy during war is applicable to the drawing and negotiating of bills of exchange between subjects of the powers at war. Wheat. Int. Law, § 317; Story on Cont. (4th ed.), § 608; Willison v. Patterson and others, 7 Taunt. 439. Chancellor Kent (1 Kent's Com. 67) states that the drawing of a bill of exchange by an alien enemy on a subject of the adverse country is an illegal and void contract, because it is a communication and contract with the enemy.

Some exceptions to this rule are stated, in the books, to be allowed by reason of the necessity of the case. These are bills drawn for ransom, and bills drawn by a citizen in the enemy's country on his own country, to provide him with necessary means of subsistence. The case of U. S. v. Barker, referred to by the appellant's counsel in 1 Paine's C. C. 166, is difficult to reconcile with the authorities; but even that case contains special circumstances not existing in the present case. The bill, in that case, was drawn here by a citizen of the United States against funds which he had in England, and was indorsed to the United States government, and prosecuted in its name and behalf.

The argument, that the effect of drawing the bill in the present case was to remove the plaintiff's funds from Georgia to New York; and that, therefore, the contract was not within the spirit of the prohibition, cannot be maintained. Even if the transaction had the effect claimed, yet, if not licensed by our government, it would come within the general prohibition. Nations at war adhere to these interdictions for reasons of general policy, although in special cases they may recoil upon themselves. In the *Prize Cases*, one item of the property in dispute was restored to the complainant, not merely on the ground that it was the property of a loyal citizen which he was attempting to withdraw from the enemy's country, but, on the additional ground, that an order of the secretary of the navy permitted such withdrawal. But in the case of the U. S. v. Grassmayer, 9 Wall. 75, G., a creditor in New York, directed E., his debtor in Georgia, to invest the amount of the debt in cotton and hold it for him, which was done. The cotton was stored in Georgia as the property of G., and was seized by the United States, and the proceeds were claimed by G. under the captured and abandoned property act of 1863. But the court held that, as G. was prohibited during the war from having any dealings with his debtor, it followed that nothing which either or both of them did could have the effect

But a person is not disqualified from suing or taking out a commission of bankruptcy, as a partner, although he be resident in an enemy's country, if he do not trade there,[1] or if he be resident there for the purposes of trade, licensed by the government of this country—as, for instance, if he be resident for the purpose of receiving payments for licensed consignments.[2]

Married women.

SEC. 14. A *feme covert* cannot sustain the character of partner, because she is legally incapable of entering into the contract of partnership; and although married women are, not unfrequently, entitled to shares in banking-houses and other mercantile concerns, under positive covenants, yet, where this happens, their husbands are entitled to such shares, and become partners in their stead.[3] But it should seem that, by the custom of London, a *feme covert* trading separately from her husband may be a partner.[4] But of this, more hereafter. In many of the States of this country, by statute, the rights and powers of married women are essentially extended and enlarged, and in very many of them, she may become a partner in trade or transact any business upon her own account, with her own separate estate. So, even at common law, where the husband was an alien, and had never resided in the country, the wife might act as a *feme sole*,[5] and the same rule has been adopted in this country, where the husband had never been in the State.[5] And the rule in some of the States has been extended so that an abandonment of the wife by the husband,

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to vest in G. the title to the cotton in question. The reasons for making an exception in that case were much stronger than in this. There, the cotton was withdrawn from the use of the enemy, and locked up in store for the benefit of the northern creditor; but in the present case the dealings did not, in fact, effect any change in the position of the fund, which was advantageous to our government; it merely transferred its custody from the bank to Wheaton, and gave him the full power of disposal over it. The draft being illegal and void, no action could lie against any of the parties to it; but there are other reasons applicable to the defendants, Wilder and Beers, which clearly exonerate them. All commercial partnerships, existing between subjects of the two parties prior to the war, are dissolved by the mere act and force of the war itself. Story on Cont. (4th ed.), § 609; 1 Kent's Com. 67; Griswold v. Waddington, 16 Johns. 438; and this consequence was held to ensue from the civil war of 1861. The William Bagaley, 5 Wall. 377, 407.

[1] Roberts v. Hardy, 3 M. & S. 533.

[2] Ex parte Baglehole, 18 Ves. 525; 1 Rose, 271.

[3] Penn v. Whitehead, 17 Gratt. (Va.) 501; Everett v. Watts, 10 Paige's Ch. (N. Y.) 84; Williams v. Butler, 35 Ill. 550. But in the States where the matter rests upon the common law, evidence that one of the persons sought to be charged as a partner is a married woman will defeat the action. Brown v. Jewett, 18 N. H. 230.

[4] Kay v. Pienne, 3 Camp. 123; Dunly v. Mazarine, 1 Salk. 116.

[5] McArthur v. Bloom, 2 Duer (N. Y.), 151; Abbott v. Bayley, 6 Pick. (Mass.) 89; Gregory v. Paul, 15 Mass. 31; Boyce v. Owen, 1 Hill (S. C.), 8; Robinson v. Reynolds, 1 Aik. (Vt.) 174.

with an intent not to live with her again in the marital relations, has been held equivalent to an abjuration of the realm so far as a restoration of the rights of the wife as a *feme sole* are concerned. And when a divorce *a mensa et thoro* is obtained, it would doubtless be amply sufficient.[1] But a mere temporary absence of the husband does not confer upon her such a right.[2] In equity in some of the States the separate estate of a married woman has been treated as subject to her own disposition, and to the extent of its use by her she is treated as a *feme sole*,[3] and such also is the rule in England,[4] but in most of the States she has no power over her separate estate, except such as is made an incident thereof by the instrument conferring it upon her.[5]

Corporations may be partners with other corporations or individuals.

SEC. 15. At common law, one corporation was held competent to become a member with another,[6] and upon principle there would seem to be no question but that it may be a partner with another corporation[7] or with an individual[8] in any purpose connected with or incident to its business. Whether it can become a partner, and assume all the rights and liabilities as such in a matter foreign to the business and purposes for which it was established, is perhaps questionable, but it is believed that, whatever might be the rule as to the rights of the corporation in such a firm, it might render itself liable as a partner to those who dealt with the firm in ignorance of the scope and extent of its corporate rights and powers.

Capital.

SEC. 16. The parties *must join together their money, goods, labor or skill*, for the purposes of trade. One partner, therefore, may bring into the trade money, another goods, and a third labor or skill,

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[1] Pierce v. Burnham, 4 Met. (Mass.) 303; Knebes v. O'Grady, 23 Ala. 726; Rhea v. Rhenner, 1 Pet. (U. S.) 105; Love v. Moynehan, 16 Ill. 277; Chauviere v. Fliege, 6 La. An. 56; Beane v. Morgan, 4 McCord (S. C.), 148; Cosio v. De Bernales, Ryan & Moody, 102; 1 Carr. & Payne, 266; Gow on Partn. 2.

[2] Concord v. Billis, 10 Cush. (Mass.) 276; Robinson v. Reynolds, 1 Aik. (Vt.) 174.

[3] Everett v. Watts, 10 Paige's Ch. (N. Y.) 82; Noyes v. Blakeman, 3 Sandf. (N. Y.) 53.

[4] Bulpin v. Clark, 17 Ves. 365; Bohun, Priv. Lond. 187; Beard v. Webb, 2 B. & P. 93. In several states of this country, married women are invested with the rights of a *feme sole* in many respects, and permitted to transact business in their own name and on their own account, and in all such cases they may become partners in trade and assume liabilities as such.

[5] Sillard v. Turner, 16 B. Mon. (Ky.) 374; Choteau v. Merry, 3 Mo. 254.

[6] Grant on Corporations, 5.

[7] Dalton City Co. v. Dalton Mfg. Co. 33 Ga. 243.

[8] Holmes v. Old Colony R. R. Co., 5 Gray (Mass.), 58; Allen v. Woonsocket, Co., 11 R. I. 288.

and they will thenceforth be partners as between themselves, provided they share proportionally the profit and loss of the concern.[1]

In Peacock v. Peacock,[2] a father took his son into business with him as a partner; and it was agreed that the son should be entitled to a moiety of the profits, although he contributed neither money nor effects, but only his personal labor. There was no question as to this being a partnership between the parties, and that the son might file a bill against the father, praying for a dissolution, an account of profits and a receiver of the outstanding estate. And in a subsequent case it was held, that where, by agreement, persons have a joint interest of the same nature in a *particular adventure*, they are partners *inter se*, although some may contribute money and others labor. "Such a partnership," observed Abbott, C. J., "may well exist, although the whole price is, in the first instance, advanced by one party, the other

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[1] Any contribution in the shape of capital or labor, or any beneficial act is a sufficient consideration for a partnership. The Herkimer, Stewart's Adm. Rep. 23; Chipman v. Wilson, 1 Rob. (Va.) 267; Perry v. Butt, 14 Ga. 699; Gregory v. Dodge, 14 Wend. (N.Y.) 593; Soloman v. Soloman, 2 Ga. 18; Fail v. McRae, 36 Ala. 61; Somerby v. Buntin, 118 Mass. 279; Pettee v. Anderson, 114 Mass. 114. In Dale v. Hamilton, 5 Hare, 393, Vice Chancellor Wigram very aptly observed: "If one man has skill, and wants capital to make that skill available, and another has capital, and wants skill, it is perfectly clear that there is a good consideration for the agreement on both sides, and it is impossible for the court to measure the quantum of value. The parties must decide for themselves." Geddes v. Wallace, 2 Bligh, 270. An agreement between two merchants to set up a store and for one to superintend the business, and to receive one-third the profits, he putting in no stock, constitutes a partnership. Simpson v. Felty, 1 McCord's Ch. (S. C.) 218. Where two persons made a shipment on joint account, they were held jointly liable for advances made for the joint concern. Felichey v. Hamilton, 1 Wash. (U. S.) C. C. 492. See Everitt v. Chapman, 6 Conn. 347; Musier v. Trumpour, 5 Wend. (N. Y.) 274. Where one person advances funds for carrying on trade, and another furnishes his personal services, for which he is to receive a proportion of the profits, they are partners both as to themselves and other persons. Dob v. Halsey, 16 Johns. (N. Y.) 34. See Dix v. Otis, 5 Pick. (Mass.) 38. Four tenants in common of a paper mill agreed, for the management of their business, that they should each receive a fixed compensation for attending to particular parts of the business. It was held to be a partnership in the business of making and vending paper. 8 Me. 170. Cases of stage proprietors, where each was to furnish his own stage and horses for a particular section, etc., the profits of the whole line to be divided, proportionably, between them. Cobb v. Abbot, 14 Pick. (Mass.) 289; Bostwick v. Champion, 11 Wend. (N. Y.) 571. The rule, that all who participate in the profits are liable as partners, is subject to many exceptions If three enter into an agreement, by the terms of which one is to do certain things, and the other two certain things, each at his own expense, and each to be entitled to an equal share of the profits arising out of the subject-matter of the contract, this does not constitute them all partners, and make them all liable for expenses incurred by either in the performance of his part of the contract. Hecker v. Fegely, 6 W & S. (Penn.) 139. The rule, that a partnership in the profits will establish the existence of a partnership in favor of third persons, Judge Story says, in his Commentaries, is to be regarded as mere presumptive proof thereof, and therefore liable to be repelled, and overcome by other circumstances. Story on Part. 56.

[2] 16 Ves. 49.

contributing his time, and skill, and security, in the selection and purchase of the commodities."[1]

Partners in profits but not in the goods.

SEC. 17. Consistently with these principles, it frequently happens that one party is the sole owner of the goods, and the other the sole disposer or manager of them; in this case, if they share the profits, they are partners in the profits, although one contributed goods and the other only trouble.[2] And sometimes neither party contributes goods, but both act as managers and disposers of the goods of others, receiving a commission for their pains. In this case, if they share the commission, they are partners *quoad hoc.*[3]

Communion of profits.

SEC. 18. Again, to constitute a partnership between the parties themselves, there must be a communion of profit between them. A communion of profit implies a communion of loss; for, "every man who has a share of the profits of a trade, ought also to bear his share of the loss."[4] It is not, however, necessary that every party to the con-

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[1] Reid v. Hollinshead, 4 B. & C. 878; 7 Dow. & Ryl. 444.

[2] Meyer v. Sharpe, 5 Taunt. 74.

[3] Cheap v. Cramond, 4 B. & A. 663.

[4] Per De Grey, C. J., 2 Sir W. Bl. 999. See Dry v. Boswell, 1 Camp. 329.

Partners inter se. In order to constitute a partnership *inter se*, there must be either a voluntary agreement to assume that relation, or the parties must so conduct in reference to the property or business, as to show an *intention* to become partners. Their *intention*, to be gathered from the contract, if there is one, or from their acts, if there is no written contract, is the test. Coulter v. Thomas, 25 Vt. 273; Parkhurst v. Kinsman, 1 Blatchf. (U. S. C. C.) 488; Irwin v. Forbes, 11 Barb. (N. Y.) 587; Hazard v. Hazard, 1 Story (U. S. C. C.), 371; Rice v. Austin, 17 Mass. 197; Lamb v. Grover, 47 Barb. (N. Y.) 317; Newman v. Bean, 21 N. H. 93; Blue v. Leathers, 15 Ill. 31; Perrine v. Hankinson, 11 N. J. L. 181; Mohawk R. R. Co. v. Niles, 3 Hill (N. Y.). 162; Briggs v. Vanderbilt, 19 Barb. (N. Y.) 222; Strong v. Place, 4 Robt. (N.Y.) 380; Christian v. Crocker, 25 Ark. 327; Phillips v. Phillips, 49 Ill. 437; Chisholm v. Cowles, 42 Ala. 179; Niehoff v. Dudley, 40 Ill. 406. Persons may be proved to be partners *inter se* by their acts. Widdefield v. Widdefield, 2 Binn. (Penn.) 245; Mifflin v. Smith, 17 S. & R. (Penn.) 165; Salter v. Ham, 31 N. Y. 321. It is not necessary that the parties should agree to share the profits and loss. If they actually *do* share them, they are partners in fact, as well as to third persons. Thus, where several persons engaged in working a gold mine together, which they had purchased, and each received a share of the profits and bore an equal proportion of the losses, it was held that they were partners, although they had never agreed to become so. Duryea v. Burt, 28 Cal. 569 S. P.; Newbrau v. Snyder, 1 W.Va. 153; Martin v. Tidwell, 36 Ga. 332. A mere joint interest in property does not make the joint owners partners. They occupy the relation of tenants in common; as the joint owners of a patent, a horse, etc. Parkhurst v. Kinsman, 1 Blatchf. (U. S. C. C.) 488; Hopkins v Forsyth, 14 Penn. St. 34; Brady v. Calhoun, 1 id. 140; Macy v. DeWolf, 3 W. & M. (U. S.) 193.

But, if the property is used by them as stock in business, they thereby become partners therein by operation of law. Copley v. Lawhead, 11 La. An. 615; Penniman v. Munson, 26 Vt. 164; Champion v. Bostwick, 18 Wend. (N. Y.) 183; Matter of Warren, Davies (U. S. C. C.), 320; Ward v. Thompson, 22 How. (U. S.) 330; Vandewater v. Mills,

tract should undertake to share the loss. A man, on entering a part-

19 id. 162; DeWolf v. Howland, 2 Paine (U. S. C. C.), 356; Coffin v. Jenkins, 3 Story (U. S. C. C.), 108. In a Massachusetts case, Julio v. Ingalls, 1 Allen (Mass.), 4, A and B made an agreement in writing, by which B was to furnish a vessel and cargo, and A was to take charge of the same and prosecute a certain voyage upon the following terms, namely: "Monthly wages $50, and one-fifth interest in the voyage." A received and acted upon a letter of instructions from B, saying, "Your interest in the vessel and cargo is one-fifth part." Other voyages being made with the same and another vessel, A received and acted upon another letter of instructions from B, saying, "For your services you are to receive $50 per month, and one-fifth interest in all the vessels and cargoes I may send to you." The accounts of all the voyages were kept as partnership accounts, *which A knew*. At the end of the transaction A claimed to own one-fifth of the property that was left, and it was held that they were partners *inter se*. And generally, when two persons have a joint interest, of the same nature, in a particular adventure, they are, as between themselves, partners, although one furnishes money and another labor. Robbins v. Laswell, 24 Ill. 387; Copley v. Lawhead, 11 La. An. 615. In Bullfinch v. Winchenbach, 3 Allen (Mass.), 161, two persons agreed to prosecute a voyage in a vessel together, each contributing services and time and sharing in profits and losses, and it was held that they were partners. So in Dwight v. Brewster, 1 Pick. (Mass.) 50, the proprietors of stage coaches, whose practice of carrying parcels had made them common carriers, it was held that they were partners *in that business*, and jointly liable for the loss of a parcel. So in Barrett v. Swann, 17 Me. 180, four persons entered into an association for the manufacture of paper, providing for the purchase of stock and the sale of paper indefinitely, and they were held partners *inter se*, although there was no agreement to share either profit or loss.

It is not essential that the parties should agree to become partners; the question is, what did they intend? and this is to be gathered from the contract and their course of dealing, where the contract is silent as to their intention. Thus where several persons entered into an agreement to buy and sell potatoes, and the others were to furnish the money, and the other to buy and sell and to be allowed a certain sum per bushel for his labor, each to have the privilege of selling, and at the end of the season the profits were to be divided, it was held that, although the word partnership was not used, yet the other language showed every ingredient of a partnership, and that the parties must be presumed to intend what the language expressed. Duryea v. Whitcomb, 30 Vt. 399. In Manhattan Brass Co. v. Sears, 1 Sweeney (N.Y. Sup. Ct.), 426; S. C., 45 N.Y. 797; 6 Am. Rep. 177, the parties entered into a written contract in reference to a patent, by which one party agreed for a loan of $4,000 to be furnished by the patentor, to sell to the defendant a quarter interest in the patent at the risk of its success, and $15,000 purchase-money. The agreement ran as follows: "The said $4,000 loan is to be paid at any time within one year to be used for the benefit of the patent, and returned out of the first profits of the business after paying the salary of the agent and other necessary expenses. The said $15,000 purchase-money is to be paid as follows, viz.: To be realized and retained by the said Frederick Judson out of Herman B. Sears' share in the profits arising from the sale of rights under the patent, and one-half of all dividends payable to the said Herman B. Sears are to be retained by said Frederick Judson until they amount to said $15,000. The said Frederick Judson is to continue to be the sole agent of the whole of said patent right, at a salary of $1,500 a year, payable only from the profits of the whole of said patent right, subject to an increase hereafter to be agreed upon, whenever the said $15,000 shall be realized, and the profits of the business shall authorize it. The object of this agreement is not for any purpose of business, or manufacture, or partnership, but only to make the parties joint owners of said patent right. The said Frederick Judson is to transact all business, and make all grants in his own name, and to keep books of account showing all moneys received and expended in said matters, which are to be always open to the inspection of either of the parties to this contract.

"FREDERICK JUDSON.
"HERMAN B. SEARS."

"Here," says Peckman, J., "appear to be all the elements of a partnership,

nership, may stipulate to be free from all liability to loss; and such

as claimed by any writer, 1. Sharing in profits. 2. Sharing in the losses, at least, to the extent of $4,000, the repayment of the whole of which depended upon the profits. 3. The right to inspect the books. 4. A common interest in the stock of the company. It is not the less a partnership that Judson was to transact all business, and make all grants in his own name." A secret or dormant partner is always intended to be unknown. He is not thereby the less a partner. It is urged that the respondent expressly refused, in the contract, to enter into any 'business or manufacture or partnership.' There is no such refusal. But the contract says simply, that such was not the '*object* of the parties,' but only to make the parties joint owners of the patent. Yet the contract carefully provides for the business, and for the disposition of its profits. It continues Judson as the sole agent of the whole of the patent right at an agreed salary, payable from the profits, subject to an increase thereafter to be agreed upon 'whenever the $15,000 shall be realized, and the profits of the business shall authorize it.' What the precise business is as to the patent is nowhere stated, except incidentally, viz.: that, 'the profits arising from the sale of rights under the patent' are to be applied in a share for the defendant's benefit toward paying for an interest in the patent. Nor is the business to cease when the one-third interest in the patent is paid for, as provision is expressly reserved for an increase of the agent's salary at that time. Here, then, is express and particular provision for carrying on this business for the joint benefit of the parties defendants, for sharing in the profits, and, in a degree, in the losses; and the mere statement that its 'object is not for a partnership,' will not change the legal effect of the contract. It is plainly a partnership as to third persons, even though expressly agreed that it should not be so between themselves. The best position that can be claimed by defendant Sears is that this is a special or limited partnership, as between the parties thereto. In such case it is general as to the public, or our statute on that subject would be superfluous. Story on Part. § 63, and cases cited. Judson, therefore, was the agent of the defendants in all matters touching the business of the patent. It cannot be held, as matter of law, that the hiring of this store by Judson was not within and for the purpose of the partnership business. If it were for manufacturing and exhibiting specimens of the patent's work, with a view of selling the rights, and it was pertinent to that end, then it was within the partnership business, though it may not have been a wise mode of attaining the end. It may be possible that the steam power was outside of the business; and yet it would not then be proper to nonsuit, if the renting was appropriate as to the building or room, but if the general agent of the company thought it appropriate, and acted in good faith, it should be a plain case of excess of authority, or the company should be bound by his contract. It may be observed that the defendant, Sears, loaned this $4,000, 'to be used for the benefit of the patent,' and yet he paid a draft which he thought, as he testified, went for a payment on this same rent. He then, obviously, regarded this renting as appropriate to the business, or he would not, or should not, have consented to the misappropriation of his money."

An agreement to share in the profits and losses of a business, in the absence of an express provision to the contrary, makes the parties copartners in fact. Brown v. Higginbotham, 5 Leigh (Va.), 58; Brown v. Tapscott, 6 M. & W. 122; French v. Roberts, 6 Mod. 96; Brown v. Cook, 3 N. H. 64; Ex parte Church, 8 Bing. 471.

In an Alabama case (Emanuel v. Draughn, 14 Ala. 306), the parties entered into an arrangement by which the defendants were to furnish the plaintiff with goods at a profit of seven per cent, and a horse and cart in which to peddle the goods. The goods were to be sold by the plaintiff, and the profits were to be divided in the ratio of three-fifths to the defendants and two-fifths to the plaintiff. The court held that they were partners *inter se*.

The *method* in which the business is done is an important element in determining the intention of the parties; as, when one furnishes capital and the other labor, if each have the right to buy and sell, and the profits are divided, it has been held sufficient to establish a partnership in fact. Miller v. Price, 20 Wis. 120; Adams Bank v. Rice, 2 Allen (Mass.), 480; Pattison v. Blanchard, 6 Barb. (N. Y.) 541; Hunter v. Kock, 5 Wilson & S. App. Cas. 639. So when the capital is advanced by one as a

stipulation will hold good as between himself and his co-contractors.[1] In such case he will still be a partner, enjoying, in addition to the advantages of partnership, the indemnity afforded him by his companions.[2] *Vinny*, after giving his definition[3] of partnership, says: *"De damno nihil adjeci, quia lucrum tantum sperant spectantque socii; damnum præter votum eorum accidit. Sed nec damni communio ad substantiam societatis pertinet: quippe quæ etiam ita constitui potest, ut unis e sociis damni sit expers."*[4]

What is meant by communion of profits.

SEC. 19. By a communion of profit is intended a joint and mutual

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mere loan, if the re-payment of the loan is dependent upon the success of the business, and if any profits are made over and above the capital, they are to be divided, it is held that a copartnership between the parties is created. Brigham v. Dana, 29 Vt. 11. See, also, Cruikshank v. McGregor, 8 Beav. 106, where three companies located in different counties entered into an arrangement for a joint speculation in teas, to be purchased by one, and consigned to another for sale, the profits to be equally divided between the companies, and it was held that they were copartners. Barrett v. Swan, 17 Me. 180.

So, where one labors for another, at a fixed salary, *and in addition thereto is to have a share of the profits of the business*, they become partners *inter se* and *quoad*. Thus in Bucknam v. Barnum, 15 Conn. 68, the firm of Barnum & Taylor entered into a contract by which they were to furnish all the necessary goods, to be purchased in their own name, or that of either of them, for sale in Texas. Taylor & Smith were to go out to Texas and sell, Taylor to have thirty dollars a month as salary, if the profits were only one thousand dollars in six months; and if the profits exceeded two thousand dollars in that time, he was to be paid sixty dollars a month and have five per cent of the net profits. It was held that the parties were partners *inter se* and as to third persons. See also Rowland v. Cranshaw, L. R., 1 Ch. App. 424.

Partners may stipulate against liability — effect thereof.— An agreement between partners that one of them shall not be liable for any debts of the firm is valid as between them, but it does not have any effect as against third persons, unless they dealt with the firm with the full knowledge of the real contract between the members thereof. Zaepfel v. Baumgardner, 6 L. Bar. (Penn.) 141.

Surviving partner carrying on business with the consent of the executors of a deceased partner.—The fact that a surviving partner carries on the business of the firm *with the consent* of the executors of his deceased partner, does not render them liable personally as partners for the firm debts. In order to have that effect, it must be shown that they entered *voluntarily* into such partnership and employed the testator's assets in the business. The fact that they assent to the prosecution of the business by the surviving partner with the testator's assets, for the benefit of the estate, does not make them partners, particularly if it is done in pursuance of the provisions either of the will or the partnership agreement. Richter v. Poppenhusen, 39 How. Pr. (N. Y.) 82.

Partnership in separate ventures.— When one party furnishes money, and the other purchases certain articles which are sold, and the profits and losses are divided upon such sale, although the business continues through a considerable period, it is not a continuous partnership, but only a partnership in each venture, Marsh v. N. A. Ins. Co., 3 Bis. (U. S. C. C.) 351; and neither can bind the other except while a particular venture is being prosecuted.

[1] Gilpin v. Enderbey, 5 B. & Ald. 954; Bond v Pittard, 3 M. & W. 357.

[2] Fareday v. Hordern, Jac. 144.

[3] *Ante*, p. 2.

[4] Vinn. Comm., lib. 3, tit. 26.

interest in profit. The interest must be joint: for, although persons may be jointly concerned in the purchase of goods, yet if they be not jointly concerned in the profit arising from the goods when purchased, they are not partners *inter se*.[1]

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[1] Thus, in Hoare v. Dawes (Doug. 371) an action for money lent and advanced was brought against the defendant, under the following circumstances: The plaintiffs, who were bankers, had advanced a sum of money on certain tea-warrants of the East India Company to Contencin, a broker, who deposited the tea-warrants with the plaintiffs as a security, and also gave them his note of hand for the sum advanced. He had been employed by a number of persons, of whom the defendants were two, to purchase a lot of tea at the East India Company's sale, of which they (together with himself) were to have separate shares, the lots being in general too large for any one dealer. The practice at such sales is for the company to give a warrant, or warrants, to the broker or purchaser, for the delivery of the quantity of tea purchased, on payment being made. At the time of the sale, 25*l*. per cent is advanced, and is forfeited, unless the whole is paid on the third, which is the last day of payment; if paid sooner, allowance is made for prompt payment. The warrants are often pledged, and money raised upon them; generally, considerably less than the supposed value of the tea. It happened, however, in this instance, that, between the time of the deposit of the warrants with the plaintiffs, and the time when the payment was to be made at the India House, the value of the tea sunk so much as to be considerably under the amount of the sum advanced. The broker, in the meantime, had become a bankrupt, and had informed the plaintiffs who his employers were, all of whom, except the defendants, were since either dead or become bankrupts. The shares of the defendants were to be two-sixteenths of the whole lot. The ground of the action was, that all the employers of the broker were to be considered as partners, and jointly and severally liable for the whole. The defendants owed nothing upon their own two-sixteenths. There was not any joint concern in the re-disposal of the tea. Upon this evidence the defendants obtained a verdict, and the court of King's Bench afterward discharged the rule which had been obtained for a new trial. Lord Mansfield—"I considered this, at first, as a case of dormant partners. The law with respect to them is not disputed, viz.: that they are liable when discovered, because they would otherwise receive usurious interest without any risk; but, toward the end of the cause, the nature of the transaction and of these loans was more clearly explained, and I was satisfied with the verdict, and am now confirmed in my opinion. Is this a partnership between the buyers? I think it is not; but merely an undertaking with the broker by each, for a particular quantity. There is no undertaking by one to advance money for another, nor any agreement to share with one another in the profit or loss. The broker undertakes to buy and sell, but makes no advance without the security of the tea-warrants, which are considered as cash, and pass by delivery, like East India bonds. These warrants are pawned with the lender, but the broker has no power to pledge the personal security of the principals; he cannot sell the warrants, and borrow more money on such personal security. It makes no difference whether specific tea, or the warrants, are delivered at the sale. It would be most dangerous if the credit of a person, who engages for a fortieth part, for instance, should be considered as bound for all the other thirty-nine parts. *Non hæc in fœdera veni.*" Buller, J.—"This is a very plain case. The plaintiffs had no reason to consider the broker as a partner with the other persons; for though he had a share, he did not act or appear as a partner; nor were they partners as among themselves. They had never met or contracted together as partners. If this transaction were sufficient to constitute a partnership, a broker would have it in his power to make five hundred persons partners, who had never seen or heard of one another; or might, at his pleasure, convert his principals into partners or not, without any authority from them, by taking joint or separate warrants" Rule discharged.

The same principles were acted upon in the case of Coope v. Eyre (1 H. Bl. 37), which was an action brought to re-

The rule is, that if a partner shares in the advantages, he also shares in all the disadvantages.[1] In order to constitute a partnership,

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cover the amount of a loss sustained by the sale of some oil under the following circumstances: The defendants, Eyre for himself and partners (who were Atkinson and Walton), general merchants, Hattersley for himself and Stephens, who were oil-merchants, and Pugh for himself and son, who were also oil-merchants, agreed to purchase jointly as much oil as they could procure, on a prospect that the price of that commodity would rise. That Eyre should be the ostensible buyer, and the others share in his purchase at the same price which he might give. Hattersley & Co. were to have one-fourth, Pugh one-fourth, and Eyre & Co. the remaining moiety. In consequence of this agreement, Eyre *alone* gave general orders to a broker to purchase any quantity of oil which might offer. The plaintiffs accordingly contracted with Eyre to sell the oil in question. The contract with them was signed by Eyre for himself and Co.; and by way of collateral security two bills of exchange were deposited in the hands of the plaintiffs, one of which was accepted by the defendants Eyre, Atkinson, and Walton. The oil not having been paid for nor taken away, the plaintiffs, in pursuance of a power they had in that contingency, authorized the broker to sell it. The deficiency on this resale was very great; the bill of exchange accepted by the defendants was presented to them for payment, and refused; and before the action was brought, Eyre & Co. had become bankrupts. The question was, whether or not the other defendants, Hattersley, Stephens and Pugh, were liable for the amount of the loss sustained by the plaintiffs.

At the trial, it was held that, as the defendants did not appear to have been jointly concerned, further than the purchase of the oil, they had not such a joint interest in the profit and loss as the law made necessary to a partnership. The jury accordingly found a verdict for the defendants; and the Court of Common Pleas, with the exception of Wilson, J., held the verdict to be right. In that case, it will be observed that there was no communication between the buyers as to the profit or loss. Each party was to have a distinct share of the whole, the one to have no interference with the share of the other, but each to manage his own share as he judged best. It was merely a sub-contract; Pugh, Hattersley, and Stephens were not partners, inasmuch as they were interested in the purchase of the commodity, and not in the subsequent disposition of it. And being an action on a contract of sale, the vendor could have no remedy against any person with whom he had not contracted, unless there was a partnership, in which case all the partners would be liable as one individual. A secret partnership can be no consideration to the vendor, though, for reasons of policy and general expedience, the law is positive with respect to the secret partner, that when discovered he shall be liable to the whole extent.

[1] "An agreement to share profits," says Mr. Lindley in his work on Partnership, vol. 1, p. 14, "nothing being said about losses amounts *prima facie* to an agreement to share losses, also Greenham v. Gray, 4 Ir. C. L. 501; Dry v. Boswell, 1 Camp. 330; Heyhoe v. Burge, 9 C. B. 440, per Parke, B.; for it is but fair that the chance of gain and of loss should be taken by the same persons, and it is natural to suppose that such was their intention if they have said nothing to the contrary. It follows from this, that an agreement to share profits is *prima facie* an agreement for a partnership; and accordingly it is held, that unless an intention to the contrary can be shown, persons engaged in any business or adventure and sharing the profits derived from it, are partners as regards that business or adventure. Wood v. Valette, 7 Ohio St. 172; Sheridan v. Medara, 10 N. J. Eq. 469; Cushman v. Bailey, 1 Hill (N. Y.) 526; Motley v. Jones, 3 Ired. (N. C.) Eq. 144; Bromley v. Elliott, 38 N. H. 287; Leggett v. Hyde, 58 N. Y. 272; Manhattan Brass Co. v. Sears, 45 N. Y. 797; Mason v. Partridge, 66 id. 633; Brigham v. Clark, 100 Mass. 430; Ward v. Beath, 23 Wis. 254; Campbell v. Dent, 54 Mo. 325; Bocklin v. Hardenburgh, 37 N. Y. Superior Ct. 110; Benedict v. Hittrick, 35 id. 405.

"Indeed, it has often been said, that community of profit is the test of partnership. Heyhoe v. Burge, 9 C. B. 446, E. C. L. R. 67; Fox v. Clifton, 9 Bing. 799; Ex parte Langdale, 18 Ves. 300.

a communion of profit and loss is essential. *The shares must be joint,*

This, however, is scarcely accurate. It is undoubtedly true that persons who share profits are liable as if they were partners, and it is also true that persons who are so liable are *prima facie* partners *inter se*, Peacock v. Peacock, 2 Campb. 46, but it cannot be said that persons who share profits are necessarily and inevitably partners in the proper sense of the word. Whether persons are partners or not is a question of intention, to be decided by a consideration of the whole agreement into which they have entered, and ought not to be made to turn on one or two only of the clauses in it. A good instance of this is afforded by the Irish case of Barklie v. Scott, 1 Huds. & Br. 83. Compare Reid's Case, 24 Beav. 318, where the father who had transferred shares into his infant son's name was held a contributory. There a father paid a sum of money as his infant son's share of the capital of a partnership, and it was agreed that during the son's minority the profits should be accounted for to the father; it was held that the father was not himself a partner, that clearly not being the intention of the parties to the agreement. The case of Rawlinson v. Clarke and Stocker v. Brocklebank (compare Harrington v. Churchyard, 8 W. R. 302, a somewhat similar case), may also be referred to as illustrating the principle now in question.

Rawlinson v. Clarke (15 M. & W. 292) was as follows: Clarke was a surgeon, and agreed to sell his practice, and drugs and stock in trade to Rawlinson, who was to pay for them partly in cash down and partly in cash at the end of a year. During this year Clarke agreed to carry on his practice as usual, and to introduce Rawlinson to the patients; and Rawlinson agreed to allow Clarke during this one year one-half of the clear profits of the concern, to be paid at the expiration of the year. It was contended that the above agreement rendered the plaintiff and the defendant partners for a year; but it was held that the whole agreement showed only that Clarke was to receive a salary for the services he was to afford to Rawlinson in helping him to continue the business.

In Stocker v. Brocklebank (3 M. & G. 250, E. C. L. R. 42. In Withington v. Herring, 3 Moo. & P. 30, an agent paid by a salary and a share in the profits was thought to be a partner, but the question was not decided), the plaintiff was a patentee and the defendants were partners, and had obtained a license to work the plaintiff's patent. An agreement was entered into between the plaintiff and the defendants to the effect that the plaintiff would serve them as manager of their partnership business, and that he should receive by way of a salary such a sum as should equal £40 per cent of the net profits of the business, and it was expressly stipulated that there should be no partnership between the plaintiff and the defendants. Disputes, however, arising, the plaintiff contended that under the agreement he was, in fact, a partner with the defendants. But it was held that he was not: the Lord Chancellor saying, "The contract is in express terms one of hiring and service, and the question thereof is, whether in the absence of every incident of partnership, except that of sharing in the profits, that circumstance constitutes a partnership; and I am of opinion, upon principle and authority, that it does not. There is nothing in common between the parties, neither capital, liability, nor participation in loss. The plaintiff has neither the liability, nor the authority, nor the interest of a partner; he could not be joined as a plaintiff in any legal proceeding to assert the rights of the partnership, nor could he be made defendant in respect of any partnership liability; and, as before stated, the contract throughout speaks of service, and requires him to obey directions, at the peril of a determination of the contract. No principle was stated during the argument upon which the contract was contended to inure as a partnership, but the fact was frequently adverted to that the plaintiff was entitled to forty per cent upon the profits before the firm, which consisted of three persons at first, and afterward of two, were entitled to participate. Now, whether the plaintiff was to be paid one per cent upon the profits or forty would make no difference in principle, and if the forty per cent was but a mode of measuring the amount of wages, salary, or remuneration, I do not think that its being contingent upon profits has any effect in creating a partnership."

In Rawlinson v. Clarke, Stocker v. Brocklebank, and Geddes v. Wallace there was no capital or stock common to those who shared the profits. If there

though it is not necessary they should be equal. If the parties be

had been, a partnership would, it is apprehended, have been created; or, at all events, that additional circumstance would have gone far to show that a partnership was, in fact, intended. See Reid v. Holinshead, 4 B. & C. 867; Ex parte Chuck, 8 Bing. 469; Gilpin v. Enderby, 5 B. & Ald. 954.

It is not, however, essential to the existence of a partnership that there shall be any joint capital or stock. If several persons labor together for a common object, and for the sake of gain, and of dividing that gain, they will not be partners the less on account of their laboring with their own tools. Thus in Fromont v. Coupland (2 Bing. 170. See, too, Lovegrove v. Nelson, 3 N. & K. 1), two persons who horsed a coach and divided the profits, were held to be partners, although each found his own horses, and the other had no property in them.

So in the late case of French v. Styring, 2 C. B. (N. S.) 357, where two co-owners of a race-horse agreed to share its winnings and the expenses of its keep, although there was some doubt as to whether they were partners or not, the court had no hesitation in admitting that they might have been partners in the profits although not in the horse itself.

The ordinary agreement between publishers and authors, to the effect that the latter shall contribute the manuscript, and the former, in the first instance, defray the expenses of publication, and then that the profits shall be divided, furnishes another instance of a partnership confined to profits only. See Gardiner v. Childs, 8 C. & P. 345; Reade v. Bentley, 3 K. & J. 271; 4 id. 656; Wilson v. Whitehead, 10 M. & W. 503; Gale v. Leckie, 2 Stark. 107; Venables v. Wood, 3 Ross' L. C. on Com. Law, 529. This last case is an authority for the proposition that authors and publishers are not partners, and query whether this is not the correct doctrine.

Again, it frequently happens that one person has property and another skill, and that they agree that the latter shall have the control of the property for the benefit of both, and that the profits shall be divided. In such cases it may be difficult to say whether partnership is or is not created. In Stocker v. Brocklebank, *ante*, it is clear that no partnership was intended and none was created; in the late Irish case of Greenham v. Gray, 4 Ir. Com. L. Rep. 501, the real truth here seems to have been that the plaintiff intended to create a partnership, whilst the defendant did not, which was somewhat similar to the last, it was thought that the whole agreement could only receive a reasonable construction by holding a partnership to exist, and a partnership was held to exist accordingly, although the mills and machinery, and buildings, by means of which the business was carried on, clearly belonged to one partner only.

Other instances of partnership in profits, although there is no community of interest in the capital or stock producing them, will be noticed when the subject of partnership property is examined. In Meyer v. Sharpe, 5 Taunt. 74, the distinction between an interest in profits and an interest in the goods by the sale of which those profits were to be produced was held to be clear and manifest. See, too, Smith v. Watson, 2 B. & C. 401.

Persons who agree to share the profits of an adventure, to the expenses of which they contribute, are *prima facie* partners, although they stipulate that they will not be liable for losses beyond the sums they engage to subscribe. Brown v. Tapscott, 6 M. & W. 119.

The doctrine that where there is community of profit there is a partnership is so strong that, even if community of loss be expressly stipulated against, partnership may nevertheless subsist. In Coope v. Eyre, 1 H. Blackst. 49, Lord Loughborough is reported to have said, "In order to constitute a partnership, communion of profits and loss is essential," but there is nothing to prevent one or more partners from agreeing to indemnify the others against loss, or to prevent full effect from being given to a contract of partnership containing such a clause of indemnity. See Bond v. Pittard, 3 M. & W. 357; Geddes v. Wallace, 2 Bligh, 270.

The true effect of such a complex agreement would, it is apprehended, be to entitle each of the partners to a share of the excess of the returns over the advances, while some of the partners would be entitled to be indemnified by the others for all losses *beyond the advances.* If this were not the result of the agreement, and if the persons indemnified were indemnified not only against losses beyond the advances, but

jointly concerned in the purchase, *they must also be jointly concerned*

also against the loss of the advances themselves, the contract would lose its character of a contract of partnership, and become a contract of loan. See Pothier, Contrat de Société, §§ 21, 22.

This last proposition is, however, apparently modified by the doctrines of quasi-partnership; for it has been held that if a person lends another money on such terms as to become liable as if he were a partner with him, a partnership as between themselves will be the result, although repayment of the advance is distinctly stipulated for. This was decided in Gilpin v. Enderly, 5 B. & Ald. 954, E. C. L. R. 7. There the plaintiff and the defendant agreed to become partners as army clothiers; the defendant advanced £20,000 as part of the capital to carry on the business, and it was agreed that he should have out of the profits of the trade (and in case of any deficiency therein, then out of the capital thereof), £2,000 a year as his share of the profits. The plaintiff, on the other hand, agreed to repay the £20,000 on the termination of the partnership, and to pay out of the partnership capital all such losses as should arise in carrying on the business. The question before the court was whether this agreement was an agreement for a loan, and so void on the ground of usury, or a contract of partnership, and so binding between the parties; and it was held to be a contract of partnership, although of an unusual kind.

Ferreday v. Hordern, Jac. 144, was a very similar case, and Lord Eldon decided that the agreement there was not usurious, because the lender of the money was not a mere creditor, but became liable as if he were a partner with the borrower. This, it is apprehended, was the real point decided in Gilpin v. Enderby, which ought to be referred to as a decision on the law of usury, rather than as a decision on the law of partnership. See Ex parte Briggs and Ex parte Notley, 3 D. & Ch. 367.

Although, as has been already pointed out, those who share gross returns share profits, if any there be, and although an agreement to share profits is *prima facie* an agreement for a partnership, yet it is held, and it is conceived rightly, that a partnership is not the result of an agreement to share gross returns.

If several persons make advances for a common object and agree to share the gross returns in proportion to their advances, this does not create such a community of interest in profit or loss as to make such persons partners. Thus in Gibson v. Lupton, 9 Bing. 297. See, further, as to joint purchasers, Coope v. Eyre, 1 H. Black. 37; and Hoare v. Dawes, 1 Doug. 371, and *post*, p. 31, where two persons joined in the purchase of wheat with the intention of paying for it and dividing it equally, it was held that they were not partners. So, if two workmen agree to divide their wages, that, *per se*, does not make them partners. See Finckle v. Stacey, Select Cas. in Ch. 9. But the strongest illustrations of this doctrine are afforded by those cases in which co-owners of chattels divide the earnings of the chattel. The distinction between co-owners and copartners will be noticed hereafter, and therefore it is not necessary to do more at present than to give an instance in which co-owners have been held not to be partners, although they agreed to divide the returns obtained by the use or employment of the thing owned. A good illustration of this is afforded by French v. Styring, 2 C. B. (N. S.) 357. There the plaintiff and defendant were entitled in common to a race-horse. It was agreed that the plaintiff should keep, train and have the management of the horse, that thirty-five shillings a week should be allowed for the expenses of his keep, that the plaintiff should pay the expenses of entering the horse and conveying him to the different races, and that one-half of the horse's keep and other expenses and his winnings should be equally divided between the plaintiff and the defendant. This agreement was held not to create a partnership. It was no more a partnership than if two tenants in common of a house had agreed that one of them should have the general management and provide funds for necessary repairs, so as to render the house fit for the habitation of a tenant, and that the rent should be divided amongst them equally. See the judgment of Mr. J. Willes, 2 C. B. (N. S.) 366.

Again, in whaling voyages the sailors are usually paid a certain proportion of the produce of the oil obtained, but they are not therefore partners, either with each other or with their employers. Mair v. Glennie, 4 M. & S. 240; Wilkinson v. Frazier, 4 Esp. 182; and see Perrott v. Bryant, 2 Y. & C. Ex. 61. In such cases as the last, partnership is

in the future sale, otherwise they are not partners.[1] If one was a mere speculator and the others were to share in the purchase, *but were not jointly interested in any subsequent disposition of the property,* though they may, by other purchases, have concluded themselves as to some particular vendors, yet, in the transaction in question, there would not be that communion between them necessary to make them partners; their agreement would be merely a sub-contract, which may be executory, to share in a purchase to be made. The seller in such a case could look to no other security but to the ones to whom the credit was given. So upon similar principles, if two persons jointly agree to do a particular piece of work, but the money received for such work is not to be employed on their joint account, the persons so contracting are not partners. Thus, in the case of Finckle v. Stacey,[2] joint articles were entered into by the plaintiff and defendant for doing a particular piece of work for the Duke of Marlborough, on account of which several sums of money had been jointly received by them, and immediately divided between them. There being a sum demanded by them in arrear, which the Duke refused to pay, as being unreasonable, Stacey applied to Finckle to join him in a suit to recover what was in arrear, which he refused to do, declaring he had several advantageous works under the Duke which he should lose should he join in a suit, on which Stacey applied, and got his own half of the sum which was due to the two. A bill was then brought for a moiety of the money so received, and insisted it should be considered as a partnership in trade, and this money as so much received on the joint account. But the court were of opinion it was not to be considered as a partnership, but only an agreement to do a particular act; between which there is great difference; and that it is so, is plain, for the money which they had received they immediately divided, and did not *lay out on a common account.* The bill was dismissed with costs.

In this case, however, if no application had been made to the plaintiff to sue the duke, a bill for an account, supposing an account necessary, would clearly have been sustainable against the defendant on other grounds than those of partnership. Here, however, the plaintiff, for his own private ends, had absolutely refused to join in

clearly not intended; and although persons who share profits incur, by the law of this country, liabilities as if they were partners, nevertheless it is held that persons who merely divide gross returns, do not incur any such liabilities. *A fortiori* it is impossible to regard them as partners *inter se.*"

[1] Woodward v. Cowing, 41 Me. 9; Brady v. Calhoun, 1 Penn. St. 140.

[2] Sel. Ca. Ch. 9.

suing for the money; and the court observed: "It is pretty extraordinary that he should come here to have the benefit of another's act, in which he refused to join; which refusal was with a corrupt view for his own advantage, and not on a common account, the money due on which he would rather sacrifice than forego his own particular advantage. And here is no insolvency in the duke; if there had been, perhaps it would have deserved consideration."

Various modes of creating partnership liability.

SEC. 20. Where there is no participation in profits, there is no partnership, either between the parties or as to third persons, and consequently mere joint ownership of property, or a joint interest in any matter, of itself does not make the persons interested therein partners. In order to constitute them partners there must be an intention to sell, or to use the property for their mutual profit.[1] But where there is a

[1] Hopkins v. Forsyth, 14 Penn. St. 34; Hoare v. Dawes, Dougl. 371; Gibson v. Lupton, 9 Bing. 297; Coope v. Eyre, 1 H. Bl. 37; Brady v. Calhoun, 1 Penn. St. 440; Ludlow v. Cooper, 4 Ohio St. 1. In Cowand v. Pulley, 11 La. An. 1, it was held that persons, owning materials, and manufacturing them into carriages for sale, were partners, but if they had purchased the materials to be manufactured into carriages, the carriages to be divided when completed, they would not have been partners, but merely joint owners. Thus, in Stoallings v. Baker, 15 Mo. 481, where one party furnished a saw-mill, and men, and team to keep it in operation, and the other furnished logs, and feed for horses and hands, the lumber when sawed to be equally divided between them, they were held not to be partners. But in Musier v. Trumpbour, 5 Wend. (N. Y.) 275, a different rule was adopted, and persons who entered into an agreement to burn lime on shares, one to build the kiln and the other to burn it and furnish wood therefor, the lime when burned to be equally divided between them, were held technical partners; and in Cox v. Delano, 3 Dev. (N. C.) L. 89, an agreement between the owner of a boat and the captain that each should pay certain expenses and divide the freight, with authority in the captain to invest the freight money on joint account, was held a partnership. It may be doubted whether the doctrine of Musier v. Trumpbour, *ante*, can be regarded as expressing a correct rule of law. See, conflicting therewith, Austin v. Thomas, 45 N. H. 113; Mohawk R. R. Co. v. Niles, 3 Hill (N. Y.), 162; Pillsbury v. Pillsbury, 20 N. H. 90; Fay v. Davidson, 13 Minn. 523; Dwinel v. Stone, 30 Me. 384; Wilkinson v. Jett, 7 Leigh (Va.) 115; Snell v. DeLund, 43 Ill. 323; Fawcett v. Osborn, 32 id. 411; Oliver v. Gray, 4 Ark. 425. In Braly v. Goddard, 49 Me. 115, it was held that, under such a state of things, a partnership could not be said to exist, if one of the parties had not the unqualified right to dispose of his own share of the property, nor any right to dispose of the remainder on any terms whatever; and this is in accordance with the English doctrine. Hoare v. Dawes, *ante*. In Finckle v. Stacy, *ante*, two persons joined in doing a certain piece of work, and immediately upon receipt of the money therefor *divided it*, and the court held that they were not partners. Neither are they partners therein if it is sold for their benefit by an agent, under instructions to pay to each an equal moiety thereof. Porter v. McClure, 15 Wend. (N. Y.) 187, was a case where two persons were jointly interested in building a mill, and one having promised to pay for advances made thereon, it was held that the other was not liable thereon, as they were not partners, but mere joint owners, and a similar doctrine has been held in several cases. Sikes v. Works, 6 Gray (Mass.) 433; Pillsbury v. Pillsbury, 20 N. H. 90; In Parkhurst v. Kinsman, 1 Blatchf. (U. S. C. C.) 488, it was held that the joint owners of a patent were not partners, and a similar rule was adopted in Pitts v. Hall, 3 Blatchf. (U. S.) 201. See,

joint purchase with a view to a joint sale and a communion of profit and loss, this constitutes a partnership *inter se* and *quoad*.[1] The modes by which a person may become a partner are numerous, and in all cases the question as to what is a partnership, is a question for the court, while the question as to whether a partnership exists, is a question for the jury.[2] In the following cases a person may be held as a partner, whether so in fact or not: First, by sharing in the profits and losses of a business as principal;[3] second, by holding himself out as a partner, in which case he is estopped from denying that he is so in fact.[4] But, where a person holds himself out as a partner, yet, if there are certain stipulations that he shall not participate in the profits of the business or be liable as a partner, he is only estopped from denying that he is a partner, as to those who have dealt with the firm in ignorance of such restrictions. A person who knows the facts cannot hold him as a partner. Thus, in Alderson v. Pope, 2 Chitty, 120, Lord Ellenborough held that "Where there was a stipulation between A, B and C, who appeared to the world as copartners, that C should not participate in the profit and loss, and should not be liable as a partner, C was not liable as such to those who had notice of this stipulation, and that notice to one member of a firm was notice to the whole partnership." The report of this case states no more than what is here extracted, and the reader is left in doubt as to the meaning of the words "should not be liable as a partner." If these words meant that C was to be indemnified by A and B, the observations already made show, it is conceived, that the decision was erroneous. But if they meant that C would not be liable at all to third parties for the acts of A and B, then the question would arise whether this was not altogether inconsistent with C's conduct and whether the maxim *protestatio facto contraria non valet* would not apply. In any point of view the reported note of the case is unsatisfactory. Moreover, if a person has

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also, Holmes v. United Ins. Co., 2 Johns. Cas. (N. Y.) 329; Post v. Kimberly, 9 Johns. (N. Y.) 470; Hickert v. Figley, 6 W. & S. (Penn.) 139; Finckle v. Stacy, Sel. Cas. Ch. 9; Penniman v. Munson, 26 Vt. 164.

[1] In re Warren, Davies (U. S. C. C.) 320, Penniman v. Munson, *ante;* in Benson v. McBee, 2 McMull. (S.C.) 91, grain received at a mill as toll, was mixed up, and became the subject of traffic between the defendants, and it was held that as each part owner was interested in the proceeds of the sale, they were partners in that particular transaction.

[2] Drake v. Elwin, 1 Cai. (N. Y.) 184; Beecham v. Dodge, 3 Hare (Del.), 485; Doggett v. Jordan, 2 Fla. 541.

[3] Chapman v. Wilson, 1 Rob. (Va.) 267; Perry v. Butt, 14 Ga. 699; Gregory v. Dodge, 14 Wend. (N. Y.) 593; Vassar v. Camp, 14 Barb. (N. Y.) 341; Mumford v. Nicoll 20 Johns. (N. Y.) 611; Brown v. Tapscott, 6 M. &W. 119.

[4] Carmichael v. Greer, 55 Ga. 116; Pickard v. Sears, 6 Ad. & El. 469; Campbell v. Hastings, 29 Ark. 512; Freeman v. Cooke, 2 Ex. 654.

been induced by the fraud of others to hold himself out as a partner with them, their fraud does not relieve him from liability to third parties who have been induced by his conduct to trust him as well as them, and who have had nothing to do with the fraud practiced upon him.

The expression in Waugh v. Carver, "If he will lend his name as a partner, he becomes against all the rest of the world a partner," requires qualification, for the real ground on which liability is incurred by holding oneself out as a partner is, that credit has been thereby obtained. This was put with great clearness by Mr. Justice Parke in Dickinson v. Valpy,[1] in which he said: "If it could have been proved that the defendant had held himself out to be a partner, not to the world, for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged, and gave credit to the defendant, upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff arising from his conduct as much as if he had stated to him directly and in express terms that he was a partner and the plaintiff had acted upon that statement."[2] It follows from this that a person cannot be

[1] See Ellis v. Schmœck, 5 Bing. 521; Ex parte Broome, 1 Rose, 69. It will be seen hereafter that persons induced to join companies, by the false and fraudulant statements of directors, cannot on that ground escape from liability to creditors.

[2] 10 B. & C. 140.

[3] See, too, Vice v. Anson, 7 B. & C. 409, where the defendant held herself out as a partner, but not to the plaintiff. Pettis v. Atkins, 60 Ill. 454. In order to come within the rule as to liability, credit must have been given to the firm on the faith of his connection with it, and liability for its obligations. Stearns v. Havens, 14 Vt. 540; Bowie v. Maddox, 29 Ga. 285; Sherrod v. Langdon, 21 Iowa, 518; Crozier v. Kirker, 4 Tex. 252; Benedict v. Davis, 2 McLean (U. S.) 347; Furber v. Carter, 11 Humph. (Tenn.) 271; Kellogg v. Griswold, 12 Vt. 291; Stanchfield v. Palmer, 4 Greene (Iowa), 23; Gill v. Kuhn, 6 S. & R. (Penn.) 333; Grieff v. Bondonsquie, 18 La. An. 631; Fisher v. Bowie, 20 Ill. 396. That would be an exceedingly harsh and unreasonable rule that would hold one liable who had no connection in fact with a firm, simply because at some time the members thereof, or the person himself, had represented himself to belong to it. No one, except those who knew of such holding out, *and who relied upon it* can claim to hold him. Hicks v. Cram, 17 Vt. 449; Bry v. Weston, 16 Me. 261; Gilbert v. Whidden, 20 id. 367; Irvin v. Conklin, 36 Barb. (N. Y.) 66; Markham v. Jones, 7 B. Monr. (Ky.) 457; Vibbard v. Roderick, 51 Barb. (N. Y.) 629; Freeman v. Bloomfield, 43 Mo. 391; Conklin v. Barton, 43 Barb. (N. Y.) 440; Edmundson v. Thompson, 6 H. & N. 1020. Where persons are sought to be made liable as partners, it is held, that if one holds himself out to be a partner of another, that does not make him in fact a partner, nor render him liable as such, except as to those who are thereby led to believe he is a partner, and who gave credit to the supposed firm upon such belief. But this liability from estoppel is confined to the acts and admissions between the parties, and to the fact that credit was given by the plaintiff in consequence of the holding out, admission or declaration made to him. Wood v. Pennell, 51 Me. 59.

liable on a contract, on the ground that he held himself out as a partner, unless he did so before the contract was entered into.[1] It also follows that no person can be fixed with liability on the ground that he has been held out as a partner, unless two things concur, viz.: first, the alleged act of holding out must have been done either by him or by his consent, and secondly, it must have been known to the person seeking to avail himself of it. In the absence of the first of these requisites, whatever may have been done cannot be imputed to the person sought to be made liable, and in the absence of the second, the person seeking to make him liable has not in any way been misled. As illustrative of these propositions, reference may be made to Fox v. Clifton, Pott v. Eyton, and Newsome v. Coles.

Rule in Fox v. Clifton.

SEC. 21. In Fox v. Clifton,[2] certain persons resolved to form a company with a capital of £600,000 in 12,000 shares at £50 each. The defendants applied for shares, which were allotted to them, and their names were entered in a book made up by the secretary of the company and kept at its counting-house. The plaintiff, before he did the work for which he sued the defendants, applied to the secretary to know of what persons the company consisted, and the plaintiff was shown the book in which the defendants' names were; but it did not appear whether the plaintiff saw their names or not. The plaintiff sought to make the defendants liable on the ground (amongst others) that they had held themselves out as partners. The judgment upon this point is extracted at length, owing to its practical importance. "Now, the evidence upon which the plaintiff contends that the defendants permitted themselves to be represented to the plaintiff as partners in the concern is, that the secretary to the company had prepared a book containing a list of the names of all those persons to whom shares had been allotted in the concern, in which list the names of the seven defendants had been included; that this list had been left with the bankers of the company to enable them to receive the deposits from the contributors, upon which list the payments had been made and receipts given at the banking-house; and that a copy of it was lying upon the table of the counting-house belonging to the company, where it was seen by the plaintiff when he called upon the subject of the contract; and that, on one occasion, when the plaintiff was expressing a doubt about trusting such a numerous company, the sec-

[1] Baird v. Planque, 1 Fos. & Finn. 344. [2] 6 Bing. 776.

retary opened the book, and the plaintiff looked over some of the names. The book itself, when referred to, contained lists on the different pages of the names of the several persons to whom shares had been allotted, arranged alphabetically, one leaf being assigned to each letter of the alphabet, and the whole number of names consisted of upwards of 200; so that the merely opening the book in the counting-house and seeing some of the names could not, in the ordinary course of things, give any intimation to the plaintiff that the names of the seven defendants were included in the lists; indeed, it is not argued on the ground that the plaintiff saw the names of the defendants in this list, but that the bare circumstance that their names were included in such list used for the purposes above specified, by their own permission, was a sufficient holding themselves out to the world as partners in the company. But, in the first place, there was no evidence that the defendants knew of the existence of any copy of the list at the counting-house; still less, any evidence that such list was made up or shown to any one with their permission or knowledge. The holding oneself out to the world as a partner, as contradistinguished from the actual relation of partnership, imparts at least the voluntary act of the party so holding himself out. It implies the lending of his name to the partnership; and is altogether incompatible with the want of knowledge that his name has been so used. Thus, in the ordinary instances of its occurrence, where a person allows his name to remain in a firm, either exposed to the public over a shop-door, or to be used in printed invoices or bills of parcels, or to be published in advertisements, the knowledge of the party that his name is used, and his assent thereto, is the very ground upon which he is estopped from disputing his liability as a partner. That there must have been some list of the subscribers to so numerous a company, the defendants may indeed be taken to have known; it would have been impossible to make calls for deposits, to give notices, or to do any of the acts necessary for carrying on the concern, without a written list of the names of subscribers. So far, therefore, the authority of the defendants to the existence of a list may be assumed. But that implies no authority whatever that a copy should be made out to lie in the counting-room for the purpose of being shown to strangers who might demand to look at it. And still less could the list left with the bankers be considered as making any communication to the world with the assent of the defendants. That list was a matter in strict confidence and privity between the banker who received the money, and the party who called with the letter in his hand and paid

the deposit. It held out no information to the public, because not communicated to any third person whatsoever. Even upon the face of the book itself, it conveyed no information of the relation in which the parties stood to each other; as it contained nothing but a long list of names, without any notice or heading whatever, leaving it altogether uncertain whether the persons named are partners in any concern actually established, or merely subscribers to a projected partnership; and as to the receipt given by the bankers for the deposit, and called the scrip receipt, it could give no information to any one, for it was a receipt given to the directors *eo nomine*, and not to the individual paying the money. But without reference to the information which the plaintiff actually received from the book, we think the communication of this book was no act done by the defendants themselves, or by their authority or permission, so as to make them nominal and ostensible partners, in contradistinction to real partners or sharers in the profits of the concern, so that the verdict, if it rested on this part of the evidence, cannot be supported."

Rule in Pott v. Eyton.

SEC. 22. In Pott v. Eyton,[1] Jones managed a shop for Eyton paying him a percentage on the amount of all sales. Eyton's name was over the door,[2] and licenses to sell tea, etc., were taken out in his name. Jones had other shops in the neighborhood with which Eyton had no concern, and had an account in his own name at the plaintiff's bank. The account was overdrawn, and it was sought to recover from Eyton the balance due to the bank on the ground, amongst others, that he had held himself out as a partner with Jones. There was, however, nothing to show that the bankers knew that Eyton's name was over the door of one of Jones' shops, or that licenses were taken out in Eyton's name, or that the bankers ever supposed him to be a partner with Jones, or that they had ever in fact given any credit to Eyton. The jury found that Eyton had not consented to have his name held out as a partner or to have his credit pledged to the bank, and the defendant had a verdict, which the court refused to disturb, inasmuch as it appeared from the evidence that the bankers had looked only to Jones.

Rule in Newsome v. Coles.

SEC. 23. In Newsome v. Coles, a firm of four partners carried on busi-

[1] 3 C. B. 32, E. C. L. R. 54, and *ante*, p. 39.

[2] Relied on in Williams v. Keats, 2 Stark. 290.

[3] 2 Camp. 617.

ness under the name of Thomas Coles and Sons. Thomas Coles died, but the three sons carried on business in the old name for a few years; they then dissolved partnership, two of them establishing a new business and the other continuing the old business alone, but in the old name. The dissolution was advertised in the Gazette. The plaintiff, who did not know of the dissolution, but had had no dealings with the firm before its dissolution, sought to make all three brothers liable on a bill accepted after the dissolution by the one brother, who continued to trade under the old name, and had accepted the bill in that name. The other two brothers, however, had never held themselves out to the plaintiff that they were partners in any firm of the name of Thomas Coles & Sons; they had done nothing to authorize the use of that name after the dissolution; at the same time they knew that the old name was still used, and they had taken no steps to prevent such use. This, however, it was held they were not bound to do, and the plaintiff failed. The case would have been decided differently if the plaintiff had been a customer of the firm before its dissolution, for in that case he would have been justified in supposing that there had been no change in the firm.[1]

Estate of deceased partner not liable when business is continued by surviving partners under old name.

SEC. 24. However, if a partner dies, and the surviving partners continue the old business in the old name, this will not have the effect of rendering the estate of the deceased liable, even to old customers or correspondents of the firm, for acts done by the survivors after the death of their late copartner. The doctrine of holding out has never been applied to such a case, and the executor of the deceased incurs no liability by the continued use of the old name.[2] If, indeed, the executor is the surviving partner using the old name, that makes no difference, for as executor he can bind his testator's estate.[3]

When person holds himself out as partner.

SEC. 25. A person who holds himself out as willing to become a partner does not incur liability by so doing. Although a person who represents himself to be a partner, is properly held liable as a partner to persons who have acted on the faith of his being so, it would be in the highest degree unjust to confound a representation by a person that he

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[1] See the note to the case of Newsome v. Coles, 2 Camp. 620.

[2] See Webster v. Webster, 3 Swanst. 490; Devaynes v. Noble (Houlton's case), 1 Mer. 616; Vulliamy v. Noble, 3 Mer. 614.

[3] See Vulliamy v. Noble, 3 Mer. 614.

intended to become a partner, with a representation that he was one in point of fact, and to hold him as much liable to third parties for the one representation as for the other. This distinction was recognized and acted on in Bourne v. Freeth,[1] where the defendant, who had signed a prospectus containing the terms on which it was proposed to form a company, was held not to have held himself out as a shareholder therein.

Whether the defendant has or not held himself out to the plaintiff is in every case a question of fact to be determined by a jury, and the consequence is, that there is great apparent conflict in the cases on this head. In Wood v. The Duke of Argyll,[2] and in Lake v. The Duke of Argyll,[3] the very same acts were relied on as a holding out, viz.: being advertised as president of a society, acting as president at a meeting, and signing some resolutions then agreed upon; in the first case, this was held not sufficient and the defendant had a verdict; whilst in the last, it was held to be sufficient and the plaintiff had a verdict. The jury was asked whether the defendant had held himself out as intending to pay for the work charged, and the question was answered in the affirmative in the one case, and in the negative in the other, and the court in each case refused to disturb the verdict.

Person liable on principles of agency.

SEC. 26. It cannot be too carefully borne in mind in all cases of this description that a person who is neither a partner nor a *quasi*-partner, is liable on the general principles of agency, for acts done by others with his authority express or implied. If, therefore, members of provisional committees, managers of clubs, or any other persons not in partnership, pass resolutions that work shall be done or goods supplied, they authorize whatever may be done in pursuance of such resolutions, and they are the persons naturally looked to, and *prima facie* liable to pay for what may be so done.[4] The question in these cases is simply one of agency, and the question of partnership or no partnership is immaterial, save that if a partnership can be established, the liability of one member for the acts of the others in the prosecution of their common object, follows almost as a matter of course.

Sub-partnerships.

SEC. 27. A sub-partnership is, as it were, a partnership within a part-

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[1] 9 B. & C. 632. See, too, Reynell v. Lewis, 15 M. & W. 517, and Wyld v. Hopkins, ib.

[2] 6 Man. & Gr. 928.

[3] Doubleday v. Muskett, 7 Bing. 110; Braithewaite v. Skafield, 9 B. & C. 401; Burls v. Smith, 7 Bing. 705.

[4] 6 Q. B. 477.

nership; it presupposes the existence of a partnership to which it is itself subordinate. An agreement to share profits only constitutes a partnership between the parties to such agreement. If, therefore, several persons are partners and one of them agrees to share the profits derived by him with a stranger, this agreement does not make the stranger a partner in the original firm. The result of such an agreement is to constitute what is called a *sub-partnership*, that is to say, it makes the parties to it partners *inter se;* but in no way affects the other members of the principal firm, nor is there any authority for saying that because the stranger shares the profits of that firm he can be made liable to persons dealing with it as if he were a partner therein. In the language of the Civilians, *Socius mei Socii, Socius meus non est.*[1] In ex parte Barrow, Lord Eldon puts the law on this subject very clearly: "I take it," he says, "to have been long since established, that a man may become a partner with A where A and B are partners and yet not be a member of that partnership which existed between A and B. In the case of Sir Charles Raymond, a banker in the city, a Mr. Fletcher agreed with Sir Charles Raymond that he should be interested so far as to receive a share of his profits of the business, and which share he had a right to draw out from the firm of Raymond & Co. But it was held that he was no partner in that partnership; had no demand against it; had no account in it; and that he must be satisfied with a share of the profits arising and given to Sir Charles Raymond."[2]

If a partner sells and assigns his share and interest to a purchaser, no partnership subsists between the vendor and purchaser, for there is no community of profit or loss between them. On the other hand, no partnership is created between the purchaser and the vendor's copartners, for between them and the purchaser there is no contract or privity whatever. If, indeed, the other partners recognize the assignment and adopt it, and treat the purchaser as their partner, and he acts as if he were a partner with them, a partnership between them and him will undoubtedly be created; but still the only effect of the assignment in the absence of any such recognition and adoption is to render the vendor a trustee for the purchaser, and to put an end to the partnership as between the vendor and his former partners from the time they received notice of the assignment.[4]

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[1] See Pothier, Partn. § 91.

[2] See, too, Bray v. Fromont, 6 Madd. 5; Killock v. Greg, 4 Russ 285; Fairholme v. Majoribanks, 3 Ross, L. C. on Com. Law, 697; Ex parte Dodgson, Mont. & M'Ar. 445.

[3] Jefferys v. Smith, 3 Russ. 158; Heath v. Sansom, 4 B. & Ad. 175.

[4] Dig. xvii. tit. 2 (*pro socio*) 15. pr.

General and particular partnerships.

SEC. 28. It is customary for writers on partnership law to divide partnerships into universal, general, and particular (or special or limited), according to the extent of the contract entered into by the members. The classification is traceable to a passage in the Digest—"*Societates contrahuntur sive universorum bonorum, sive negotiationis alicujus, sive vectigalis, sive etiam rei unius*[1]—and is not worth enlarging upon, except for the purpose of distinguishing cases in which persons are partners in some trade or business generally, from those in which they are partners in some particular transaction or adventure only. If persons who are not partners at all agree to share the profits and loss, or the profits of one particular transaction or adventure, they become partners as to that transaction or adventure, but not as to any thing else.[2] For example, if two solicitors, who are not partners, are jointly retained to conduct litigation in some particular case, and they agree to share the profits accruing therefrom, they become partners so far as the business connected with that particular case is concerned, but no further.[3] So a partnership may be limited to the working of some particular patent;[4] or to the working of it in some particular place or district.[5] In all such cases as these, the rights and liabilities of the partners are much less extensive than the rights and liabilities of those who have entered into less limited contracts; and it must never be forgotten that the extent to which persons can be considered as partners, depends entirely on the agreement into which they have entered and upon their conduct.

Clubs and societies not having gain for their object.

SEC. 29. The leading propositions established may be thus shortly recapitulated.

1. An agreement to share profit *and* loss is, in fact, an agreement for a true partnership.

2. An agreement to share profit creates a *quasi*-partnership, or, as it is called, a partnership as against third persons, and *prima facie*, but not necessarily, a true partnership.

3. An agreement to share gross returns does not create either a true or a *quasi*-partnership.

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[1] 2 Rose, 252.

[2] See De Berkom v. Smith, 1 Esp. 29; Heyhoe v. Burge, 9 C. B. 431; Smith v. Watson, 2 B. & C. 401.

[3] Robinson v. Anderson, 20 Beav. 98, & 7 De G. Mac. & G. 239; M'Gregor v. Bainbridge, 7 Ha. 164.

[4] As in Lovell v. Hicks, 2 Y. & C. Ex. 481.

[5] As in Ridgway v. Philip, C. R. M. & R. 415.

4. Persons who do not share either profit or loss, but who hold themselves out as partners, are liable as if they were partners.

5. No partnership or *quasi*-partnership subsists between persons who do not share either profit or loss, and who do not hold themselves out as partners.[1]

It follows from this that societies and clubs, the object of which is not to share profits, are not partnerships in any sense. It was held in Caldicott v. Griffiths,[2] that the members of "The Midland Counties Guardian Society for the Protection of Trade" were not partners *inter se;* and in Flemyng v. Hector[3] it was held that the members of the "Westminster Reform Club" were not partners as against third persons.[4] It is a mere abuse of words to call such associations partnerships;[5] and if liabilities are to be fastened on any of their members it must be by reason of the acts of those members themselves, or by reason of the acts of their agents; and the agency must be made out by him who relies on it, for none is implied by the mere act of association.[6]

Upon the ground that there is neither community of profit nor community of loss, it has been held that no partnership subsists between the members of an insurance society, in which each, in consideration of a payment made to him, underwrites a policy for a stipulated sum. A policy so underwritten is neither more nor less than a number of separate contracts, whereby each underwriter agrees, on a given event, to pay the whole or a proportionate part of the sum written against his name. In such a society there is no joint stock; the members of it enter into no joint contract; but each is alone liable for any loss which may happen to the insured, according to the terms of the contract into which each for himself has entered."[7]

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[1] In addition to the cases elsewhere referred to on this head, see Price v. Groom, 2 Ex. 542.

[2] 8 Ex. 898. See, too, R. v. Whitmarsh, 15 Q. B. 600.

[3] 2 M. & W. 172.

[4] See, too, Todd v. Emly, 8 M. & W. 505; The St. James' Club, 2 De G. Mac. & G. 383.

[5] In Lloyd v. Loaring, 6 Ves. 773, the Caledonian Lodge of Freemasons, and in Silver v. Barnes, 6 Bing. N. C. 180, and Beaumont v. Meredith, 3 V. & B. 180, friendly societies were called partnerships; and a benefit building society, 4 Drew, 154, and a loan society, 1 Sim. N. S. 165, have been held to be within the winding up acts.

[6] See Flemyng v. Hector, 2 M. & W. 172, and Cockerell v. Aucompte, 2 C. B. N. S. 440. In Burls v. Smith, 7 Bing. 705, the agency was made out, and a member of the managing committee of a club was held liable for goods supplied to it; and in Delauney v. Strickland, 2 Stark. 416, E. C. L. R. 3, a member, not on the managing committee, was held liable for plate supplied to the club, he having impliedly authorized its purchase.

[7] See Strong v. Harvey, 3 Bing. 304. See Lindley on Partnership, 47.

Parties who retain specific shares of property not partners.

SEC. 30. It sometimes happens that persons purchase goods which they ship to a foreign country, under an agreement that the proceeds of the sale of the goods shall be invested in a return cargo. Cases of this sort give rise to nice questions whether a partnership exists in the entire transaction, that is to say, in the joint purchase, joint sale, and joint re-investment, or only in parts of the transaction. But it is clear, upon the principles already laid down, that no partnership can exist, either in the entire transaction or in that part of it which relates to the disposal of the return cargo, unless there be an agreement to share in the future sale of the return cargo. In a New York case,[1] A & B, partners in trade, owning three-fourths of a vessel, and C & D, also partners and owning the other fourth, agreed to fit her out for a voyage from New York to Laguira. A & B purchased three-fourths of the cargo, and C & D purchased the other fourth, and it was agreed that the whole cargo should be sold at Laguira, for the joint account of A & B and C & D, and that the proceeds should be invested in a return cargo. A went out as super-cargo and agent, and having sold the cargo at Laguira, he invested the proceeds in a return cargo, with which he sailed for New York. He was obliged, however, by stress of weather to put into Norfolk, where he sold the return cargo, except a small quantity of coffee, and received payment in bills of exchange, which he indorsed, and remitted, with the coffee, to P & Q, who were creditors of his own firm of A & B, and who had notice of C & D's interest in the cargo. C & D having demanded of P & Q their proportion of the proceeds of the sale, it was held by the Supreme Court of the United States that they were entitled to receive it, for that there was no such partnership existing between the two firms of A & B and C & D as to render the disposition of the return cargo by A, binding as the act of a partner on C & D. Thompson, J., said, "A partnership, being matter of contract between parties, they may limit and modify it at pleasure. There is, therefore, no incongruity in admitting a partnership in the outward cargo[2] and not in the return cargo, if such was the agreement of the parties, or the necessary inference of law from the facts proved. It is true, that the proceeds of the outward cargo were to be invested in a return cargo. *But there was no agreement to share the profit and loss on the return*

[1] Post v. Kimberly, 9 Johns. (N. Y.) 470; and see Holmes v. United Ins. Co., 2 id. 239; United Ins. Co. v. Scott, 1 id. 106.

[2] It was held that there was no partnership in the outward cargo.

cargo, nor any provision for a joint sale on its arrival in New York. It is necessarily, therefore, to be inferred, that each party was to take his share of the coffee, and dispose of it at his pleasure, without any community of interest as to profit and loss. Here, therefore, was the want of one of the most essential requisites of a partnership." And Kent, Chancellor, said, there was no partnership in these proceeds, *because there was no agreement to be jointly concerned in the final result of the adventure.*[1]

Mutual interest in the profits must exist.

SEC. 31. In order to constitute a communion of profit between the parties, the interest in the profit *must be mutual;* that is, each person must have a specific interest in the profits as a principal trader; he is not a partner if he merely receives out of the profits a compensation for his trouble in the character of an *agent* or servant of the concern. Thus, where A purchased goods for an adventure on the credit of B, and it was agreed, "that, if any profit should arise from them, B should have one-half *for his trouble,* it was held, that this was not a partnership between the parties."[2]

Factors and brokers renewing commission.

SEC. 32. Upon the same principle, factors and brokers receiving a commission out of the profits of the goods sold by them, are not part-

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[1] This, and other American cases, fully recognize the doctrine established by Hoare v. Dawes and Coope v. Eyre; but see *contra,* Everitt v. Chapman, 6 Conn. 347; Musier v. Trumpbour, 5 Wend. (N. Y.) 274.

[2] Hesketh v. Blanchard, 4 East, 144.

In all cases there must be a participation as a principal. If the person sought to be charged, merely occupies the relation of an agent, no partnership can be predicated upon the fact that he receives a share of the profits for his services or other benefit conferred. This proposition is illustrated by numerous cases: In Berthold v. Goldsmith, 24 How. (U. S.) 542, the defendant sent one Hook to St. Louis to make arrangements with some commission house there to accept consignments of cigars from Goldsmith, and sell and dispose of them on his account. If successful, Hook should have half the profits, with a guaranty from Goldsmith that his, Hook's, compensation should amount to one thousand eight hundred dollars per year. Hook went to St. Louis and made an arrangement with Berthold, and communicated the terms and conditions of it to the plaintiff. By these terms Berthold was to sell for a commission of two and a half per cent., and to guarantee sales for a like commission. Goldsmith afterwards wrote to Berthold referring to the arrangement which had been made; he informed him he had consigned to him an invoice of cigars, and requested him, when the cigars were sold, to render to him the account of sales, and stated, "as to all shipped to your house by me, I will hold you responsible." Afterwards, and before the cigars were sold, Berthold & Co. dissolved, and turned over the cigars to another firm, pursuant to an order drawn on them by Hooks, the person who negotiated the arrangement. The question was raised whether Hooks, by reason of his being entitled to half the profits, was a partner, and whether, as such, he had the right to control the cigars. The court held, there was no such relation between Goldsmith and Hooks as to constitute a copartnership. In Burckle v. Eckhart, 1 Den. (N. Y.) 341, the firm of Gibb & Co. employed

ners with their principals. In Dixon v. Cooper,[1] which was an action for goods sold and delivered, the only witness for the plaintiff was the factor who sold the goods, and who was to receive a shilling in the pound on the price. It was held that he was a competent witness, a circumstance inconsistent with the existence of a partnership between the parties.

Selling goods for what can be got over a certain price.

SEC. 33. Again, in the case of Benjamin v. Porteus,[2] it was held, collaterally, in a question of evidence, that, if a person is employed to sell goods, and is to have for himself whatever money he can procure for them beyond a certain sum, he is not a partner with the owner of the goods. In that case, an action was brought to recover the price of a quantity of indigo, which was sold for 3s. a pound weight, and the broker, who was employed by the plaintiff, was called as a witness to prove the contract. Upon being examined on the *voir dire*, he stated, that, by his agreement with the plaintiff, he was to have for his own profit whatever sum he could get for the indigo above half a crown for the pound, which price the plaintiff had fixed for himself; but not an allowance of so much *per cent.* on the sale, by way of commission, in the usual way. At the trial, Eyre, C. J., thought this was an objection to the competency of the witness, on the score of interest, and directed a nonsuit. The Court of Common Pleas, however, set aside the nonsuit, and granted a new trial. Heath, J., said he was of opinion that the witness was admissible; that he must be considered as a broker, and not as a principal: he was only paid for his trouble in a particular manner. Rooke, J., likewise said, that he could see no difference, in point of interest, between a person selling upon a commission and one who is to have a share of the profit; nor could he make a distinction between this witness and a common broker. "He is an agent," added his Lordship, "who makes his

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Isaac R. Eckhart to assist them in the purchase of produce, under the direction and control of Gibb & Co. He exercised no kind of ownership over the produce. Eckhart was to receive one-fourth of the profits arising out of the Western produce business. Held, Eckhart was not a partner with Gibb & Co. The court say, "There was no community of interest in the capital stock. He was not clothed with the usual powers, rights, or duties, but was subject to the orders of his employers. He had nothing to do with losses, except as they affected the profits out of which he was to be paid, and he was only to take a share of the profits in lieu of wages, as a mode of getting compensation for his services. An agent who has no interest in the capital stock, will not be a partner even as to third persons, merely because he is to be compensated for his services by receiving a share of the profits which may arise in the business in which he is employed."

[1] 3 Wils. 40.

[2] 2 H. Bl. 590.

bargain between two others, and whose evidence is admissible from necessity, which is a necessity created by the parties themselves."

Peddlers supplied with goods to sell for share of profits—distinction between sharing losses and expenses.

SEC. 34. Where one receives a share of the profits as a mere remuneration for services, he is not a partner.[1] But, if in addition to the share of

[1] Bull v. Schuberth, 2 Md. 38; Hodgman v. Smith, 13 Barb. (N. Y.) 302; Miller v. Chandler, 29 La. An. 88; Chaffraix v. Price, 29 id. 176; Ambler v. Bradley, 6 Vt. 119; Good v. McCartney, 10 Tex. 198.

In Hanna v. Flint, one Little, as broker for the firm of Ellis & Hanna, purchased some wheat. He was authorized to sell it and the profits arising from the sale were to be equally divided. Ellis furnished the money to pay for the wheat. The court held that this did not constitute the broker a partner with Ellis & Hanna. The rule that a participation in the profits of a business creates the relation of partners between the participants has no application whatever to a case of service or special agency, where the employee has no power as a partner in the firm, and no interest in the profits, as property, but is simply employed as a servant or special agent, and is to receive a given sum out of the profits, or a proportion of the same, as a compensation for his services. Unless he is in some way interested in the profits of the business as principal, it is plain that he cannot bring suit as a partner, and go into equity and compel an account; nor cannot it be held that he has any such lien on the profits as a court of equity may enforce. Berthold v. Goldsmith, 24 How. (U. S.) 542; Macy v. Combs, 15 Ind. 472; Vanderburgh v. Hull, 20 Wend. (N.Y.) 61; Gibson v. Stevens, 7 N. H. 351; Hodges v. Dawes, 6 Ala. 215; Reynolds v. Hicks, 1 Ind. 115; Niehoff v. Dudley, 40 Ill. 407; Normant v. Hall, 1 Humph. (Tenn.) 324; Sylvester v. Smith, 9 Mass. 120; Denny v. Cabot, 6 Met. (Mass.) 83; Chapline v. Conant, 3 W. Va. 507; Heckert v. Fegley, 6 W. & S. (Penn.) 139; Allen v. Dunn 15 Me. 274; Williams v. Soutler, 7 Iowa, 445; Coffin v. Jenkins, 3 Story (U. S.) 113; Judson v. Adams, 8 Cush. (Mass.) 562; Pomeroy v. Sigerson, 22 Mo. 177; Bradley v. White, 10 Met. (Mass.) 304; Rice v. Austin, 17 Mass. 206; Loomis v. Marshall, 12 Conn. 70; Douly v. Hall, 5 Bush (Ky.) 550. In Gibson v. Stevens, 7 N. H. 352, a testator provided by his will, that A should have, hold, and carry on, in a business-like manner, free of rent, a certain house, store and other real estate, until the time when the eldest son of the testator should be of age. He then directed, that he should be trustee of the testator's two sons for the purposes following, to wit: That he should retain in his hands, for their use, all the goods, securities, money, and other stock in trade, belonging to said store, during said term; should trade upon the same in his own name as such trustee, and at the end of the time deliver over to said sons all the original stock then remaining, and one full half of the profits, and also interest upon a certain portion of such stock. A accepted the trust and carried on the business. On the arrival of the eldest son at the age of twenty-one, he executed to said A a power of attorney, authorizing him to continue the business of the store, etc., as he had done under the will, and it was thereupon continued, until the youngest son became twenty-one years of age. The court held that there was no partnership. In Denny v. Cabot, 6 Met. (Mass.) 82, by an agreement between A and B, A was to supply B with stock to be manufactured into cloth, at his mill, on A's account, and B was to manufacture the stock into cloth, and to deliver the cloth to A, for a certain sum per yard. A also engaged that, if B should fulfill his said agreement to manufacture and deliver the cloth, A would pay him one-third part of the net profits of the business. It was held that this agreement did not make A and B partners, either between themselves or as to third persons. In a Vermont case the plaintiff, and one P., purchased a mail contract from the original contractors, and executed to them a bond for the performance of the contract, and procured four of the five defendants to sign with them as sureties. The plaintiff afterward sold his interest in said contract to P., and took from him a like bond, signed by the remaining defendant, with one of the others, as sureties. Afterward, P., having failed to perform

profits, the person is to bear a certain proportion of the losses, he becomes a partner. Thus, in Emanuel v. Draughn, 14 Ala. 303, a contract was entered into between A, B and C by which A and B were to furnish C with goods to peddle, C to furnish a team and devote his whole time to the business, the expense of license, traveling expenses, etc., to be deducted and the profits to be divided between them in a certain ratio, and each to share the losses in the same ratio, and it was held that they were partners.[1] But there is a distinction between an agreement to share losses and one to share expenses. Thus, where one agrees to carry on a farm, furnishing his own labor and paying for such additional labor as is necessary, the owner of the farm and the person carrying it on, although they agree to divide the crops, are not partners.[2] So in McArthur v. Ladd, 5 Ohio, 514, an owner of certain land warrants entered into an agreement with a locator to locate the warrants, each to contribute a share of the expenses, and the lands to be divided between them in a certain ratio, and it was held not to constitute them partners.[3]

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the contract, the plaintiff and the five defendants signed a contract, which recited that the "undersigned" had taken charge of said property, and by which they constituted the plaintiff their "agent or superintendent" on said mail route, for which he was "to receive a reasonable compensation," and by which they bound themselves to indemnify all persons who might assist the plaintiff in the execution of said business, and also pay the bills which had accrued under the plaintiff and P. It was held that the plaintiff did not thereby become a partner with the defendants but might sustain an action against them on the contract. Stearns v. Haven, 16 Vt. 87. See also French v. Price, 24 Pick. (Mass.) 13; Blanchard v. Coolidge, 22 id. 151; Dunham v. Pryor, 1 Penn. St. 255; Wilkinson v. Jett, 7 Leigh (Va.), 115; Shropshire v. Shepperd, 3 Ala. 733; Oliver v. Gray, 4 Ark. 425. In an Illinois case (Fawcett v. Osborn, 32 Ill. 411) a party furnished hides to another to be tanned and returned to the consignor, who was to sell them and to pay one-half the profits to the tanner, after deducting all charges, including a stipulated price for tanning. It was held that no partnership was thereby created between the parties, which would enable the tanner, while the leather was in his possession, solely for the purposes of the contract, to sell it, and which would protect a purchaser from him as against the consignor.

[1] Dob v. Halsey, 16 Johns. (N. Y.) 34.

[2] Moore v. Smith, 19 Ala. 774; Perrine v. Hankinson, 11 N. J. L. 181.

[3] See Muzzey v. Whitney, 10 Johns. (N. Y.) 226.

In Boyer v. Anderson, 2 Leigh (Va.), 550, B, the owner of a ferry, leased it to F for two years, in consideration of $1000 paid him by F, in cash. It was agreed between the parties that, if the net profits of the ferry did not yield F $2,000 within the two years, F should hold over the term until the profits did yield that sum; and if the profits gave more than $2,000 within the two years, that the surplus should be equally divided between them. It was held that this agreement did not constitute a partnership in the ferry between B and F, and that B was not liable for losses, by negligence at the ferry, during the term of F's tenancy thereof.

In Turner v. Bissell, 14 Pick. (Mass.) 192, by a written contract between B and R, B agrees to furnish R for one year with wool, to be worked into satinets, and R is to deliver to B all the satinets which the wool will make, and is to find and pay for warps for the same. For working the wool, finding warps, etc., B is to pay R 40 per cent on the sales of the satinets. Each is to pay half the charges. B is to have the

Shipowners—Ships' crews—Shipmasters, etc.

SEC. 35. Where two, being joint owners of a vessel, agreed to send her on a foreign voyage for their mutual benefit; and part of the outward cargo was purchased by each, separately, and part by both, jointly; it was held, that they were still but tenants in common of the property, and not partners; and that, therefore, a creditor of both owners, for cordage for the vessel, was not entitled to priority in payment out of the vessel and cargo against the separate creditors of either.[1]

The master and crew of a ship engaged in a whaling voyage, who are to receive, in lieu of wages, a proportion of the net proceeds of the oil which shall be obtained, are not partners with the owners of the ship.[2] A shipmaster, having agreed to take the defendant's schooner for the purpose of getting employ in the freighting business, engaged to victual and man her, and pay half the port charges, pilotage, etc.; and the defendant engaged to pay the other half, together with eight dollars per month for one man's wages, and to put the schooner in sufficient order for the business; and all money so stocked in the schooner, whether for freight or passage, or whatever, was to be equally divided between the master and defendant, each party accounting for the above. It was held that the master was owner *pro hac vice;* and that the contract did not make him and the defendant partners.[3]

The owner of a vessel, which the master runs for a share of the net profits, should not join in an action for freight due on an agreement in which the master only was known to the shipper.[4] Part-owners of

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whole direction of the sales, and, should he make sales himself, he is to have one and a half per cent on 40 per cent of the sales. In an action against B and R for the price of the warps furnished by the plaintiff to R, it was held that B was not a partner of R, and, consequently, was not liable.

In Holmes v. Old Colony R. R. Co., 5 Gray (Mass.), 57, it was held that a railroad corporation, who lease to an individual a house owned by them, he paying them a certain sum annually and "half the net proceeds arising from keeping said house as a hotel," and keeping an account open to their inspection, and giving his own time and attention, and having free passage over their railroad for himself and all persons employed and all articles used by him in carrying on the house, do not thereby become partners, even as to third persons, in the business of keeping the house.

In Ward v. Thompson, 22 How. (U. S.) 330, one furnished a vessel and the other navigated it, both sharing the profits in a certain ratio, and the court held that they were partners. See also to same effect Duryea v. Whitcomb, 31 Vt. 395; Bromley v. Elliott, 38 N. H. 287; Fitch v. Harrington, 13 Gray (Mass.), 387; Jones v. Michael, 12 Rich. (S. C.) 176.

In Williams v. Soutter, 12 Iowa, 435, it was held that one who furnished money to another to be used in a certain business, *to be repaid in any event*, but with an option to take 30 per cent per annum interest, or one-third the profits, did not constitute them partners.

[1] Harding v. Foxcroft, 16 Me. 76.

[2] Baxter v. Rodman, 3 Pick. (Mass.) 435.

[3] Cutler v. Winsor, 6 Pick. (Mass.) 335.

[4] Boardman v. Keeler, 2 Vt. 67.

a ship or cargo are not partners.[1] Where a person advances money to the owners of a vessel and cargo, who promise to pay him a share of the proceeds of the voyage, in proportion to the sum advanced by him, he does not thereby become a partner.[2]

Must be a right in profits as result of the venture.

SEC. 36. There must be a right to share the profits as a result or gain of the capital and industry, in which the parties are mutually interested, and there must be an interest in the subject-matter of the business and a right of control. A mere contract of service, whereby one undertakes to labor for another for a certain price, and to receive as compensation therefor a certain portion of the profits of the business, does not make them partners *inter se*.[3] In Morgan v. Stearns, 41 Vt. 397, the court held that sharing the profits and losses of a business is not the decisive test in investing and imposing upon parties, as between themselves, the rights and liabilities of copartners. "It may," says the court, "be merely an agreement with a view to compensation for services rendered by one in the employment of another, the amount of the compensation to depend on the success of the business in which they are engaged or interested."[4]

Purchasing goods for share of profits.

SEC. 37. In Hodges v. Daws, 6 Ala. 215, it was held that a person who purchases goods in the name of another is not thereby rendered liable as a partner, because he was to receive a certain share of the net profits of all the purchases made by him, if it appears that he in fact only acted as agent, and his share in the profits was only as a measure of compensation. This, however, would depend upon the circumstance, whether he held himself out as a partner, as in that case, although not a partner *inter se* he would yet be liable as such to third persons. In other words, the great and controlling test is, whether, in addition to sharing the profits and losses, the parties *intended* to become copartners.[5]

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[1] Holmes v. United Ins. Co., 2 Johns. Cas. (N. Y.) 329.

[2] Gallop v. Newman, 7 Pick. (Mass.) 282.

[3] Burkle v. Eckhart, 3 N. Y. 132; Vandenburgh v. Hull, 20 Wend. (N. Y.) 70; Chapline v. Conant, 3 W. Va. 507; Berthold v. Goldsmith, 24 How. (U. S.) 536 · Felichy v. Hamilton, 1 Wash. (U. S.) 491; Smith v. Perry, 29 N. J. L. 24; Price v. Alexander, 2 Greene (Iowa), 427.

[4] Reed v. Murphy, 2 Greene (Iowa), 574; Burton v. Goodspeed, 67 Ill. 237; Hanna v. Flint, 14 Cal. 73; Shepherd v. Pratt, 16 Kan. 209; Mason v. Hackett, 4 Nev. 420; Atherton v. Tilton, 44 N. H. 452; Com. v. Bennett, 118 Mass. 443; Shropshire v. Shepperd, 3 Ala. 733; Strong v. Place, 4 Rob. (N.Y.) 385; Merwin v. Playford, 3 Robt. (N. Y.) 702.

[5] Lee v. Ballard, 3 La. An. 462.

[6] Niehoff v. Dudley, 40 Ill. 406; Polk v. Buchanan, 5 Sneed (Tenn.), 721; Hazard v. Hazard, 1 Story (U. S.), 371; Bull v. Schuberth, 2 Md. 38.

Carrying on lands for share of crops—Advancing money to manufacturer for certain interest in goods.

SEC. 38. In an Arkansas case, a firm contracted with laborers to carry on certain lands, and raise and harvest the crops, agreeing to give them one-third the proceeds of the crops. It was held that this did not create a partnership between the firm and the laborers. "The share of the laborers," says the court, "is in the nature of wages, unliquidated at the time, but capable of being reduced to a certainty on the sale of the crop." In other words, the contract was one for services, rather than partnership, and the portion of the crops stipulated to be given to the laborers, was the measure of their compensation therefor.[1] So, when a sawyer and a lumber merchant entered into an arrangement, by which the latter was to advance $10,000 to be used by the former in sawing lumber, all of which was to be delivered to the merchant at $1 per thousand feet less than the market rates at the time of its arrival in Chicago, it was held that no partnership existed.[2] So, where a banker entered into an arrangement with some manufacturers, by which he agreed to furnish them with money with which to carry on their business, they to manufacture as many articles as they might think safe and profitable, they, *in any event*, to return his advances, and if the adventure proved profitable, one-third of the profits, *in lieu of interest*, but there was no understanding that he should bear otherwise any portion of the losses of the business, and no time for the termination of the venture was fixed; it was held that the parties were not partners.[3]

Instances where sharing in profits was held only to create partnership.

SEC. 39. In a Massachusetts case,[4] A furnished money to B to be employed in trade, either by B alone, or in partnership with some third person, the profits to be equally divided between A and B. Subsequently B entered into partnership with C. It was held that this did not constitute a partnership *inter se* between A and B, although as to third persons, who had no notice of their true relation, they might be so. In a New York case,[5] two persons entered into a contract with a turnpike company to build a certain turnpike for them. Afterward they entered into an arrangement with a third person to let him have a share of the profits, in making the second ten miles, in proportion to the amount of help he furnished, the

[1] Christian v. Crocker, 25 Ark. 327.
[2] Freese v. Jedson, 49 Ill. 191.
[3] Lintner v. Milliken 47 Ill. 178; Emmons v. Westfield Bank, 97 Mass. 230.
[4] Bailey v. Clark, 6 Pick. (Mass.) 372.
[5] Muzzey v. Whitney, 10 Johns. (N. Y.) 226.

amount to be taken equally from the share of the two former, and it was held that the third person was not a partner, but that his share of the profits was merely the measure of his compensation. In a Massachusetts case,[1] A furnished B money to purchase certain articles, and consign them to A, who was to sell them, and out of the proceeds re-imburse himself for the sums so advanced, and the balance of profits therefrom to be divided between them in a certain proportion, was held not to constitute them partners. In an Iowa case,[2] G advanced to O $2,000, to be used in the purchase of wood for their mutual profit. O executed to G a receipt as follows: "Received of G $2,000, to invest in wool, said G to receive two-thirds of the profits on the sale of the wool, and O one-third," and it was held that they were not partners. In a Vermont case,[3] the defendant took a job of finishing a church at a certain price. Subsequently he agreed with the plaintiff to work with him; the work of each to offset that of the other, and the expense of other labor, and of the material used, to be deducted from the contract price, and the balance to be divided equally between them. The work was executed under this arrangement, the plaintiff performing thirty days' work more than the defendant. It was held that they were not partners, and that the plaintiff was entitled to recover for the excess of labor performed by him. But in a case decided by the same court, at about the same time, a doctrine apparently inconsistent with this was held. Thus, when A, a tinner, and owning a shop, entered into an arrangement with B, a plumber, to work together, A to be allowed ten per cent of the profits, on his stock invested, and the balance to be equally divided between them, it was held that they were partners, although the business was done in A's name, and B's share of the profits remained in the business. There is no real conflict between the cases, however, as, although B had no property in the capital employed, yet, by virtue of the arrangement between them, he had a right to use the same, and was powerless, under the contract, to prevent it, and the interest of each in the profits was an interest in them *as profits*, and not as a measure of compensation. Their interests were joint in the entire business, and their evident intention was to become partners.[4]

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[1] Rice v. Austin, 17 Mass. 197.

[2] Ruddick v. Otis, 33 Iowa, 402.

[3] Hawkins v. McIntyre, 45 Vt. 496.

[4] See, similar in principle, and holding the same doctrine, Gilbank v. Stephenson, 31 Wis. 592, where two persons agreed each to furnish a horse to do certain work, the other to do the work, and the other to pay all expenses, and it was held that they were partners.

Furnishing materials for another to manufacture.

SEC. 40. The mere fact that one furnishes material and the other labor for manufacturing it into articles of commerce, under an agreement to divide the profits resulting therefrom, does not constitute them partners, and it has been held that under such an arrangement the articles manufactured, although upon the premises of the person manufacturing them, are not liable to attachment upon his debts.[1] But in all cases where contracts of this character are in question, the contract itself will control the legal relation of the parties. Their intention must be gathered from the written agreement, if one exists, and if not, from the contract proved. It is for the court to say whether, as a matter of law, the contract made the parties partners, but whether in point of fact a partnership existed in a given case, is, if there is any evidence outside the contract, a question of fact for the jury,[2] and in arriving at a result, all the declarations by word or act, of the supposed partners, the rights they have exercised, the manner in which they have dealt with the property and third persons, and every circumstance attending the transaction, are proper to be considered.[3] In a late English case[4] B agreed with a builder, that C should find the stock, plans and materials for building houses, and he would find the funds, and grounds on which to erect them. The houses were to be sold, and B was to be credited with advances and debited with receipts, and the profits and losses were to be equally divided. It was held that they were partners, and that C was liable for materials purchased by B to go into the houses.

Land conveyed to two or more, one only working it, and all sharing profits.

SEC. 41. When real estate is conveyed to two or more persons upon condition that they shall do certain things, and by agreement between them one of the grantees undertakes to perform the conditions and to manage the property under an agreement, express or implied, to share the profits they are not partners in the land, but only to the extent of the profits and loss. As to the land, they are tenants in common.[5]

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[1] Judson v. Adams, 8 Cush. (Mass.) 556; Smith v. Moynihan, 44 Cal. 53. In Jordan v. Wilkins, 3 Wash. (U. S. C. C.) 110, an agreement was made by several persons by which each stipulated that he would, upon his own account, and with his own funds, conduct a store; that each was to bear his own *loss*, but that whatever *profit* was made by either should be equally divided among all, and it was held that this did not constitute a partnership, as between themselves, or as to third persons *knowing* the facts.

[2] Daggett v. Jordan, 2 Fla. 541; Drake v. Elwyn, 3 Cai. (N. Y.) 184; Beecham v. Dadd, 3 Harr. (Del.) 485.

[3] Pierson v. Steinmeyer, 4 Rich. (S. C.) 309.

[4] Noakes v. Barlow, 20 W. R. 386.

[5] Howe v. Howe, 99 Mass. 71.

So where a person enters into an arrangement with a patentee by which he agrees, in consideration of a license to make and vend the patented article, to give the patentee one-third, or any other proportion of the profits of the business, they are not partners. The moiety of profits given to the patentee is by way of compensation, and does not create an interest, in him, in the profits, *as such*.[1] It has been held that an agreement that one shall provide a shop, loom and tackle, and another do the weaving, and each receive one-half the profits, is a partnership, and not a contract of hiring;[2] but it was held by the same court, that an agreement between three persons that each shall do a certain thing, and that they shall share equally in the profits of their separate action, is not a partnership;[3] but such an arrangement, although not creating the relation of partners *inter se*, nevertheless raises a sort of *quasi*-partnership that renders the parties liable as partners to third persons.[4]

Renting premises for share of profits.

SEC. 42. When one furnishes a building and manages the business, and another furnishes the goods, under an agreement to divide the profits, they are partners as to third persons, even though it is agreed between them that the person managing the business shall have the moiety of profits in lieu of a salary.[5] So where one leases to another a manufactory for five years, under an agreement on the part of the lessee to furnish the capital and operate the business, and divide the profits between them, a partnership *inter se* exists.[6]

Joint venture and agreement to share profits and losses.

SEC. 43. Where there is a joint adventure, and an agreement or un-

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[1] Wheeler v. Farmer, 38 Cal. 203. In Pratt v. Langdon, 12 Allen (Mass.), 544, the defendant bought a stock of goods, with furniture and fixtures, hired a building and agreed with one A to carry on the business in his (A's) own name, pay all the bills and a certain portion of the purchase-money, keep the stock good by new purchases, and if any thing was left after such disbursements, the residue of the proceeds to be equally divided between them; the defendant to have the right to take possession at any time. It was held that the defendant and A were not partners, and that he was not liable for the debts created by A while carrying on the business. Boecklin v. Hardenburgh, 37 N. Y. Supr. Ct. 110.

[2] Gregg v. Half Moon, 2 Watts (Penn.) 342.

[3] Heckert v. Fegley, 6 W. & S. (Penn.) 139.

[4] Sims v. Willing, 8 S. & R. (Penn.) 103; Hopkins' Appeal, 3 Brewst. (Penn.) 164; Purviance v. McClintee, 6 S. & R. (Penn.) 259.

[5] Brigham v. Clark, 100 Mass. 430; Dalton City Co. v. Hawes, 37 Ga. 115.

[6] Wood v. Beath, 23 Wis. 254. In Dalton City Co. v. Dalton Mfg. Co., 33 Ga. 243, it was held that an agreement between two parties by which the real estate of one was to be used by the other in the prosecution of a business, for which a certain percentage of the profits was to be given to the owner, created a partnership, even though such interest in the profits, by the agreement, is described as rent.

derstanding, express or implied, that they shall be partners, as where one furnishes the capital and another his labor and skill, and mutually share the profits and losses, a partnership *inter se* and as to third persons is created, and the portion of profits received by the latter, is not treated as merely a measure of compensation.[1] When persons combine their capital, or when capital and labor are combined, or both, in a common undertaking, under an agreement to share the profits and loss of the business, the partnership is thereby created.[2]

Loaning money for share of profits.

SEC. 44. In a case recently decided by the United States Supreme Court, an agreement was entered into by one party, to obtain in his own name, but for the joint account of himself and the parties of the second part, a lease of a certain railroad, and manage the same at a designated salary, for their mutual benefit; and that the parties of the second part should furnish the money necessary to carry out the enterprise, to be reimbursed, with interest, out of its annual profits. The annual profits, after the reimbursement of such capital, to be equally divided between all the parties, and the losses, if any, to be equally borne by them. It was held that the parties were partners.[3]

In a New Jersey case,[4] it was held that the loaning of money at a legal rate of interest to be used in a business, with a further condition that if the borrower was successful he should pay the lender one-fourth the profits, constituted them partners, although the business was carried on in the name of the borrower, and there was no intention on their part to become partners.[5]

Joint interest in profits and losses creates partnership.

SEC. 45. It is not requisite to the constitution of a strict partnership that each partner should, as between themselves, be liable to share indefinitely in the losses of the concern. *It is sufficient if they are to share in the profits and in the losses, so far as they affect the capital advanced.* Nor is it necessary that the partners should be proportionate joint owners of the capital. It is enough that they are jointly interested in the profits and losses. In a Vermont case,[6] the defendant agreed

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[1] Dob v. Halsey, 16 Johns. (N. Y.) 34; Perry v. Butt, 14 Ga. 699; Chapman v. Wilson, 1 Rob. (Va.) 267; Gregory v. Dodge, 14 Wend. (N. Y.) 593; Ward v. Thompson, 22 How. (U. S.) 330; Chapman v. Devereaux, 32 Vt. 616.

[2] Perry v. Butt, 14 Ga. 699; Gregory v. Dodge, 14 Wend. (N. Y.) 593; Doane v. Adams, 15 La. An. 350; Bulfinch v. Winchenbach, 3 Allen (Mass.) 161.

[3] Beauregard v. Case, 91 U. S. 134.

[4] Sheridan v. Medina, 10 N. J. L. 469.

[5] Leggett v. Hyde, 45 N. Y.; Manhattan Brass Co. v. Sears, *contra*.

[6] Brigham v. Dana, 29 Vt. 1.

with the plaintiff, in consideration of two hundred and fifty dollars to be paid by the latter, to go to California for the purpose of gold digging and to divide what he should earn there equally between himself or heirs, and the plaintiff or his heirs. The sum advanced was expressed to be for the defendant's outfit; and in case of his decease, was to be paid from his earnings, and the remainder divided between his heirs and the plaintiff or his heirs. If the defendant was unsuccessful, whatever he did earn was to be appropriated first to the payment of the outfit. It was held that by this agreement the plaintiff ran the risk of losing his advance, if the defendant failed to earn any thing; that the contract therefore created a valid partnership; and that the plaintiff was entitled under it to his share of the defendant's earnings. The defendant, after spending some time in gold digging, gave it up and engaged in the business of furnishing supplies to the miners; but it appeared from the correspondence between the parties and from their conduct after the defendant's return, that they entertained no doubt that the plaintiff was equally a partner in the whole business. A general judgment, that the defendant account, having been given in the court below, from which it must be inferred that all facts which the evidence tended to show, and which were necessary to render the defendant liable, were proved. It was held that the defendant must account for the profits of the furnishing business, as well as of the mining. Also, that the defendant must be allowed in accounting, for the expenses caused by his sickness on the way home from California and after his arrival; but not for the time lost by such sickness. It appeared that the defendant had persuaded the plaintiff to take a less sum than his share and give a receipt for it; but the plaintiff not appearing to have intended this for a settlement, it was held that his right to an account was not barred thereby.

Person who shares losses as well as profits.

SEC. 46. A broker, factor, or other person who, as a remuneration for his services in a certain transaction, is to have a share of profits, becomes a partner, *if he is also to share a proportion of the losses.* By becoming liable for a proportion of the losses, the contract elevates him from the position of an agent to that of a partner. Thus in Smith v. Watson,[1] it was agreed between A and B that A should buy whalebone through B, as his broker, and that, as a remuneration for his trouble, B should receive one-fourth of the profits arising from the

[1] 2 B. & C. 401; 3 D. & R. 751. See Reid v. Hollinshead, 4 B. & C. 867; 7 D. & R. 444.

sale, and *bear one-eighth proportion of the losses.*[1] The parties acted on this agreement, and it was clear, upon the evidence, that A considered B only as his agent or broker. The question before the court was, whether B was interested as a partner in the property, the subject-matter of the adventure—not whether he was a partner in the

[1] There must be an interest in the profits, as profits. A mere agreement to share gross earnings is not sufficient. Heimstreet v. Howland, 5 Den. (N. Y.) 68; Pattison v. Blanchard, 5 N. Y. 186; Leggett v. Hyde, 58 N. Y. 272. Therefore, where a manufacturer agrees with a capitalist to manufacture stock furnished by him into cloth, and give him half or any other share of the cloth, or between the owner of a farm and a farmer, that the latter will carry on the farm and give the former a share of the crops. Ambler v. Bradly, 6 Vt. 119; or where one furnishes a vessel and another runs it, and the gross earnings are divided. Day v. Boswell, 1 Camp. 330; or where the sailors upon a whale ship are given a share of the oil; Wilkinson v. Frazier, 4 Esp. 182; or where one furnishes a store and goods and another sells the goods, and the latter is paid a per cent of the profits, no partnership exists. Miller v. Bartlett, 15 S. & R. (Penn.) 137; Robbins v. Laswell, 27 Ill. 365; Greenham v. Gray, 4 Irish C. L. 501; Smith v. Watson, 2 B. C. 401. In French v. Styring, 2 C. B. (N. S.) 357, two co-owners of a trotting horse agreed to share its winnings and the expenses of keeping it. The court entertained some doubt whether they were partners, and had no hesitation in admitting that they might be partners in the profits, although only joint owners of the horse. In Froment v. Coupland, 2 Bing. 170, two persons horsed a coach and divided the profits, and it was held that they were partners, although each found his own horses and there was no joint interest therein. In Ex parte Hodgkinson, 19 Ves., Jr. 291, it was held that a partnership might exist where the parties had an interest in the profits but none in the capital. The mere circumstance, however, that two or more persons share the profits of a business does not of itself make them partners. It may, perhaps, with some accuracy, be said that persons who share the profits of a business are *prima facie* partners *inter se*, but, whatever may be the *prima facie* effect of such a relation, the profits must be shared under an arrangement that clearly shows an intention, express or implied, to be partners, in order to constitute them such *inter se*, and as to third persons, the question of their liability as partners will depend upon the circumstance whether they were in fact partners, or had held themselves out as such. Barklie v. Scott, 1 Huds. & Br. 83. It may be said that, *prima facie*, an argument to share profits amounts to an agreement to share the losses also, but this is a mere presumption, and may be overcome by showing that in fact the losses were not to be borne by the parties jointly. Greenham v. Gray, 4 Irish C. L. 501; Heyhoe v. Bunge, 9 C. B. 446. Wheatcroft v. Hickman, 9 C. B. (N. S.) 47. In a Virginia case, Wilkinson v. Jett, 7 Leigh (Va.), 115, a contractor for carrying the mails entered into an arrangement that each should perform one-half the services and be entitled to one-half the compensation, and it was held that they were not partners. The distinction between an interest in the profits and an interest in the goods from which the profits are derived is marked and manifest. Meyer v. Sharpe, 5 Taunt. 74. Thus, where an author furnishes manuscript to a publisher, who agrees to publish it at his own expense and divide the profits with the author, if any partnership whatever exists between the parties it is confined wholly to a partnership in the profits. Gardiner v. Childs, 8 C. & P. 345; Wilson v. Whitehead, 10 M. & W. 503; Reade v. Bentley, 3 K. & J. 271; Gale v. Leckie, 2 Starkie, 107; See Venables v. Wood, 3 Ross. Leading Cases, 527, where it is held that no partnership whatever exists in such cases.

Mr. Lindley, in his work upon the Law of Partnership, pp. 10, 11, thus defines profits, and illustrates the distinction between them and gross returns, and, as it may be valuable in the investigation of questions involved in the law of partnership, I give it here. He says:

"By writers on Political Economy the word profit is used to denote the difference between the value of advances, and the value of returns made by their employment. Profits are divided by these writers into gross or net; gross

adventure itself. The court, however, seemed to be of opinion, that, though not interested in the property, he was a partner in the profits.

In reference to the case last cited, it may be remarked, that an undertaking to share the loss is inconsistent with the notion of an agreement to take a share of the profits by way of remuneration,[1] which was probably the ground on which the court formed their opinion. In a later case, the stipulation to share the loss was held to show conclusively, that the agreement was one of partnership, and not mere agency. There A agreed with B to convey, by horse and cart, the mail between two places at £9 per mile per annum, and to pay his proportion of the expense of the cart, etc., the money received for the carriage of parcels to be divided between the parties, and the damage occasioned by loss of parcels, etc., to be borne in equal portions; it was held, that this agreement constituted a partnership, and not a mere measure of wages; and, consequently, that A could not maintain an action against B for the £9 per mile.[2]

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profits being the whole of the above difference, and net profits being so much of that difference as is attributable solely to the capital employed. The remainder of the difference, or, in other words, the gross profits, *minus* the net profits, has no particular name, but it represents the profits attributable to industry, skill, and enterprise. If the term profit be used to denote the difference between the value of advances and the value of returns, the profits arising from any trade, business, or adventure, will be a positive or a negative quantity, or neither, according as the value of the returns is greater or less than, or equal to the value of the advances. Using the term profit in this sense, persons who share the profits of any business necessarily share its losses, if losses are incurred; for if they do not, what they share is not the difference above alluded to, but something else, as, for example, that difference, if it happens to be a gain. But the word profit is generally used in a less extensive signification, and presupposes an excess of the value of returns over the value of advances. Using the word profit in this more limited and popular sense, persons who share profits do not necessarily share losses, for they may stipulate for a division of gain, if any, and yet some one or more of them may by agreement be entitled to be indemnified against losses by the others; so that whilst all share profits, some only bear losses. The actual or gross returns obtained by advances obviously include profits (in the sense of gain), if profits have been made. But those returns do not include losses, if losses are incurred, for losses are the excess of the advances over the actual returns, and come out of the advances, and not out of the returns. Hence, persons who share gross returns share profits in the sense of gain, but they do not *by sharing the returns* share losses, for these fall entirely on those making the advances. Moreover, although a division of gross returns is a division of profits, if there are any, it is so only incidentally, and because such profits are included in what is divided; it is not a division of profits as such; and under an agreement for a division of gross returns, whatever is returned must be divided, whether there be profit or loss, or neither.

These considerations have led to the distinction in English law between agreements to share profits and agreements to share gross returns, and to the doctrine that whilst an agreement to share profits creates a partnership, an agreement to share gross returns does not."

[1] In Waugh v. Carver, Eyre, C. J., says, "I cannot agree that this was a mere *agency*, for there was a *risk* of profit and *loss*."

[2] Green v. Beesley, 2 Bing. N. C. 108; 2 Scott, 164.

Share of profits as measure of compensation.

SEC. 47. Generally, however, upon the same principles as are applicable to brokers, persons acting merely in the character of servants in an adventure, and receiving a certain share of the profits in lieu of wages, are not partners in the undertaking.[1] Where, by articles, it

[1] The difficulties have mostly arisen in cases where the parties have sought to avoid the disadvantageous incidents and, consequently, the appearance of partnership. With regard to this class of cases, it seems to be settled that, notwithstanding an agreement between the partners that neither shall be answerable for the acts or losses of the other, but each for his own; or that one partner shall participate in the profits, but not in the losses, the liability will not be obviated toward the world at large, though the partners may not be answerable as between themselves; but universally, whatever agreement exists among the partners themselves, stipulating for a restricted responsibility, and however limited may be the extent of his own separate beneficial interest in, and however numerous the members of the partnership, each individual member is liable for the joint debts to the whole extent of his property. Bailey v. Clark, 6 Pick. (Mass.) 372; Leavitt v. Peck, 3 Conn. 124; Cargill v. Corby, 15 Mo. 425; Gram v. Cadwell, 5 Cow. (N. Y.) 489; Johnston v. Dutton, 27 Ala. 245; Boardman v. Gore, 15 Mass. 359; Langan v. Hewitt, 13 S. & M. (Miss.) 123; Dow v. Sayward, 12 N. H. 271; Baxter v. Clark, 4 Ired. (N. C.) 127. But if notice is given of the true relations between the parties, persons dealing with them with knowledge thereof are bound thereby, unless such person's conduct subsequent to notice has been such as to indicate a withdrawal of his dissent. Pearce v. Wilkins, 2 N. Y. 469. It is only when limitations upon the authority of partners are secret that persons dealing with the firm can ignore them. As to all who know of such limitations they are binding. Post v. Kimberly, 9 Johns. (N.Y.) 489; Lansing v. Ten Eycks 2 id. 304; Engsign v. Wands, 1 Johns. Cas. (N. Y.) 171. So, too, where a person deals with a partner as to matters not within the scope of his apparent power or the usage of the business. Breckenridge v. Shrieve, 4 Dana (Ky.). 375; Crosthwait v. Ross, 1 Humph. (Tenn.) 23; Cheney v. Clark, 3 Vt. 431; Holmes v. Burton, 9 id. 252; Lansing v. Gaine, 2 Johns. (N. Y.) 300; Grey v. Wood, 18 Ill. 32; Wells v. Turner, 16 Ind. 133; Lea v. Guice, 13 S. & M. (Miss.) 656. Rice v. Shute, 5 Burr. 2611; Abbot v. Smith, 2 W. Bl. 947; Rex v. Dodd, 9 East, 516; Smith v. Jameson, 5 T. R. 601; Huntingdon v. Wolcott, 5 Day, 390.

But the rule does not apply to a positive agreement made by a partner with creditors themselves, or an express and absolute notice from a partner that he will not be answerable. Vice v. Fleming, 1 You. & J. 227; Willis v. Dyson, 1 Stark. 164; Lord Gallway v. Matthew, 10 East, 264. But see Booth v. Quin, 7 Price, 193. The principle, or rather the ground upon which the communion of profits is held to constitute a partnership as to third persons, was stated by EYRE, C. J., in Waugh v. Carver, 2 H. B. 247, predicated upon the dicta of the court in Grace v. Smith, 2 W. Bl. 998, as follows: "He who takes a moiety of all the profits indefinitely shall, by operation of law, be made liable to losses, if losses arise, upon the principle that by taking a part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of the decision in Grace v. Smith, and I think it stands upon the fair ground of reason." Or, in the language of DE GREY, C. J., in the case of Grace v. Smith: "Every man who has a share of the profits of a trade ought also to bear his share of the loss. And if any one takes part of the profit he takes a part of that fund on which the creditor of the trader relies for his payment." But it being admitted that a participation in profits will render the participator liable as a partner to strangers, a question, and a very difficult one, frequently arises, what kind or degree of participation is necessary to produce that effect? In order to obtain a satisfactory solution of this question, it is necessary to settle with some precision the meaning of the term "profits." In a certain sense, every individual connected with a partnership business by

was stipulated that the produce of a whaling voyage should be divided in certain proportions, namely, a certain proportion to the owners, a certain proportion to the captain, and the rest to the other officers and seamen, in lieu of wages, it was held, that a seaman under these

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performing services for the partners, and being remunerated for those services, may be said to come under the description of taking a part of the profits, and therefore taking a part of that fund on which the creditor of the trader relies for his payment. It may be said, in answer to this objection, that the word "profits" is well understood to mean the net return to the capital or stock employed, after deducting all the expenses, including not only the wages of those employed by the capitalists, but the wages of the capitalists themselves for superintending the employment of their capital or stock. Adam Smith's Wealth of Nations, book 1, ch. 6, with Mr. McCulloch's note. But even according to this definition, it does not appear that a very broad and easily recognized distinction exists between him whose remuneration consists in the wages of labor, and him whose remuneration consists in the profits of stock. For in most cases a man's income from a certain partnership business partakes of both those characters. The point, indeed, to be made out, in order to take a man entirely out of the category of liability, would seem to be that his income from the business belongs solely to the character of wages; whenever that can be done, it might seem that the presumption of partnership would be repelled. But there are cases in which it is extremely difficult to determine this point; and there are cases in which persons who had no interest in the stock, and therefore whose remuneration must have, in a strict sense, borne the character solely of wages, and in no degree of profits, have been held liable as partners to third persons. Ex parte Digby, 1 Deac. 314; ex parte Hamper, 17 Ves. 403; Taylor v. Terme. 3 H. & J. (Md.) 505; Price v. Alexander, 2 Greene (Iowa), 427; Dob v. Halsey, 16 Johns. (N. Y.) 34; Simpson v. Feltz, 1 McCord's (S. C.) Ch. 213; Wright v. Davidson, 13 Minn. 449. There are many cases in which, while a partnership has been held to subsist as regards the world, the parties thus made liable to third persons have been held not to be partners as between themselves; and it is in these cases, or in cases that bear or appear to bear a close analogy to them, that the greatest difficulty arises. In the case of Waugh v. Carver, EYRE, C. J., said: "The definition of a partnership, cited from Puffendorf, is good as between the parties themselves, but not with respect to the world at large. If the question were between A and B whether they were partners or not, it would be very well to inquire whether they had contributed, and in what proportions, stock or labor, and on what agreement they were to divide the profits of that contribution. But in all these cases a very different question arises, in which that definition is of little service. The question is generally not between the parties as to what shares they will divide, but respecting creditors claiming a satisfaction out of the funds of a particular house, who shall be deemed liable in regard to these funds? Now a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners; that A is to contribute neither labor nor money, and, to go still further, not to receive any profits. But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, when, in fact, they lent it only to two of them, to whom without the others they would have lent nothing. Waugh v. Carver, 2 H. Bl. 246. But this liability only extends to those who trusted the firm on his credit. Stearns v. Havens, 14 Vt. 540; Moffat v. Moffat, 10 Bosw. (N. Y.) 468; Burns v. Rowland, 40 Barb. (N. Y.) 368; Cottrill v. Van Duzen, 22 Vt. 511; Fisher v. Bowles, 20 Ill. 396; Stiles v. Myer, 64 Barb. (N. Y.) 77; Stea v. Matthews, 50 N. Y. 166; Crozier v. Kinker, 4 Tex. 252; Buckingham v. Burgess, 3 McLean (U. S.), 364; Craig v. Warren, 3 Phil. (Penn.) 298; Fisher v. Bowles, 20 Ill. 396; Bowie v. Maddox, 29 Ga. 285.

Lord ELDON (in ex parte Hamper, 17

articles was not a partner with the captain, and might maintain an action against the latter for his share of the profits.[1]

Sailing vessel for share of profits.

SEC. 48. So the captain of a ship, who, instead of receiving wages, is to share in the profit of the adventure on which he sails, is not a partner with the owner. Mair[2] was the owner of a ship and cargo;

Ves. 403, and in Ex parte Rowlandson, 1 Rose, 89), attempting to give a general expression for the precise degree and kind of participation of profits that should constitute partnership liability, laid down a distinction, which is so subtle, refined and ambiguous that it is difficult to understand it, and though expressed as if they were the result of cases previously decided, do not seem to have been warranted by any express anterior decision. In Ex parte Hamper (17 Ves. 404) Lord Eldon said: "The cases have gone further to this nicety; upon a distinction so thin, that I cannot state it as established upon due consideration; that if a trader agrees to pay another person for his labor in the concern a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner; but, if he has a specific interest in the profits themselves, as profits, he is a partner." And, again, afterward in the same case: "The ground is settled, that if a man, as a reward for his labor, chooses to stipulate for an interest in the profits of a business, instead of a certain sum proportioned to those profits, he is as to third persons a partner, and no arrangement between the parties themselves could prevent it." Ex parte Rowlandson, 1 Rose, 91.

Some of the writers (Story on Partn. 75, cites 3 Kent's Com. Lect. 48, p. 25, note, 4th ed's.; Cary on Partn. 11, note), and even some of the courts (Lord Eldon in Ex parte Hamper, 17 Ves. 412; and Mr. Chancellor Walworth, in Champion v. Bostwick) on this subject, appear to think that they have surmounted the difficulty, by confining the rule of liability to the cases where the party would have a right to an account of the profits; but to this it may be answered, that in all cases where a person is to be paid for his services by a sum *proportioned* to the profits, he must be entitled to an account of profits. If not, how is he to ascertain that he has what he stipulated for? In many of the cases, notwithstanding a clear right to an account, no partnership was held to subsist either as between the parties or as to third persons.

The distinction between the cases where a participation in the profits has been held to make a man liable as a partner and those where it has been held not to make him so liable, is so slight that it is not possible from the most careful consideration of it, to arrive at any clear general conclusion. If the matter were *res integra*, a plain and intelligible rule, would be that those who share in the returns of the business or adventure consisted wholly of the profits of stock, or partly of the profits of stock, and partly of the wages of labor, should be held liable as partners; but that those whose share of the said returns consisted wholly of the wages of labor, or the interest of money lent, or a certain fixed annuity, and who had no control or voice as principals in the management of the business or adventure, should not be held liable as partners. This would provide for all those cases in which agents or servants, for the purpose of stimulating their exertions, are paid not by a fixed sum, but by a certain proportion of the profits, or, to speak more accurately, of the returns of the business or adventure. Of course it is not meant to apply to those cases where a party, although not interested in the capital stock or even in the profits, suffers himself to be held out to the world as a partner; nor to those cases where it is the intention that the party, though not interested in the capital stock, should nevertheless exercise the control of a principal in the business or adventure, and in short fill the character of partner to all intents and purposes. Nor would this rule be altogether inconsistent, and irreconcilable with Lord Eldon's dictum cited above. On the contrary, would it

[1] Wilkinson v. Frasier, 4 Esp. 182.

[2] Mair v. Glennie, 4 M. & S. 240.

Young was the captain, under an agreement that he was to have, in lieu of all wages, primage, etc., one-fifth share of the profit or loss of the intended voyage, on ship and cargo, and was to follow Mair's instructions, do all the business himself that he could do, and, for the

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not tend to throw light on his expression so much criticised, "a specific interest in the profits themselves, *as profits*," by marking the distinction between that portion of the gross returns or earnings of a business which comes strictly under the head of wages of labor, and that portion which comes under the head of profits of stock strictly and properly so called. In ex parte Watson, 19 Ves. 461, Lord ELDON said: 'If, retiring or coming into the trade, he suffers his name to be used, it is of no consequence whether he has a salary, or sum of money, to be paid by others, or to be got out of the profits. It is the use of the name that makes him liable, as one of the persons, by and to whom everything is bought and sold." Loomis v. Munhall, 12 Conn. 69.

It is true that in his second statement of the distinction Lord ELDON expressly includes among the cases of liability to third persons, the case in certain circumstances of a person having no property in the capital. But there are many cases of exception to the general rule. In Boyer v. Anderson, 2 Leigh (Va.), 556, B leased a public ferry to F, for the consideration of $1,000, and gave him possession of it; F to remain in possession after the term, until he should make out of the profits $2,000; if the profits during the term should exceed $2,000, the surplus to be equally divided between the parties; B to furnish the boats, and a hand sometimes, and F to furnish a ferryman, and to superintend the ferry. It was held there was no partnership, and that B was not liable for losses through negligence at the ferry. Where a person leased to another a tavern and farm, and was to receive as rent a portion of the profits thereof, they were held not to be partners, as between themselves. Perrine v. Haskinson, 11 N. J. 184. And there is a considerable class of cases which fall under this principle. Thus, where it was stipulated that the produce of the voyage should be divided in certain proportions, viz.: a certain proportion to the owners, a certain proportion to the captain, and the rest to the other officers and seamen (the proportion of a common sailor being a 190th part, which obviously gives a right to an account), it was held that the shares of the seamen were in the nature of wages, unliquidated at the time; but capable of being reduced to a certainty on the sale of the oil, that a seaman was not a partner, and might maintain an action for his wages against the captain. (Wilkinson v. Frasier, 4 Esp. 182). So oyster dredgers who had no interest in the boats, but agreed to receive from the owners of the boats a stipulated share of the profits, were held not to be partners with the owners; and though in this case it was alleged that should the whole stock of oysters deposited on the perches be killed by frost, which often happened, or by any other accident, the dredgers always bore their proportion of the loss, the court treated it not as a partnership, but only as a mode of calculating the amount of wages due to the dredger from the owners of the boats. Perrott v. Bryant, 2 You. & Coll. 61. As to the case of Coppard v. Page, Forrest, I. which has been supposed to be an authority the other way, it is to be remarked, that in that case the court only dismissed the bill, on the technical ground of want of parties, giving no opinion on the subject of partnership, and the owners of the nets not having been made parties, any more than the master and crew of the boat. In a recent case in New York, Prouty v. Smith, 51 N. Y. 594, A advanced money to B, an attorney, to buy prize claims, under an agreement that B would collect them for one-half the profits, and the parties were not held as partners. The court treated the share of profits received by him as a mere measure of compensation for his services. In Moore v. Smith, 19 Ala. 774, the plaintiff entered into a contract with the defendant to serve him as overseer for one year, and to furnish a certain number of hands and horses, which were to be worked on the defendant's plantation with the defendant's hands and horses, and to receive one-fourth of the crops raised, *as compensation*. The court held that this did not make the parties partners in fact. See, also, Ellsworth v. Taitt, 26 Ala. 733; Lamb v. Grover, 47 Barb. (N. Y.)

rest, make the best bargain he could. The ship sailed, and afterward Mair, being indebted to Sharpe & Co., executed to them a bill of sale of the ship; but Sharpe & Co. never took *actual* possession of the ship, though it was argued for them, that they had, by means of this

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317; Newman v. Bean, 21 N. H. 93; Austin v. Thomson, 45 id. 113; Holmes v. Old Colony R. R. Co., 5 Gray (Mass.), 58; Hazard v. Hazard, 1 Story (U. S.), 371; Bull v. Schuberth, 2 Md. 38; Blue v. Leathers, 15 Ill. 31; McArthur v. Ladd, 5 Ohio, 514; Johnson v. Miller, 16 id. 431. So where the master of a ship, under an agreement between him and the owner, was to have in lieu of all wages, primage, etc., one-fifth share of the profit or loss of the intended voyage, on ship and cargo, Lord Ellenborough said: "It has been contended that the captain was virtually a partner, but on what ground has it been so contended? The ground is because payment of the captain's wages was to depend, as to its amount, upon a reference to the value of the cargo; but according to that mode of argument, every seaman in a Greenland voyage would become a partner in the fishing concern. There is no pretense, therefore, for saying that the captain was a partner, because his wages were to be regulated and paid by reference to a calculation on the profits of the adventure." Mair v. Glennie, 4 M. & S. 240. Putting the case on the same ground as that of seamen in the whale fishery, who, as well as the oyster dredgers and all persons similarly situated, must, in a certain sense, be considered as concerned in the loss as well as the profit of the adventure, inasmuch as they will be losers by whatever diminishes the amount of the produce. So, where there was an agreement between the sole owner of a lighter and a lighterman, that the latter, in consideration of working the lighter, should have half her gross earnings,—Lord Ellenborough observed, that this was only a mode of paying the lighterman wages for his labor; so that no partnership could be considered as existing between him and the owner of the lighter. Dry v. Boswell, 1 Camp. 329. In this case, however, the witnesses having first stated, that the two shared the *profits* (not the *gross earnings*) of the lighter equally between them, Lord Ellenborough said: in that case, there was such a participation of profit and loss as constituted a partnership; a conclusion that does not appear very easily reconcilable with his decision quoted above, in Mair v. Glennie. In fact, in Mair v. Glennie, the evidence seems rather more in favor of a partnership than in this; for there the agreement *expressed* a participation in profit and loss. In Ambler v. Bailey, 10 Vt. 170, it was held that where one person furnished a boat and another sailed it under an agreement to share *gross earnings*, they were not thereby constituted partners. In Heimstreet v. Howland, 5 Den. (N. Y.) 69, A leased to B a ferry, which B agreed to run and give A one-half the gross earnings, in lieu of rent. The court held that A and B were not partners, nor liable as such to third persons. See, also, Bowyer v. Anderson, 2 Leigh (Va.), 550; S. P. Murray v. Stevens, 1 Rich. Eq. (S. C.) 205; Pattison v. Blanchard, 5 N. Y. 187; McGuire v. Hallahan, Hill & D. Sup. (N. Y.) 86. But where the owners of a ship fitted her out at their joint expense, and sailed her for their *joint profit*, they were held partners, as well in the ship as in the cargo. Mumford v. Nichols, 20 Johns. (N. Y.) 611. In order to create the relation of partners, either *inter se*, or as to third persons, where there is no holding out in that respect, there must be a mutual interest or community in the profits *as such*, Gibson v. Stone, 43 Barb. (N. Y.) 129, rather than a sharing of gross returns. Clement v. Hadlock, 13 N. H. 190; Fail v. Ree, 35 Ala. 66; Stoallings v. Baker, 15 Mo. 482; Mohawk, etc., R.R.Co. v. Niles, 3 Hill (N. Y.) 164; Merrick v. Gordon, 20 N. Y. 93. So where A purchased two bullocks, and put them to depasture on the lands of B, it being agreed that the profit to be made upon the re-sale (after they had been fatted upon B's land) above £20, at which A then valued them, should be equally divided between him and B,—it was held that A and B were merely partners in the profits, and that this was a mode of paying B for the pasture, and on motion that the verdict should be set aside, a rule *Nisi* was refused by the Court of King's Bench. Wish v. Small, 1 Camp. 331. This case seems referable to the same principle, for the benefit contributed to the stock by B's

transfer and notice thereof to the captain, the *virtual* possession. Mair, as also Sharpe & Co., afterward became bankrupts; and in an action of *assumpsit* by the assignees of the former against the assignees of the latter, the question was, whether, under the circum-

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pasture may be fairly considered as the result of B's labor. Compensation for services in the form of commission on the profits, creates no such interest in the concern as constitutes a partnership, and an agreement by a manufacturer to furnish wooden handles made to order, to a country merchant, at a tariff of prices, to be paid out of the store on the proceeds of the handles, the manufacturer finding the stuff and labor, and receiving a further compensation for skill and the rent of the storehouse, in the form of fifty per cent on the net profits of the whole, does not constitute a partnership. Even if there was a partnership in the store, it did not extend to the procuring of the stuff, and consequently, the merchant was not liable to the creditor of the manufacturer for the price of it. Dunham v. Rogers, 1 Penn. St. 255. In Gibson v. Stone, 43 Barb. (N. Y.) 291, a similar doctrine was held, and a party loaning money to a firm and selling out to them his good will in another firm, was held not to be a partner, because he received one per cent of the gross returns of the firm. So persons owning different lines of boats, or other conveyances for freight or passengers, who agree to divide gross earnings, are not partners. Mohawk, etc., R. R. Co. v. Niles 3 Hill (N. Y.), 174; Merrick v. Gordon, 20 N. Y. 93; Pattison v. Blanchard, 5 id. 187; McGuire v. O'Hallaran, H. & D. Sup. (N. Y.) 86; Murray v. Stevens, 1 Rich. Eq. (S. C.) 205; Gibson v. Lupton, 2 M. & S. 371: and the same rule prevails where one party furnishes materials, etc., and another manufactures them, dividing the products. Clement v. Hadlock, 13 N. H. 190; Fail v. McRee, 35 Ala. 66; Stoallings v. Baker, *ante;* McArthur v. Ladd, 5 Ohio, 521. So when one performs services for a commission upon the profits. Edwards v. Tracy, 62 Penn. St. 382; or for a salary equal to a certain proportion of the profits. Trieber v. Lanahan, 23 Md. 133; Edmundson v. Thompson, 2 Foster, 564; Pinckney v. Keyler, 4 E. D. S. (N. Y.) 471; Dixon v. Cooper, 29 Vt. 83; Blanchard v. Cooledge, 22 Pick. (Mass.) 151; Miller v. Bartlett, 15 S. & R. (Penn.) 137; or, receives a certain proportion of profits in lieu of rent. Churchman v. Smith, 6 Whart. (Penn.) 150; Gibson v. Stone, 28 How. Pr. (N.Y.) 468; Dillard v. Scroggs, 36 Ala. 670; or, for the use of money. Hart v. Kelley, 83 Penn. St. 286; Delaney v. Timberlake, 23 Minn. 383; Cox v. Hickman, 8 H. L. Cas. 268; Mulroo v. Wards Court, L. R., 4 P. C. 419; Dean v. Harris, L. T. N. S. 33; Bullen v. Sharp, L. R., 1 C. P. 83. *Contra*, however, see Leggett v. Hyde, 58 N. Y. 272; 17 Am. Rep. 244; Manhattan Brass Co. v. Sears, 45 id. 797; 6 Am. Rep. 177.

Upon the same principle, factors, brokers, and other agents have been held not to be partners with their principals as to third persons, and *a fortiori*, not between themselves and their principals. Thus a factor who sold the goods, and was to receive one shilling in the pound on the price, was held to be a good witness to prove the contract and sale, and therefore not a partner. Dixon v. Cooper, 3 Wils. 40. And a person who was employed to sell goods, and was to have for himself whatever money he could procure for them beyond a stated sum, was held to be a competent witness to prove the contract between the seller and the buyer, and consequently not a partner. Benjamin v. Porteus, 2 H. Bl. 590. So where C was sent by H. & Co., merchants in London, to Peru, for the purpose of taking and working mines, and was furnished by them with a letter of instruction, a letter of credit, and a power of attorney, and was to receive a certain stipulated salary, and "further one-fifth share of the clear profit," Best, C. J., said, "At the trial, I thought that this was not a case of partnership, but that it ranged within that class of cases in which a servant or agent receiving a certain per centage upon the profits, has been decided not to create a partnership. It is not necessary now to consider, whether or not the view I then took was correct. The inclination of my opinion is, that it was. I do not, however, decide this case upon that point, but upon the supposition that Crabtree was an agent of the defendants in this particular transaction." Gaselee, J., also said, "I was at first

stances mentioned in the report, Mair, when he became a bankrupt, had the possession, order, and disposition of the ship and cargo, within 21 Jac. 1, c. 19.—In behalf of Sharpe & Co., it was argued, amongst other things, that it was out of their power to take actual possession,

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strongly inclined to think that this was a case of partnership, but my opinion on that point has been somewhat shaken by the argument in support of the rule, and the cases to which we have been referred." But Park, J., and Burrough, J., inclined to the opinion that it was a case of partnership. Withington v. Herring, 8 M. & P. 30. In Miller v. Bartlett, 15 S. & R. (Penn.) 137, R. employed D. to procure consignments for him, and to act as his agent in certain mercantile business to be carried on in the name of R., and to keep his books. D., as a compensation for his services, was to receive one half of the profits of the business; but he had no authority to contract debts in the name of R., nor was he to be liable to third persons for the debts of R. Held, there was not a partnership between them. Ross v. Drinker, 2 Hall (N. Y.), 415. A owning a mill, agrees with B to work it, and to divide the gross earnings equally. They are not partners. Ambler v. Bradley, 6 Vt. 119. A clerk in a commercial firm, who, in addition to his salary, is to receive share of the profits, is not a partner. St. Victor v. Daubert, 9 Curry's La. Rep. 314. See Muzzy v. Whitney, 10 Johns. (N. Y.) 226; Loury v. Brooks, 2 M'Cord (S. C.), 421. In Maryland, a person acting as agent in another's business, and receiving a portion of the profits as his compensation, has been held a partner. Taylor v. Terme, 3 H. & J. (Md.) 505.

In Rice v. Austin, 17 Mass. 197, where A advanced his funds to be invested by B in live oak in Florida, to be procured, cut, and transported at the expense of B, but on account and risk of A, to the navy yard of the United States, and for his services and disbursements, B was to receive half the profits, and A, for his risk and advances, was to have the residue of the profits; it was held, that the parties were not partners in the timber, nor could third persons be at liberty to treat it as partnership property. On that occasion the court said, that it was not true that all who participated in the profits are to be considered as partners in respect to the concern or adventure from which the profits arise. And the case was put of shipments to India upon half profits (which are so generally practiced in this country), in which it has never been supposed, that thereby the shippers and the owners of the ship became answerable for each other, or were in any way interested, as partners, in respect to the property, which constituted the original adventure, and which was undertaken to be carried to India for half profits, or in the return cargo, in which the proceeds were invested; but that the half profits were treated only as a mode of compensation for freight, disbursements, and charges in the course of the voyage. In Loomis v. Marshall, 12 Conn. 69. "A, residing at a distance from a factory for the making of cloths, occupied by B, entered into an agreement with B, in substance as follows: A was to furnish a full supply of wool for the factory for two years; and B was to manufacture such wool into broadcloths and satinets, in a good and workmanlike manner, according to the directions of A, and to devote the entire use of his factory to that purpose for the term; and the net proceeds of the cloths, after deducting the incidental expenses and charges of sale, were to be divided, so that A should have fifty-five per cent, and B forty-five per cent thereof; and in the manufacture of satinets from such wool A was to pay fifty-five per cent and B forty-five per cent of the cost of the warp; and the expense of insurance on the work and cloth was to be borne by A and B, in the same ratio as their interest was in the final division of the avails of the cloths; and in case of the destruction of any work or cloth by fire, the amount received of the insurers was to be divided between A and B, according to the loss sustained by each; it was held, that under this agreement, A and B were not partners, either *inter se*, or as to third persons, and that B had no other interest in the profits, than a compensation for his labor and materials by a per centage on the avails of the cloths."

In Turner v. Bissell, 14 Pick. (Mass.) 152, by a written agreement, A agreed to furnish B for one year with wool to be worked into satinets, and B was to de-

for, by the agreement between Mair and the captain, the latter was interested in ship and cargo to the extent of one-fifth, in respect of which Sharpe & Co. could not have divested him of the possession — *sed, per* Lord Ellenborough, "One of the points which has been raised

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liver to A all the satinets, which the wool would make, and to find and pay for warps for the same; A was to pay B for working the wool, finding the warps, etc., forty per cent on the sale of the satinets; each was to pay half the charges; A was to have the whole direction of the sales, and if he should make sales himself, he was to have one and a half per cent upon forty per cent of the sales. It was held that A and B were not partners *inter se*, or as to third persons." An agreement to share the profits of an adventure does not, necessarily, constitute a partnership. Mumford v. Nicoll, 20 Johns. (N. Y.) 171. Where two persons enter into a single transaction of purchase, for the purpose of profit, it does not make a partnership, such as will confine either to an action of account against the other. Galbreath v. Moore, 2 Watts (Penn.), 86. See Harding v. Foxcroft, 6 Me. 76; Thompson v. Snow, 4 id. 264; Cutler v. Winsor, 6 Pick. (Mass.) 335. He who participates in the profits and loss of a purchase or sale, is a partner therein. Scott v. Colmesnill, 7 J. J. Marsh. (Ky.) 416; Miller v. Hughes, 1 A. K. Marsh. (Ky.) 181; Brown v. Robbins, 3 N. H. 64; Purviance v. M'Clintle, 6 S. & R. (Penn.) 259; Winship v. Bank of U. S., 5 Pet. 529; Cumpston v. M'Nair, 1 Wend. (N. Y.) 457. Two may be partners, as to third persons, without being partners with respect to each other in a particular transaction. Gill v. Kuhn, 6 S. & R. (Penn.) 333.

In Elgie v. Webster, 2 M. & W. 518, by an agreement in writing, W. agreed with E. to advance him a sum of money for the purpose of manufacturing certain inventions; and it was agreed that if the inventions should become of public or private use, W. should be entitled to one-third of the profits of the inventions; and the agreement contained an express promise on the part of E. to repay the sum of money advanced by W., it was held that, though there might be a question whether a partnership was not created by this agreement, as to the subsequent profits, and the sums of money agreed to be afterward advanced by the plaintiff for the purpose of carrying out the inventions, yet the express promise to pay this specific sum at all events took away the objection of that forming a part of any partnership fund. In Leggett v. Hyde, 58 N. Y. 272; 17 Am. Rep. 244, a similar question arose. In that case one Putnam and one Henneberger were partners in business, under the firm name of A. D. Putnam & Co. In that year, the appellant invested or deposited with that firm $1,500. This sum was credited on its books to Fredk. Hyde, the son of the appellant. For this sum the appellant was to share in the profits of the business of the firm. His share was to be one-third, and demandable by him at the end of the year. At the end of the year, his share of the profits was $500. This sum was also placed to the credit of Fredk. Hyde. Then, in 1870, the appellant loaned to the firm for one year the original sum of $1,500 and the $500 of profits, thus making $2,000. In consideration of this loan, the firm agreed to hire Fredk. Hyde as clerk, at ten dollars per week, for the year; to pay the appellant one-third of the profits, which were to be settled half-yearly; and, at the end of the year, to take him in as a partner, if the firm and he should feel satisfied, on his making further investments, and putting in more capital. Though it is nowhere in the testimony so stated in terms, yet it is fairly to be inferred that the $2,000 was loaned to be used in the business, and that if, at the end of the year, the appellant did not become an ostensible partner, he was to be repaid, out of the concern, the $2,000, but without interest, strictly as such. The appellant never interfered in the affairs of the concern, nor exercised any control in the business. At the end of the first six months there were no profits of the business. The appellant never received any thing for his $2,000; nor any thing by way of interest money.

FOLGER, J., in applying the law to these facts, said: 'The prominent and important facts are, that he loaned the firm a sum of money to be employed as capital in its business, and that therefore he was entitled to have and demand from it one-third of the profits of its business every half-year. In my judgment there results from this, that

in this case is—supposing in other respects it was proper for the Sharpes to take possession, whether they were precluded from doing so in respect of the captain's interest. And, upon this point, it has been contended that the captain was virtually a partner; but, on

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Putnam and Henneberger, making use of that money as capital in that business, used it there for the benefit of the appellant, because any return to him, for the loan to them, must come from the use of it. If not used so that profits were made, he got no return. Further that he had an interest in the profits, which, while they were anticipatory, was indefinite as to amount, but when they were realized, was measured and specific as to share. Further that his interest in them was in them as profits; that is, that he had a right on the lapse of every six months, though having no property in the whole capital, to have an account taken of the business, and a division made of the profits then appearing. Ex parte Hamper, 17 Ves. 403. So it is said in Everett v. Coe, 5 Den. 182: 'If he is to be paid out of profits made, then he has a direct interest in them. And see Ogden v. Astor, 4 Sandf. 321, 322. That he had this right to an account and a division at other time than at the end of each six months, if at any other time the exigencies of the concern, as the dissolution of the firm by death of one partner, or other reason, required an account to be taken. He had that interest in the profits, as profits, because he could claim a share of them specifically, as they should appear on each six months, or other accounting of the business of the term then ended, and could then have and demand payment of his share. By the terms of his contract with the firm, if it be upheld as made, he was interested in and affected by the results only of the year, as ascertained at the end of each six months. It would not affect him in the right to account, though the business of a previous year had been disastrous. If either six months' business should yield a profit, he could insist on payment to him of one-third thereof; and could demand that an account be had of the business of any six months to ascertain if there had been profit. It was one-third of the profits he was to have, and not a sum in general equal to that one-third. So that he was to take it as profits, and not as an amount due; not as a measure of compensation, but as a result of the capital and industry. The learned counsel for the appellant states the question of law to be this: Does a loan of money, with an agreement for compensation from the profits of the business, *per se* constitute the lender a partner *quoad* the creditors of the firm? Is this statement of it correct? Does the phrase 'compensation from the profits' fully meet the case? Does it fully present the fact that by the agreement the appellant obtains an interest in the profits, as such, and a right to insist upon an accounting, and a division thereof half-yearly? With this supplement, the question for decision is as stated by him. I am not to say what I think ought to be the answer to it, was this a case of first impression. I am to declare what I ascertain to be the answer already given by the law in this State, as it has been settled and declared by the authorities. The argument of the learned counsel is very ingenious, and very forcible when considered in reference to what should be the proper rule, and what the true reasons upon which a rule should be founded. Yet, if it is found that, by a long course of decisions, or by long acquiescence in, and adherence to, a rule some time ago authoritatively promulgated, there has been established a principle of commercial law upon which the community has acted, it is the duty of the courts to adhere thereto, leaving it to the law-making power to find a remedy, if remedy be needed, in a positive alterative enactment. In England this has been done, and by an act of Parliament an important change has been made. 28 and 29 Vict., ch. 86. In the first place, it matters not that the defendants meant not to be partners at all, and were not partners *inter sese*. They may be partners as to third persons notwithstanding. Manhattan Brass Co. v. Sears, 45 N. Y. 797; 6 Am. Rep. 177. And this effect may result, though they should have taken pains to stipulate among themselves that they will not, in any event, hold the relation of partners. Among the reasons given is this, whether it be strong or weak; that whatever person shares in the profits of any concern shall be liable to creditors for losses also, since he takes a part of

what ground has it been so contended? The ground is, because payment of the captain's wages was to depend, as to its amount, upon a reference to the value of the cargo; but, according to that mode of argument, every seaman in a Greenland voyage would become a part-

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the fund, which in great measure is the creditor's security for the payment of the debts to them. Waugh v. Carver, 2 H. Bl. 235, citing Grace v. Smith, 2 Black. 998. The doctrine took its rise in the decisions in these cases. And commenting upon them, the text-writers, who have presented most forcible criticisms upon it, say: 'The principle laid down by De Gray, C. J., in Grace v. Smith, has served as the foundation of a long line of decisions which cannot now be overruled by any authority short of that of the legislature;' 'and in all cases in which there is no incorporation, nor limited liability, it must still be regarded as binding on the courts.' Lindley on Part., 36. 'The doctrine is completely established upon the very ground asserted in Grace v. Smith.' Story on Part., § 36, note 3. And so Mr. Parsons, in his book on Partnership, quoting Lord Eldon, ex parte Hamper: 'But if he has a specific interest in the profits themselves, as profits, he is a partner;' and adds, 'undoubtedly he is; every principle of the law of partnership leads to this conclusion.' He contends, however, that the specific interest in profits which is to make a person a partner must be a proprietary interest in them, existing before the division of them into shares. See, also, 3 Kent's Comm. 25, note *b*, where it is said: 'The test of partnership is a community of profit; a specific interest in the profits, *as profits*, in contradistinction to a stipulated portion of the profits as a compensation for services.' The courts of this State have always adhered to this doctrine and applied or recognized it in the cases coming before them. In Walden v. Sherburne, 15 Johns. 409, in 1819, Spencer, J., delivering the opinion of the court, says: "No principle is better established than that every person is to be deemed in partnership, if he is interested in the profits of a trade, and if the advantages which he derives from the trade are casual and indefinite, depending on the accidents of trade.' See, also, Dob v. Halsey, 16 Johns. 34, in the same year. The principle is recognized in Chase v. Barrett, 4 Paige, 148, by Walworth, Ch., in 1833; by the Court of Errors, per Walworth, Ch., in 1837, in Champion v. Bostwick, 18 Wend. 175; by the Supreme Court, in 1841, per Cowen, J., in Cushman v. Bailey, 1 Hill, 526; and, again, in 1848, per Beardsley, Ch. J., in Everett v. Coe, 5 Den. 180; by the Superior Court of the city of New York, per Sandford, J., in Oakley v. Aspinwall, 2 Sandf. 7–31; by the present Supreme Court, in repeated decisions of which, see Catskill Bank v. Gray, 14 Barb. 471; Hodgman v. Smith, 13 id. 302; by the Court of Appeals, per Peckham, J., in Manhattan Brass Co. v. Sears, 45 N. Y. 797; per Leonard, C., in Ontario Bank v. Hennessey, 48 id. 545, 552; per Gardiner, J., in Burckle v. Eckhart, 3 id. 132, 138."

Manhattan Brass Co. v. Sears, 45 N. Y. 757. See Hermanns v. Duvigneaud, 10 La. An. 285, in which it was held that where a person who had invented a patent for clarifying sugar, took out a patent in the name of himself and another person under an agreement to sell its use for a certain sum on each box of sugar clarified, was held not to constitute them commercial partners.

Where persons are partners *inter se*, they are also necessarily partners as to third persons. But the converse of this is not true—that is, persons may be partners *quoad* third persons without being partners *inter se*. Gill v. Kuhn, 6 S. & R. (Penn.) 333; Huntingdon v. Wolcott, 5 Day, (Conn.) 390.

It is not necessary in order to make the parties partners *inter se* as well as to third persons, that they should be jointly interested in the capital stock as well as in the profit and loss, but it is sufficient that they should be jointly interested in the profit and loss of the enterprise or adventure, although not jointly interested in the capital stock. Sims v. Willing, 8 S. & R. (Penn.) 108; Purviance v. M'Clintle, 6 S. & R. (Penn.) 259; Miller v. Hughes, 1 J. K. Marsh. (Ky.) 181; Scott v. Colmesnil, 7 J. J. Marsh, 416; Brown v. Robbins, 3 N. H. 64; Winship v. Bank of U. S., 5 Pet. 529; Cumpston v. M'Nair, 1 Wend. (N. Y.) 457; Dob v. Halsey, 16 Johns. (N. Y.) 34.

One leading feature of partnership, as distinguishing it from agency, is that

ner in the fishing concern. There is no pretense, therefore, for saying that the captain was a partner, because his wages were to be regulated and paid by reference to a calculation on the profits of the adventure.

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a partner has a community of interest with the other partners in the whole property and business and responsibilities of the partnership; whereas an agent, as such, has no interest in either. It would be more correct to say a community of interest, either in both the stock and profits or only in the profits, for in cases where partnership has been held to exist, the whole capital stock embarked in an adventure has been contributed by and is sometimes by agreement to remain the exclusive property of one of the parties. Part owners of a steamboat are, generally, to be considered as tenants in common, and not as joint owners or special partners. And an action on the case will lie by one against the other to recover his proportion of the damages assessed in a verdict in an action of trover, brought by the owners, for a tort in taking and detaining the boat, when the judgment on the verdict has been arrested, in consequence of one of the owners having executed a release of damages after verdict. Knox v. Campbell, 1 Penn. St. 366. Thus a person who was employed as an agent in conducting a foundry for iron castings, at a fixed salary of $300, and who was to receive in addition thereto one-third of the profits, if any were made, and who had nothing to do with the losses, and whose employers were to find all the stock and he was to give his services, was held not a partner, either as to his employers or as to third persons. Vanderburgh v. Hall, 20 Wend. (N. Y.) 70. The rules as to partnership liability apply with full force, although the party is not personally interested, but only as trustee, executor or administrator, for the use and benefit of others; and even though he does not interfere, except in settling the accounts. He becomes liable, as personally responsible, to the extent of all his own property, also in his person; and as he may be proceeded against, as a bankrupt, though he is but a trustee. But he places himself in that situation by his own choice, judging for himself whether it is fit and safe to enter into that situation and contract that sort of responsibility. If they thus carry on a trade or business, though for the benefit of others, they must do it upon their own responsibility, unless they act under the direction of the Court of Chancery. But in Barklie v. Scott, 4 Huds. & Bro. 83, it was held that a father may invest a sum of money in a partnership business for his infant son, without making himself liable as a partner, provided he personally derive no advantage, and has not reserved to himself the power of drawing the profits or calling the partners to account. Where the executor of a deceased partner voluntarily continued his share in trade, and carried on the business with the surviving partners, the executor becomes a co-partner, and personally liable for the debts of the company. Alsop v. Mather, 8 Conn. 587. If the administrator of a deceased partner merely permits the surviving partner to sell the partnership property and close the business, in the usual course of the trade, for the joint benefit of the surviving partner and the estate of the deceased, he will not be responsible to the creditors of the estate for losses incurred thereby. But he renders himself personally liable for debts contracted by the surviving partner. Thompson v. Brown, 4 Johns. (N. Y.) 628. If he put assets which are in his hands, and which had no connection with the previous partnership, into the hands of the surviving partner to trade with, he is answerable for losses sustained thereby. Id. Ex parte Garland, 10 Ves. 119; Wightman v. Townroe, 1 M. & S. 412; Barker v. Parker, 1 T. R. 295; Barklie v. Scott, 1 Huds. & Bro. 83.

In Delauney v. Strickland, 2 Stark. 416, it was held that where goods are ordered by one member of a club for the benefit of all, every member who either concurs in the order or subsequently assents to it is liable, although the member who ordered the goods is made the debtor in the plaintiff's books and the bill is sent to him, unless it clearly appear that the plaintiff meant to give credit to that member only.

But in Flemyng v. Hector, 2 M. & W. 172, where a club was formed subject to the following among other rules, viz.: that the entrance fee on admission

Capital against services.

SEC. 49. Again, though an agreement between A, the sole owner of a lighter, and B, a lighterman, that B shall work the lighter, and that the net profits made by her shall be equally divided between them, will make A and B partners in the concern, and therefore B as well as

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should be ten guineas, and the annual subscription five guineas; that if the subscription were not paid within a certain limited period the defaulter should cease to be a member; that there should be a committee to manage the affairs of the club, to be chosen at a general meeting; and that all members should discharge their club bills daily, the steward being authorized, in default of payment on request, to refuse to continue to supply them; it was held that the members of the club, merely as such, were not liable for debts incurred by the committee for work done or goods supplied for the use of the club; for that the committee had no authority to pledge the personal credit of the members. Lord ABINGER, C. B., said: "It appears to me that this case must stand upon the ground on which the defendant put it, as a case between principal and agent; and I am the more inclined to look at it in that light, by an observation made by Mr. Platt, in the course of the argument yesterday, on the subject of bills of exchange. I apprehend that one of the members of this club could not bind another by accepting a bill of exchange, acting as a committee-man, even where there might be an apparent necessity to accept, as in the case of a purchaser of a pipe of wine; the party might draw a bill, but I do not think he could accept the bill to bind the members of the club. It is, therefore, a question here how far the committee, who are to conduct the affairs of the club as agents, are authorized to enter into such contracts as that upon which the plaintiffs now seek to bind the members of the club at large; and that depends on the constitution of the club, which is to be found in its own rules; and upon two of the cases, those that were tried before me at Guildford, looking at these general rules, it certainly does strike me that it is impossible to interpret them so as to give the committee the power of dealing on credit, even for the purposes of the club. It appears by the rules, that every member is to pay his subscription of ten guineas as entrance money, before he can become a member, and a yearly subscription of five guineas; so that by the provisions of the club, there is to be a fund in hand in order to bear the expenses. But then, again, every member who makes use of the club, who either eats or drinks there, or takes any sort of refreshment, is to pay ready money. That shows again that the club was not disposed, and not intended to have any transactions on credit, even with its own members; and it also shows that care was taken to provide ready money to meet every expense, so that if a party or a gentleman of the club were to order any particular thing that the club did not contain, he is to pay for it instanter; so that no occasion was expected to be necessary for the committee's pledging the credit of the club or even their own. Under these circumstances, as the rules of the club, which are in writing, must be taken to form the constitution of the club, and are to be construed as matters of law, I do not see what there was to go to the jury." And in reference to the liability of the committee: "It is very well known that in many of those recent establishments great expense has been incurred by building, and though the committee may have signed contracts for the building, yet it has always been done after a general meeting, and the sense of the whole club has been taken upon it; for you cannot suppose they would pledge their own credit to pay the builder's bill. So in these cases, if the subscriptions of the club were not sufficient to enable the committee to furnish the provisions,— if they were run out,— it appears to me that the committee ought to have called the club together, and asked for a further subscription, and have said, 'It was not the intention of the club that we should make ourselves liable — the intention of the club was to supply us with money before hand'— that is what the committee ought to have done." Bissett on Partnership, pp. 9–39.

The result of all the cases is that *a community of interest in the profits* must exist. Pratt v. Langdon, 97 Mass. 97; Duryea v. Burt, 28 Cal. 567; Dwin

A will be liable for the repairs of the lighter; yet, an agreement between the same persons, that B, in consideration of working the

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el v. Stone, 30 Me. 484; Braley v. Goddard, 48 id. 118; Banchor v. Celley, 38 id. 555; and that, when the interest is only as a measure of compensation for services rendered or benefits conferred, no partnership exists. Goode v. McCartney, 10 Tex. 193; Norment v. Hull, 1 Humph. (Tenn.) 320; Baxter v. Rodman, 3 Pick. (Mass.) 435; Ogden v. Astor, 4 Sandf. (N. Y.) 311; Bendell v. Hittrick, 45 How. (N. Y.) 198; Ross v. Drinker, 2 Hall (N. Y.), 415; Allen v. Dunn, 15 Me. 292; Fawcett v. Osborn, 32 Ill. 411; Burckle v. Eckhart, 1 Den. (N. Y.) 337; Brockway v. Burnap, 16 Barb. (N. Y.) 309; Dunham v. Rogers, 1 Penn. St. 255; McArthur v. Ladd, 5 Ohio, 514; Chaffraix v. Price, 29 La. An. 176; Miller v. Chandler, id. 88; Prouty v. Smith, 51 N. Y. 594; Stoallings v. Baker, 15 Mo. 481; Emmons v. Westfield Bank, 97 Mass. 230; Bowman v. Bailey, 10 Vt. 170.

Person liable as partner who holds himself out as such or permits others to do so. — But where a person holds himself out as a partner, or *permits* others to do so, he may be charged as a partner by those who have dealt with the firm upon the faith of his credit, in ignorance of the facts, although not so in fact, Buckingham v. Burgess, 3 McLean (U. S.), 364; Conklin v. Barton, 43 Barb. (N. Y.) 440; Freeman v. Bloomfield, 43 Mo. 391; Wood v. Pennell, 51 Me. 52; Irwin v. Conklin, 36 Barb. (N, Y.) 64; Stearns v. Haven, 14 Vt. 540; Hazard v. Hazard, 1 Story (U. S. C. C.). 371; Bryant v. Weston, 16 Me. 261; Widdefield v. Widdefield, 2 Binn. (Penn.) 245; Anderson v. Levan, 1 W. & S. (Penn.) 334; Carrier v. Silloway, 1 Allen (Mass.), 19; Drennen v. House, 41 Penn. St. 30; King v. Ham, 4 Mo. 275; Field v. Tenney, 47 N. H. 513; Dixon v. Hood, 7 Mo. 414; Gilbert v. Whidden, 20 Me. 367; Fall River Whaling Co. v. Borden, 10 Cush. (Mass.) 458; Bryden v. Taylor, 2 H. & J. (Md.) 396; Welsh v. Speakman, 8 W. & S. (Penn.) 257.

A person who holds himself out as a partner, or permits others to do so, is liable as such to third persons who have given credit to the firm upon the faith of his connection with it, or who *knew* of such holding out. Matthews v. Fitch, 25 Vt. 537; Stearns v. Haven, 17 id. 546; Casco Bank v. Hills, 16 Me. 155; Cottrill v. Vanderzee, 21 Vt. 514; Wright v. Powell, 8 Ala. 561; Ripley v. Evans, 22 Mo. 158; Brennen v. House, 41 Penn. St. 33; *In re* Warren Davies (U. S. C. C.), 320; Irvin v. Conklin, 36 Barb. (N. Y.) 66; Markham v. Jones 7 B. Monr. (Ky.) 457; Buckingham v. Burgess, 3 McLean (U. S.) 364; Conklin v. Barton, 43 Barb. (N. Y.) 440; Smith v. Smith, 28 N. H. 252; Wilson v. Wallace, 8 S. & R. (Penn.) 53; Palmer v. Stephens, 1 Den. (N. Y.) 402; McBride v. Protection Ins. Co., 22 Conn. 248; Whitney v. Ferris, 10 Johns. (N. Y.) 66; Barnett v. Smith 17 Ill. 565; McPherson v. Rathbone, 7 Wend. (N. Y.), 216; Taylor v. Henderson, 17 S. & R. (Penn.) 453; Jennings v. Estes, 16 Me. 323; Anderson v. Levan, 1 Watts O. & S. (Penn.) 33; Thornton v. Kerr, 6 Ala., 823; Mershon v. Hobensack, 2 N. J. 372; Chidney v. Porter, 21 Penn. St. 390; Tuttle v. Cooper, 5 Pick. (Mass,) 414; Gill v. Kuhn, 6 S. & R. (Penn.) 338; Bowie v. Maddox, 29 Ga. 285; Crozier v. Kirker, 4 Tex. 252; Fisher v. Bowles, 20 Ill. 396; Gumbel v. Abrams, 20 La. An. 568; Sherrod v. Langdon, 21 Iowa, 518; Craige v. Warren, 3 Phil. (Penn.) 298; Furber v. Carter, 11 Humph. (Tenn.) 271; Kellogg v. Griswold 12 Vt. 291; Stanchfield 4 Greene (Iowa), 23; and this is so, although such person's name does not appear in the firm. Bank of Rochester v. Monteath, 1 Den. (N. Y.) 402; Ex parte Bolithio 1 Buck 100; Palmer v. Stevens, *ante;* Baring v. Crafts, 9 Met. (Mass.) 392; Bigelow v. Elliott, 1 Cliff. (U S. C. C.) 28; but in such cases, and indeed in all cases where the liability depends upon the doctrine of estoppel, the burden of establishing liability rests upon the plaintiff; Mercantile Bank v. Cox, 38 Me. 500; and where the words "& Co." are used, as "John Smith & Co.," while the words import a partnership, yet the burden of establishing that fact, as well as who are intended under the head of "& Co.," is upon the plaintiff. Charman v. Henshaw, 15 Gray (Mass.), 293. But there must be a holding out by the person sought to be charged, or by others with his knowledge and assent, express or implied. Mere general reputation that he is a partner is not sufficient. Sinclair v. Wood, 3 Cal. 98; Brown v. Crandall, 11 Conn. 92; Earl v. Hurd, 5 Blackf. (Ind.) 248; Grafton Bank v.

lighter, shall have half her *gross earnings*, does not constitute a partnership between A and B, being only a mode of paying B for his

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Moore, 13 N. H. 99; McGuire v. O'Hallaran, Hill & D. Supp. (N. Y.) 85; Inglebright v. Hammond, 19 Ohio 337; Scott v. Blood, 16 M. E. 192; Halliday v. M'Dougal, 20 Wend. (N. Y.) 81; Lockridge v. Wilson, 7 Mo. 560; Carter v. Douglass, 2 Ala. 499; Smith v. Griffith 3 Hill (N. Y.) 333; Joseph v. Fisher, 4 Ill. (3 Scam.) 137; Carlton v. Ludlow Woolen Mills, 27 Vt. 496. But see Halliday v. McDougall, 22 Wend. 264. The liability in such cases is predicated upon the doctrine of estoppel, and in order to charge a person upon that ground it is not enough to show that he was represented by others to be a partner, or that his name appeared in the firm; it must be shown that he *knew* that he was being held out as a partner, and assented thereto, or facts from which it can fairly he implied. Buckingham v. Burgess, 3 McLean (U. S.) 364; Conklin v. Barton, 43 Barb. (N. Y.) 440; and also that the plaintiff *knew* of such holding out *before or at the time* credit was given. Wright v. Powell, 8 Ala. 561; Edmundson v. Thompson, 7 H. & N. 1027 and it is purely a question for the jury whether there was such a holding out as estops the person from denying the partnership; Ward v. Duke of Argyle, 6 M. & G., 928 and they may infer it from the person's conduct. Lake v. Duke of Argyle, 6 Q. B. 477.

Sub-partners, liable as partners.—The proposition of the author, advanced in section 27, is not a correct statement of the law as held in this country, and has been questioned and denied by our courts. Thus in Fitch v. Harrington, 13 Gray (Mass.), 472, Whittemore, Harrington & Co. did business as partners for about three months, when they failed. It was alleged that the share standing in the name of Leonard Harrington belonged to Samuel P. Harrington. The court below charged that, if there was only a sub-partnership between Leonard and S. P., by which S. P. was to have a share of Leonard's profits in the firm, that alone would not make S. P. liable to third persons. This ruling, however, was reversed upon appeal, the court holding that sub-partners, or persons receiving a share of one partner's profits in the firm may be liable as a partner, and such seems to be the general doctrine in this country. See Leggett v. Hyde, 58 N. Y. 272; Mason v. Partridge, 66 N. Y. 633; Pratt v. Langdon, 12 Allen (Mass.), 546.

Persons may become partners against their intention.—Although the business be carried on in the name of one of the parties alone, and neither suppose that they are partners, and although they did not intend to become partners, and, as between themselves were not partners, yet the law may hold them liable as partners to third parties upon an agreement to share profits. Thus, where money is loaned by one party to another at an interest of six per cent, but in case the debtor's business succeeds he is to pay twenty-five per cent, such contract makes the debtor and creditor partners as to third persons, although the parties did not intend a partnership. The borrower confessed a judgment in favor of the lender, upon which an execution was issued and levied. Held, such an execution must be postponed to a judgment and execution against the borrowing partner for a partnership debt. Sheridan v. Medara, 9 N. J. Eq. 475. See, also, Bromley v. Elliott, 38 N. H. 304; Weaver v. Tapscott, 9 Leigh, (Va.), 424; Whitney v. Luddington, 17 Wis. 141, particularly as to creditors; Walden v. Sherburne, 15 Johns. (N. Y.) 422; Sauffley v. Howard, 7 Dana (Ky.), 368; Edwards v. Tracy, 62 Penn. St. 381; Wright v. Davidson, 13 Minn. 449; Wood v. Valletta, 7 Ohio St. 178; Noyes v. Cushman, 27 Vt. 396; Catskill Bank v. Gray, 14 Barb. (N. Y.) 477; Mayett v. Merrie, 6 B. Monr. (Ky.) 171; Leggett v. Hyde, 58 N. Y. 272; Manhattan Brass Co. v. Sears, 45 N. Y. 797.

When a person is sought to be charged as a partner upon the ground that he owns the premises upon or in which the business is conducted or that he has acted or represented himself as a partner, it is competent for him to rebut the presumptions arising from the facts by proof that he was not a partner in fact, and that he never acted or held himself out as being such. Tracy v. McManus, 38 N. Y. 257. Statements made by third persons are no evidence against him until he and they are shown to have been connected in some way with each other; and it is obviously reasoning in a circle to infer a partner-

labor.[1] So, where A had purchased some bullocks, and had put them to depasture on the lands of B, and it was agreed "that the profits to be made upon the resale (after they had been fatted upon B's land), above £20, at which A had valued them, should be equally divided between him and B," it was ruled that this agreement did not make A and B partners, but merely fixed the mode of paying B for the pasture. And this opinion was confirmed by the court of King's Bench.[2]

Upon the same principles, it seems to have been held, that the manager of the Glasgow Glass Work Company, enjoying an annual stipend, and also, by way of further remuneration, a share of the profits, calculated according to a proportion of capital and stock, not advanced by him, but assigned by way of nominal interest, was not a partner as between himself and the members of the company.[3] On

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ship from any acts of theirs, *unless those acts can be imputed to him for no other reason than that he and they are partners.* Grant v. Jackson, Peake, 268; McFayden v. Harrington, 67 N. C. 29; nor can the admissions of a part of those sought to be charged be used against others. Drennen v. House, 41 Penn. St. 30; Currier v. Silloway, 1 Allen (Mass.), 19; *but the separate admissions of each is competent to establish a partnership between them.* Field v. Tenney, 47 N. H. 510; Bry v. Watson, 16 Me. 261.

[1] Dry v. Boswell, 1 Camp. 330.

[2] Wish v. Small, 1 Camp. 331. See Gibbons v. Wilcox, 2 Stark. 43. The same view of the situation of an *agent*, as contrasted with an actual *partner*, appears to have occurred to the Court of Common Pleas, in Withington v. Herring, 3 Moore & Payne, 30. There Crabtree was appointed agent for Messrs. H. & Co., for the purpose of entering into contracts for the working of mines in Peru. Before his departure from London, an agreement was signed by him and Messrs. H. & Co., and he was likewise furnished with a letter of instructions, a letter of credit, and a power of attorney, with which he proceeded to Lima. At Lima, he drew bills upon Messrs. H. & Co., payable to the plaintiffs' order. An action having been brought by the plaintiffs against H. & Co., on the bills, and for money had and received, one question was, whether the defendants were liable on the ground of Crabtree being a partner with H. & Co. under the agreement, part of which was as follows:—"Mr. Crabtree shall receive from Messrs. H. & Co., for his remuneration, the sum of £1,000; and if this mission shall occupy Mr. C. more than a twelvemonth from the date of his leaving London, he shall receive at the rate of £1,000 *per annum* from the said date. Mr. C. shall further receive one-fifth share of the clear profits which Messrs. H. & Co. may make by such contracts, or by forming the association to be founded on the contracts to be entered into by him." The Court of Common Pleas declined to determine the case on the point of partnership, holding that the plaintiffs had a clear right to recover, arising from the ample powers given to Crabtree by the power of attorney. Two of the judges, however, inclined to the opinion that this was not a partnership; and Best, C. J., said, that at the trial he thought it was not a case of partnership, but that it ranged within that class of cases in which a servant or agent receiving a certain percentage upon the profits, had been decided not to create a partnership. That it was not necessary then to consider whether or not the view he had taken at the trial was correct, but he inclined to the opinion that it was.

[3] Geddes v. Wallace, 2 Bligh, 270.

Participation in profits, as profits: distinction between, and as measure of compensation.— A person who participates in profits as such, and as a result of a common venture, if not a partner in fact, may nevertheless be a *quasi* partner as to third persons. Edwards v. Tracey, 62 Penn. St. 364; Ditchie v.

the other hand, where A, a merchant and insurance broker, agreed to pay B a certain salary for superintending his mercantile concerns, and

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Becker, 6 Phila. (Penn.) 176; Manhattan Brass Co. v. Sears, 45 N. Y. 797; 6 Am. Rep. 177; Parker v. Fergus, 43 Ill. 437; Chapline v. Conant, 3 W. Va. 507; Dalton City Co. v. Hawes, 37 Ga. 115; Wright v. Davidson, 13 Minn. 449; Jones v. McMichael, 12 Rich (S. C.), 176; Fitch v. Harrington, 13 Gray (Mass.), 468, although he does not stipulate to bear any portion of the losses. Strader v. White, 2 Neb. 348. But if his interest is merely by way of commission, or as a measure of compensation for services rendered; Edwards v. Tracey, 62 Penn. St. 374; Lewis v. Greider, 51 N. Y. 231; as where one engages another to serve him in a certain business, and, as compensation therefor, the person for whom the services are rendered agrees to give him a sum equal to one-half the profits; Brockway v. Burnap, 16 Barb. (N. Y.) 309; Regina v. Wortley, 15 Jur. 1137. But *contra*, see Katsch v. Schenck, 13 Jur. 668; Mason v. Hackett, 4 Nev. 420; Reed v. Murphy, 2 Greene (Iowa), 574; Price v. Alexander, id. 427; Kerr v. Potter, 6 Gill (Md.), 404; Ogden v. Astor, 4 Sandf. (N. Y.) 311, or for money loaned, the person rendering the service or lending the money is not a partner in any sense, unless he has held himself out as such or knowingly permitted others to hold him out as a partner, or so conducted in reference to the business as to warrant third persons in dealing with the principal upon the faith of his credit. Pierson v. Steinmeyer, 4 Rich. (S. C.) 309.

In Rowland v. Long, 45 Md. 439, two persons entered into an agreement to carry on business for their mutual profit and advantage, the one to furnish capital and the other to perform the labor, and it was held that they were partners as to third persons, although they were not partners *inter se*. Robinson, J., in delivering the opinion of the court, said: "Whatever conflict there may be in the decided cases as to what are the elements necessary to constitute a partnership, and however difficult it may be to lay down definite rules as applicable to all cases, it is well settled, we think, that where two persons agree to carry on a trade for their mutual benefit, one to furnish money and the other to perform certain labor and services, and each to share the profits to be derived from such trade or business, they become liable as partners to third persons, although, in fact, no partnership was contemplated by the parties themselves. In such a case each party has an interest or property in the profits as profits, and is entitled to an account for the same. Waugh v. Carver, 2 H. Bl. 235; Smith's Leading Cases, vol. 1, part 2, and note, 1175; Smith v. Watson, 2 B. & C. 407; Ex parte Rowlandson, 1 Rose, 91; Green v. Busley, 2 Bing. N. C. 110; Ex parte Langdale, 18 Vesey, 200; Hazard v. Hazard, 1 Story (U. S.), 371."

"Actual participation in the profits, as principals," said Clifford, J., "in general, creates a partnership as between the participant and third persons, whatever may have been the real relation of the former to the firm; but the rule has no application to a case of mere service or special agency, where the employee has no power in the firm, and no such interest in the profits as will enable him to go into a court of equity to enforce a lien for the same or to compel an account. Unless such employee is in some way interested in the profits of the business, as principal, he cannot be regarded as falling within the general rule, because, when not so interested, his condition is not different from that of an ordinary creditor." Berthold v. Goldsmith, 24 How. (U. S.) 536. Partnership may be defined to be a joint interest in the net profits of an adventure or business, or in the profits as affected by the losses. But even though persons are so associated in business that as to third persons, they might be liable as partners, yet if a person dealing with them knows the extent of their relation he cannot charge them as partners. Thus, A and B were two accredited agents of the New England Protective Union, A for the making of purchases, and B for the selling of produce. By the rules of the association, all purchases were required to be for cash, and not on credit, and this rule was known to both plaintiffs and defendants. A purchased from the plaintiffs goods to the value of $9,000 on credit, but without the knowledge of B. It was held, that no partnership existed between A and B, by which the latter could be compelled to pay the debts incurred by the former for the purchase of goods on credit without B's know-

also agreed "to allow Mr. B. one half of the profit arising from my account of insurances from the commencement of the said account

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ledge, in violation of the express terms of the partnership, known to the plaintiffs, and in the absence of any fraud or deception practiced upon them. Chapman v. Devereux, 32 Vt. 616.

In Smith v. Hollister, 32 Vt. 695, the defendant's evidence tended to show that B and W were not members of an association. Evidence tending to show that they were members was introduced by the plaintiffs. It was held, that it was properly submitted to the jury, as a matter of fact, to determine whether or not they were members, and that, in determining the question, their intent and understanding in relation thereto, at the time they were alleged to have become members, as gathered from the evidence, was a material consideration for the jury. In Bryant v. Wandell, 2 Exch. 479, under an agreement between the plaintiff and the defendants, that one C D should be employed by the "said parties hereto" for a certain time, and the plaintiff should be employed for a certain time also; and "that the said parties hereto" should be allowed to have the use of certain property for a certain period, and that, at the expiration of the agreement, the property should be given up to the plaintiff; it was held that the words the "said parties hereto" meant the defendants only, and therefore that the plaintiff was not a partner with the defendants in the goods. In Stocker v. Brocklebank, 15 Jur. 591, by indenture between the plantiff of the one part and the defendants, who were partners in a certain manufacture of which the plaintiff had been the patentee, of the other part, it was stipulated that the plaintiff should have the conduct and management of the business, and that the remuneration which he should receive in respect of his services should be such a sum of money as would be equal to £40 per cent upon the net profits; that a reduced amount should be paid to his executors, in the event of his death, until the expiration of the license; that the plaintiff might purchase the business on certain terms; that the defendants might determine the plaintiff's engagement as manager if he should not in every respect perform the covenants contained in the indenture, but that so long as he continued to observe them his appointment as manager should be irrevocable during the continuance of the license, and that nothing therein contained should extend to constitute a partnership; it was held, there being an absence of every incident of partnership except that of sharing in the profits, that that circumstance alone did not constitute the indenture a contract of partnership, but that it amounted only to a contract of hiring and service. The plaintiff being dismissed by the defendants from their service, filed his bill for an injunction to restrain the defendants from excluding him from the management; it was held, discharging the injunction which had been granted by the Vice-Chancellor, that the contract, being of hiring and service, was one of which specific performance could not be enforced.

The statement that the interest in the profits of a business, essential to constitute a partnership, must be an interest in them *as profits*, is a loose and indefinite statement of the rule. The rule really is, that there must be a specific, proprietary interest in them, existing as a right, as well before as after a division. An interest that, although not existing in a proprietary sense in the capital from which it arises, nevertheless gives to the party receiving them a right of control over the capital for the purposes for which it is employed to make profit, and not as a mere measure of compensation for services rendered. The real test was well expressed in Chapline v. Conant, 3 W. Va. 507, in which it was held that the true test to determine whether a participation in profits constitutes a partnership is, whether he acquired any property in, or control over, *or specific lien upon the profits of the enterprise, while they remained unascertained and undivided* in preference *to other creditors?* If he did, he is liable *quoad*, otherwise he is not. Whatever may be the rule as to the liability of persons participating in profits, to third persons, it is uniformly held that the profits, *as profits*, must be shared in or no liability exists. If the share of profits *is merely as a measure of compensation*, and as indicative of a sum which is to be paid for the services, when ascertained, and does not entitle the party to compel an accounting and division of profits, no liability as partner exists to

until the present period, or those that may hereafter be done," the parties, having acted on this agreement, were held to be partners in

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third persons. "The general rule," says the court in Berthold v. Goldsmith, 24 How. (U. S.) 536, "that actual participation in profits creates a partnership as toward third persons, between the parties sharing the profits, whatever may be the real relationship between them, has no application to a case of mere service or special agency, *where the employee has no power in the firm, and no such interest in the profits as will enable him to go into a court of equity to enforce a lien for the same, or compel an account. Unless such employee is in some way interested in the profits of the business, as principal*, he cannot be regarded as falling within the general rule, because, when not so interested, his condition is not different from that of an ordinary creditor." Griffith v. Buffum, 22 Vt. 181; Loomis v. Marshall, 12 Conn. 69; Noyes v. Cushman, 25 Vt. 390; Bowman v. Bailey, 10 id. 170. In Burckle v. Eckhart, 1 Den. (N. Y.) 337, a firm of merchants engaged in general business and trading, among other things, in provisions, employed a third person to attend to the purchase and forwarding of produce. He was to act under their orders *and have one-fourth the profits* arising out of the purchase and sale of the produce. A creditor of the firm sought to charge such person with liability as a partner, but the court held that his interest in the profits was merely as a measure of compensation for his services, and was not an interest in the profits themselves, and that he was not a partner in fact or *quoad*. Sustaining this principle see Shropshire v. Shepperd, 3 Ala. 733; Norment v. Hull, 1 Humph. (Tenn.) 320; Hodges v. Daws, 6 Ala. 215; Dunham v. Rogers, 1 Penn. St. 255.

In Reg. v. Wortley, 15 Jur. 1137, it was held that an instrument in the following form is a contract for service by a laborer, and not a contract of partnership: "A B engages to take charge of the glebe land of C D, his wife undertaking the dairy and poultry, etc. at 15s. a week till Michaelmas, 1850, and afterward at a salary of £25 a year, and a third of the clear annual profits, after all the expenses of rent, rate, labor, and interest on capital, etc., are paid on a fair valuation made from Michaelmas to Michaelmas. Three months' notice on either side to be given, at the expiration of which the cottage to be vacated by A B, who occupies it as bailiff, in addition to his salary." In Katsch v. Schenck, 13 Jur. 668, by a memorandum in writing, the defendant, a general merchant, agreed with the plaintiff, in consideration of the general services in business of the latter, to allow him, in addition to a fixed salary, one-fifth of the net profits on all new business entered into through him:—*Semble* a partnership was thereby constituted between the parties; and it was held by the VICE-CHANCELLOR OF ENGLAND, that at any rate the plaintiff thereby acquired a right, as against the defendant, to an account of profits, and the appointment of a receiver.

In Heyhoe v. Burge, 19 L. J. C. P. 243, a document, by which F and F agreed to give the defendant a share of the profits in a particular adventure, though insufficient in itself to constitute a partnership, for want of mutuality, was held good evidence, along with evidence of interference by the defendant, to prove that he was a partner.

In Butel v. Williams, 8 Exch. 623, A, B and C were railway contractors, in partnership, and had entered into a contract to do certain work for a railway company. D had entered into a subcontract to do part of the work, for which part bricks were required, and it was necessary that D should have coals to burn the bricks. In order to induce the plaintiffs to supply D with coals, A, without the previous knowledge or subsequent assent of his copartners, entered into a guaranty in the name of the firm, to secure the payment of the price of the coals to be supplied to D by the plaintiffs. It was held that B and C were not liable on the guaranty, and that the fact that the managing clerk of the firm, without the knowledge of B and C, wrote letters to the plaintiff, containing evidence of an account stated respecting the amount due under the guaranty, and was not a partnership business, the letters of the clerk respecting it were not evidence of an account stated as against B and C. But, if the contract contemplates an interest in the profits as such, and clothes the parties with the right to compel an accounting and division thereof, or if it contemplates a sharing in the expenses or losses, a partnership

the insurance business.[1] And where Thomas, a merchant at Cadiz and R., a merchant in London, were partners in an adventure, and

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quoad exists, even though there is no partnership in fact. Thus, in Holt v. Kernadle, 1 Ired. (N. C.) 199, an agreement was made between two persons to carry on a certain trade, one of them to contribute his labor, the other to furnish the materials necessary for the business, and to supply the laborer with provisions for himself and his family. Out of the profits of the business, the materials and provisions were first to be paid for, and the balance of the profits, if any, were then to be divided equally between the parties. It was held, that this constituted them partners, and rendered the laborer a necessary party in a suit brought for work and labor done in the course of the business, although, previous to bringing the suit, the parties may have dissolved the partnership, before enough profits had been realized to pay for the materials and labor, and although the laborer may have been indebted to the other for the provisions furnished to his family. It is always important in determining the question of partnership or no partnership, to ascertain whether the party sought to be charged occupied the relation of a principal to the others. That is, whether he had an equal right of control, or *any* control over the property. If so, he is a partner in the full sense of the term. Thus, in Farmer's Ins. Co. v. Ross, 29 Ohio St. 429, the defendants agreed that Ross should furnish the ground for a brick-yard, the clay to make bricks thereon, the lumber to protect the bricks while making, and the wood to burn them, and that one M. should burn the bricks at his own expense; the bricks when burned to be divided between them in a certain proportion subject to a certain sum that R. was to have for every 100,000 bricks. The bricks were to be sold by either of the parties, and the proceeds divided accordingly. It was held that they were partners and liable as such. In this case all the essential elements of a partnership were blended, to wit.: a participation in the profits, and the relation of principal and agent. In Bucknam v. Barnum, 15 Conn. 67, A, B and C, entered into articles of agreement with each other, to fit out an adventure to Texas, for the mutual benefit of all. A and B were to furnish all the capital and make the purchases here in their own names. B and C were to go out to Texas with the goods. C was to travel about the country there, dispose of the goods and procure remittances. B was to receive a certain sum per month for his services. C was to receive one-fifth part of the net profits of the adventure; and the remaining four-fifths were to be divided equally between A and B. It was held that A and B were liable as partners with C, especially as between them and third persons, who found them carrying on such joint adventure for their mutual benefit.

Receiving a commission on profits for the sale of goods does not constitute a partnership. Thus, in Dunham v. Rogers, 1 Penn. St. 255, a manufacturer entered into an agreement with the defendant, who was a country merchant, to furnish him with wooden handles made to order at certain prices, to be paid for out of the store, out of the proceeds of the handles, the manufacturer finding the labor and materials, and receiving a further compensation for skill and the rent of the storehouse, in the form of a commission of fifty per cent on the profits, it was held that no partnership existed. Beckwith v. Talbot, 2 Col. T. 639; Burton v. Goodspeed, 69 Ill. 237; Com. v. Bennett, 118 Mass. 443; Shepard v. Pratt, 16 Kan. 207; Pleasants v. Fant, 22 Wall. (U. S.) 116. L. bought a stock of goods, with fixtures and furniture, hired the building, and agreed with W. that W. should conduct the business in his own name, pay all the bills and a certain portion of the purchase-money, keep the stock good by new purchases, and if any thing was left after such disbursements the residue of the proceeds was to be equally divided between them, L. to have the right to take possession at any time. It was held that L. was liable as a partner for debts contracted by W. in conducting the business. Pratt v. Langdon, 12 Allen (Mass.), 544.

A contract under which a manufacturer is supplied with stock and materials which are to continue the property of the capitalist by whom they are furnished, although it is stipulated that the party who carries on the business

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[1] Knowles v. Haughton, Lib. Reg. 1804, A. 1008.

before the whole of that adventure was disposed of, the parties entered into a fresh arrangement, under the following memorandum:—"I do

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shall ultimately receive any surplus which may remain after reimbursing their cost to the party furnishing them, with interest or a percentage of profit by way of compensation for his capital, constitutes the relation of principal and agent, and not of partnership, and, if *bona fide*, is not contrary to the policy of the law. On the issue whether such arrangement is what on its face it purports to be, or is a mere cover to delay or defraud creditors of the agent, the burden of proof is on the party charging the fraud, and evidence is competent of any acts and declarations of the agent, tending to show that the property embraced in the agreement is his own; as his display of moneys, style of living, family outlay, and use of the property for paying expenses of other people's lawsuits. But in such case the following facts, standing alone and unexplained, are not *prima facie* evidence of fraud; that the agreement permits the agent to have control of the property, and a living for himself and family out of the business; or that at the time of the agreement the principal knew the agent to be insolvent; or that the agreement stipulates to terminate at the end of one year, but is renewed for several successive years, without any settlement or appraisal or account of receipts and expenses. Emmons v. Westfield Bank, 97 Mass. 230.

In Voorhees v. Jones, 29 N. J. L. 270, S and T having a contract to build a railroad, agreed to pay to C one-third part of the net profits of the contract when received by them, and also one-third of the net profits made from the running of the road when completed, as a compensation for his services in procuring the contract from the company, and for the benefit of his skill and experience in the construction of the road. It was held that C was not thereby made a partner in the firm. But C afterward sold and assigned "his interest" in the contract to D and J, the defendants, with whom S and T made a sealed agreement, referring to the assignment, and reciting that J and D had agreed to assist in raising money for the completion of the work, and agreeing that the price paid for the assignment should be paid out of the price for construction, and be charged to profit and loss before any division of the profits of the contract, and S and T thereby assigned and sold to D and J one-sixth part of the entire contract for the building of the road, and one-fourth part of the lease of the road, "it being the intention of this agreement to make the interest of D and J in all respects equal with S and T's interest in both said contract and lease." And it was held that thereby a partnership was created between the parties, not only as to creditors, but *inter se*, and that D and J were liable on a note given in the name of S and T. Where parties assume the relation of partners by a written agreement, parol evidence is inadmissible to show that one of them is not really a party to the contract, but has only allowed his name to be used as a substitute for that of a third person, who is the actual partner in his stead. And a person who becomes an ostensible partner, or is so *inter se*, is liable as such, although, by an agreement with a third person, such person is entitled to the partner's share of the profits; but a partner may show a sale of his interest, his retirement from the firm, and the substitution of his vendee in his stead.

There must be an interest in the profits as profits; (Ogden v. Astor, 4 Sandf. [N. Y.] 311; Pattison v. Blanchard, 5 N. Y. 186; Putnam v. Wise, 1 Hill (N. Y.), 234), and an agreement to share gross earnings does not create that relation. Heimstreet v. Howland, 5 Den. (N. Y.) 68; Pattison v. Blanchard, ante.

In Chase v. Barrett, 4 Paige's Ch. (N. Y.) 148, an agreement was entered into between a farmer and his sons and sons-in-law upon the other, that the latter should contribute their implements and stock and labor upon the farms of the former for a term of years, and that, at the end of the term, they should have half the personal property thereon, and that he would convey to them one-half of the land, it being apparently his intention to keep the title of the whole real and personal property in himself for the term. It was held that they were not partners. Nor an agreement whereby the profits are given as a measure of compensation to be paid for services; Putnam v. Wise, ante; Ogden v. Astor, ante; Vanderburgh v. Hull, 20 Wend. (N. Y.) 70;

agree to give Thomas half the profits he makes on my goods, instead of a commission, after shipping, freight, and every expense paid; I

Burckle v. Eckhart, 3 N. Y. 132; Dob v. Halsey, 16 Johns. (N. Y.) 34; Muzzy v. Whitney, 10 Johns. (N. Y.) 226; or for the rent or use of property. Thus where two persons entered into an agreement by which one was to furnish a certain amount of money to, and build a store for another, and take one-half the profits of the business to be carried on there in lieu of rent and interest, it was held that the parties were not partners *inter se*. Pinckney v. Kuyler, 4 E. D. S. (N. Y. C. P.) 469; Ballou v. Spencer, 4 Cow. (N. Y.) 163. In Heimstreet v. Howland, *ante*, a ferry was leased upon condition that the profits of running it should be divided between the lessor and lessee in lieu of rent. Held, not a *quasi* partnership.

An agreement by which one party is to furnish merchandise and pay the rent of a store, and the other to sell the merchandise for one-half the profits, does not constitute a partnership, for there is no community of losses. Lamb v. Grover, 47 Barb. (N. Y.) 317. A written contract by which the defendants engaged the plaintiff as salesman, which provided that the plaintiff should share the profits or losses of the business, at the rate of 17½ per cent; and that the arrangement should not convey to him the right of partnership in the firm, of signing the name of the firm, etc. It was held not to constitute the parties partners, as between themselves. Osbrey v. Reimer, 49 Barb. (N. Y.) 265. A partnership *inter se* is not created between the members of a prior partnership and a third person, by an agreement between them, whereby such third person agreed to furnish such information as he might obtain in regard to the probable action of the congress of the United States, in respect to duties on certain articles of merchandise (spices), and such firm agreed to purchase those articles to a specified amount when advised by him; furnish the funds or credit for the purchase of such articles; sell the same on joint account; and pay him one-half the net profits. Strong v. Place, 4 Robt. (N. Y.) 385.

In Ellsworth v. Pomeroy, 26 Ind. 158, A, being the owner of a number of land warrants, agreed with B that the latter should locate the warrants, and take the agency of the lands as A's attorney, and sell and dispose of the same, paying all necessary expenses of surveying and recording deeds. The title was to remain in A until the lands should be sold, and the first proceeds of sale were to be applied to reimburse to A the cost of the land, with ten per cent interest; afterward B was to be reimbursed for expenses paid by him, and the residue of the proceeds was then to be equally divided between A and B. It was further agreed that B was to be the sole agent for selling said lands; that they should all be sold within four years, and if any remained unsold at the expiration of that time, that B should make no claim to any interest in such lands. B further agreed to guaranty to A the return of his capital with interest. By a subsequent contract between the same parties, in reference to other lands, it was agreed that B should take the agency of the latter lands upon the terms mentioned in the former contract. A died before the expiration of the four years, and before all the lands had been sold. It was held that the contracts did not create a partnership, or invest B with any equitable interest in the land. The relation of the parties was that of principal and agent, and the portion of the profits to be received by the agent was merely a measure of compensation to be paid to him for his service.

When one shares in the profit *and* loss of a business or venture, it generally constitutes the persons so engaged partners *inter se*, but in any event they are *quasi* partners. Fitch v. Hall, 25 Barb. (N. Y.) 16; Sage v. Sherman, 2 N. Y. 418; Vassar v. Camp, 11 id. 441; Cumpston v. McNair, 1 Wend. (N. Y.) 457; Reynolds v. Cleveland, 4 Cow. (N. Y.) 282; Benners v. Harrison, 19 Barb. (N. Y.) 53; Dunham v. Jarvis, 8 id. 88; Mumford v. Nicoll, 20 Johns. (N. Y.) 211. So if one advances money to another, or any property, and the profit for its use is made dependent upon the accidents of trade, a partnership exists as to third persons although none exists in fact. Oakman v. Aspinwall, 2 Sandf. (N. Y.) 7.

An agreement between an inventor and another, that the former will contribute his inchoate interest in a certain invention, and the latter will furnish the money necessary to make the invention available, and that both will contribute their services to make it availa-

pay Thomas's passage out, February 29, 1809;" Lord Eldon held that, under this agreement, the parties were partners.[1]

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ble, is an agreement for a partnership and not for the sale of goods. Somerby v. Buntin, 118 Mass. 279. In this case there was a joint venture and each was equally interested in the failure or success of the enterprise, and in whatever name the patent might have been obtained, in equity, it would have been treated as partnership property. But, had the agreement been to have paid to the person furnishing the money a certain per cent of the profits as a compensation for the use of his money, and his services in promoting the success of the invention, the rule would have been otherwise. Thus, in an English case, Stocker v. Brocklebank, 1 M. & G. 250, the plaintiff was a patentee and the defendants were partners, and had obtained a license to work the plaintiff's patent. The agreement provided that the plaintiff would serve them as manager of their business, and that he should receive by way of salary such a sum as should equal £40 per cent of the profits of the business. It was expressly agreed between them that there should be no partnership. But, differences having arisen between them, the plaintiff claimed that he was, in fact, a partner. But the court held otherwise, the Lord Chancellor saying, "The contract is in express terms one of hiring and service, and the question thereof is, whether in the absence of every incident of partnership, except that of sharing in the profits, that circumstance constitutes a partnership, and I am of the opinion that, upon principle and authority, it does not. *There is nothing in common between the parties, neither capital, liability, or participation in the loss.* The plaintiff has neither the liability, the authority nor the interest of a partner, he could not be joined as a plaintiff in any legal proceeding to assert the rights of the partnership, nor could he be made defendant in respect of any partnership liability; and, as before stated, the contract throughout speaks of service, and requires him to obey directions at the peril of a determination of the contract. No principle was stated during the argument upon which the contract was contended to inure as a partnership, but the fact was frequently adverted to that the plaintiff was entitled to forty per cent upon the profits, before the firm was entitled to participate. Now, whether the plaintiff was to be paid one per cent upon the profits, or forty, would make no difference in principle, *and if the forty per cent was but a mode of measuring the amount of wages, salary, or remuneration, I do not think that its being contingent upon profits has any effect in creating a partnership.*"

In Geddes v. Wallace, 2 Bligh, 270, a similar rule was adopted; so, also, in Rawlinson v. Clark, 15 M. & W. 292, a similar doctrine was advanced. In that case the plaintiff sold the defendant his interest in his professional business of a surgeon, the defendant to pay to him a moiety of the clear profits of the business for one year, and a certain stipulated sum in addition at the end of the year, and it was held that the mere circumstance that the *profits* were to be divided did not create a partnership. It was contended for the defendant that in order to exclude the idea of a partnership, there ought to be an express stipulation that the party is to fill the character of servant only, and ex parte Hamper, 17 Ves. 404; Knowles v. Haughton, 11 id. 168; Collyer on Part. 22; and 3 Kent's Comm. 27, were cited, but Erle, J., said, "The introduction of Clark into the business might make Clark a partner *quoad alias*, but not necessarily so *inter se*." Maule, J., said, "Clark may be entitled to an account at the end of the year, in order to ascertain the amount payable to him, but that does not show that Rawlinson may not sue him for money had and received during the year."

Liability upon inchoate agreements.— In Pennsylvania it has been held in several cases that a loan at usurious interest to be paid out of the profits of the borrower's business, and secured by mortgage, does not constitute a partnership either *inter se* or *inter alios;* even though he reserves the option of becoming a partner at a future day, if he has never exercised the option, because a person cannot be charged as a partner upon an inchoate agreement that has never been completed. Boyd v. Hart, 1 Weekly N. C. (Penn.) 220; Irwin v. Bid-

[1] Ex parte Rowlandson, 1 Rose, 91.

Pooling of earnings.

SEC. 50. An agreement between different railroads, steamboat companies, or other corporations, whereby each agrees to operate its individual business, and divide the excess of earnings at certain periods, does not create a partnership so as to render the companies or individ-

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well, 72 Penn. St. 244; Hart v. Kelly, 83 id. 286; West Point Foundry Association v. Brown, 3 Edw. Ch. (N. Y.) 284; Hartman v. Wæhr, N. J. L. 388. The fact that persons have agreed to become partners does not render one liable for the acts of the other for any thing done by him *before* the partnership *in fact* was launched. In Duncan v. Lewis, 1 Duv. (Ky.) 183, A purchased a lot of mules on credit, which were to be delivered to him at a future day. Before their delivery A formed a partnership with B, and by agreement the mules were to become a part of the joint stock and sold on joint account. The surety on the note given by A for the mules, having paid the note, brought an action against B therefor. The court held that B could not be held chargeable as a joint purchaser. But if persons agree to form a partnership and actually proceed to carry the joint undertaking into effect, the relation of partners will exist as to third persons, although the conditions of the partnership are not understood alike by the partners. Cook v. Carpenter, 34 Vt. 121; Drennen v. House, 41 Penn. St. 30.

Letting land upon shares.—Where one lets a farm upon shares, he furnishing stock, a team and implements, and the lessee cultivates the land and defrays all the expenses of producing and harvesting the crops, the lessor and lessee are not partners, but merely occupy the relation of landlord and tenant. Randle v. State, 49 Ala. 14; 48 Ga. 425; 42 id. 226; Regina v. Wortley, 15 Jur. 1137.

Creditors running debtor's business for joint benefit, partners when.—Where creditors of an individual, firm, or corporation, advance the money to carry on the business of their debtor, for their own profit, they contributing the money and stock essential for that purpose, and mutually share the profits and losses resulting therefrom in proportion to the amount of their respective claims, they are copartners in respect to such business and jointly liable for all the debts created in its prosecution. Wills v. Simmonds, 51 How. Pr. (N. Y.) 58. In Price v. Groom, 2 Exch. 542, a horse-dealer and jobber, by a deed of trust, assigned all his stock in trade, etc., to certain trustees, for the benefit of his creditors, until all his then debts should be paid off, to hold on certain trusts, *inter alia*, that so long as A should observe the orders of the trustees he was to be allowed to carry on and conduct the business, subject to their orders, but that they should have the power to determine his possession on his failing to observe their orders; that all moneys received in the business were to be paid to the account of trustees, and all moneys paid by their checks; and that A was to receive a certain weekly salary. The creditors also advanced a large sum of money to carry on the business. The business was carried on by A for some time, his name being over the door at the place of business, and he had dealings with various persons as if he carried on the business on his own account; but on his neglecting to observe the orders of the trustees, they determined his right to carry on the business, and he admitted in writing that they had a right to and did assume the possession of the stock in trade, etc. The trustees thereupon gave notice to the parties who had some of the horses, part of the stock in trade, that they belonged to them. Two days after this notice, A committed an act of bankruptcy. On an interpleader issue to try whose horses these were, it was held that the deed did not create a partnership between A and the trustees; and that the trustees, by allowing A to carry on the business in his own name, were not estopped from denying the horses were A's.

Community of interest.—Community of interest does not create a partnership. Thus, a purchase of a horse, mill, threshing machine or other property, by two or more persons, for which each pays an equal share, or give their joint note, does not make them partners as to the property, but merely joint owners. Illiff v. Brazill, 27 Iowa, 181; Boecklin v. Hardenburgh, 37 N. Y. Sup. Ct. 110. Generally, it may be said that a person who participates in the profits of a business, *as profits*, is a partner as to third

uals thus pooling their earnings liable for the debts created by either of them, or for injuries resulting from the negligence of either.[1]

A contract between carriers of connecting routes to carry goods over the continued line and divide the freight money of goods so carried, is not a contract of partnership, and an action by one of them for freight will not be dismissed for the non-joinder of the other.[2]

B and J, having chartered certain vessels to proceed to the Lobos Islands for guano, agreed by contract, in consideration of valuable services rendered "them," in respect to the obtaining access to and procuring said guano by K, "to pay him a sum or sums of money equal to the quarter part of the net profits, on each and every vessel so chartered." It was held that this contract did not make K a partner in this enterprise.[3] But if there is an agreement to share the losses as well as the profits, although confined to losses arising in a particular way, or of a special kind, a partnership *inter se* is created. Thus, where two steamboat companies consented that each company should furnish a certain number of boats for freight and passenger business, of which the owners of each should retain the property and assume the risk; and that all losses, injuries or damages should be borne solely by the owners of the boat causing or sustaining them, except losses paid for injuries and damages on cotton shipped from a point on a certain river through to New Orleans, which should be a charge on the joint fund and be borne by the parties according to their respective interests, although the profits were to be divided monthly, and neither party was to make contracts injurious to the other, was held to create a partnership *inter se*.[4] In an Alabama case the plaintiff agreed to serve the defendant as overseer for one year, and to furnish and pay a certain number of hands, and have one-fourth the crop, and it was held not to be a partnership. So in Pattison v. Blanchard, 5 N. Y. 186, several persons owning horses and stages, and having their own drivers paid by each owner, entered an agreement

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persons, although not in fact a partner, but when the interest is merely as a measure of compensation for services, the relation in either sense is not created. Ditchie v. Becker, 6 Phila. (Penn.) 176; Edwards v. Tracy, 62 Penn. St. 374; Miller v. Bartlett, 15 S. & R. (Penn.) 137; Blight v. Ewing, 1 Pittsb. (Penn.) 275; Dunham v. Rogers, 1 Penn. St. 255; Porter v. McClure, 15 Wend. (N. Y.) 187; Loury v. Brooks, 2 McCord (S. C.), 421; Pattison v. Blanchard, 6 N. Y. 186; Cummings v. Mills, 1 Daly (N. Y.), 520; Fitch v. Hall, 25 Barb. (N. Y.) 15; Brown v. Robbins, 3 N. H. 64; Scott v. Colemensil, 7 J. J. Marsh. (Ky.) 181.

[1] Fay v. Davidson, 13 Minn. 523; Mohawk, etc., R. R. Co. v. Niles, 3 Hill (N. Y.), 162; Holmes v. Old Colony R. R. Co., 5 Gray (Mass.), 58.

[2] Merrick v. Gordon, 20 N. Y. 93.

[3] Benson v. Ketchum, 14 Md. 331.

[4] Meagher v. Cox, 1 Ala. 156.

to divide the gross earnings at the end of each month, in proportion to the distance over which they severally transported the passengers, and they were held not to be partners.[1] In a Massachusetts case a line of stage-coaches was run by the two defendants from Barre through Holden to Worcester, and back, and it was agreed that one of them should furnish and maintain horses and coaches, and receive the money paid for the transportation of passengers between Holden and Worcester, and that the other should do the like between Holden and Barre. They hired a man to drive all the way from Barre to Worcester, and back, for a certain sum per month, and perquisites; and money was delivered by the plaintiff to this driver to carry from Barre to Worcester, but he absconded without delivering it. It was held, that the driver was the servant of the defendants jointly, and that they were jointly liable for the money, and generally the proprietors of a stage-coach, whose practice of carrying parcels has constituted them common carriers, will be considered as copartners in that business; and all the proprietors will be jointly answerable for any loss arising from the negligence, or breach of trust, of either of them, in relation to the conveyance of any parcel.[2] Neither does an agreement between two or more persons to unite for a common object certain necessary articles, one furnishing one article and the other another, render them partners. Thus where A and B mutually enter into an arrangement for keeping house, by which B is to pay the house rent and butcher's bill, and A is to pay the other bills for the family expenses, they are not partners, and neither can bind the other for articles purchased by him to be used in pursuance of such agreement.[3] Where

[1] Moore v. Smith, 19 Ala. 774; but see Bostwick v. Champion, 11 Wend. (N. Y.) 571, where under a similar arrangement the owners of stages were held jointly liable for injuries to passengers.

[2] Cobb v. Abbott, 14 Pick. (Mass.) 289 Dwight v. Brewster, 1 id. 50.

[3] Austin v. Thomson, 45 N. H. 113. See Holmes v. Old Colony R. R. Co., 5 Gray (Mass.), 58, where it was held that a railroad company, which leased a hotel owned by it, to an individual, he to give it one-half the net proceeds arising from keeping the hotel, did not thereby become a partner with such person. In Baucus v. Pioneer Tow Line 2 Sawyer (U. S. C. C.), 21, the owner of a tug agreed with the owner of a barge that both vessels should be employed in a freighting business, the wages of the servants and the expenses of repairs to be paid out of the gross earnings, and the balance of profits to be divided between them in a certain proportion agreed upon. They were held partners. In this case there was a mutual venture, and the parties shared in the losses as well as in the profits of the business. So in a Georgia case, Halifield v. White, 52 Ga. 567, A furnished land and stock, and B furnished labor, but both shared in the expenses and profits, and it was held that they were partners, the case being distinguished from 42 Ga. 226, and 48 id. 425, upon the ground that in the latter, profits alone were shared.

the venture is not joint, and one person furnishes one article, and each of the others a different one, but all of which are indispensable to the prosecution of the enterprise, the fact that they agree to share the profits of the business in which the separate stock of each is combined, does not make them partners, *inter se*, nor necessarily, as to third persons, unless they have held themselves out as such. Thus, three persons agreed verbally that they would bring out and be jointly interested in the publication of a periodical. A was to be the publisher, and make and receive general payments, B was to be the editor, and C the printer; and after the payment of all expenses, they were to share the profits equally. C was to furnish the paper and charge it to the account at cost price. No profits were ever made, nor any accounts settled. A purchased paper in his own name for the purpose of being used by him in printing the periodical, and it was held that B and C were not jointly liable with A for the paper.[1] It was held in this case, that the proper inquiries, to which the attention of the jury should be directed, were first, whether there had been a direct contract between the plaintiff and the defendants; second, whether the defendants were in fact partners, and third, whether they had ever held themselves out as partners to the plaintiff, and the jury having negatived all the inquiries, it was held that no recovery could be had. But in another case growing out of the same relation,

[1] Wilson v. Whitehead et al, 10 M. & W. 543. See, also, Austen v. Ellingwood 51 How. Pr. (N. Y.) 48. In this case there was no partnership *inter se*, because the arrangement between the parties upon its face and in terms precluded the idea that such was their intention, and, as the paper was furnished upon the credit of A alone, and there was no evidence to show that the defendants had ever held themselves out as partners, they could not be held liable *as* such. In order that a person may be held liable to third persons as a partner, where there is no partnership in fact, he must have held himself out as such, or permitted those with whom he is sought to be made chargeable to have done so, so that third persons in dealing with the firm or the individual had a right to regard him as jointly liable for the debts of the concern. If they knew, or ought to have known, that he was not a partner, and was not liable for the debts of the concern, he cannot be held chargeable under any circumstances. Thus, the names of the defendants appeared with their consent, in the prospectus of a projected emigration company, the one as president, and the other as a member of the "consulting counsel." The management of the undertaking was to be placed in the hands of six commissioners; and there was a further proviso in the prospectus, that no peer or baronet who should become a vice-president should be liable, as such, to the expenses of the association. The defendants had agreed to take shares in the same, upon a certain number being subscribed for. That number was not subscribed for, no deposits were paid, and the company was never formed. In an action against the defendants for maps furnished by the plaintiff, at the request of the secretary, it was held that they were not liable, the jury having negatived that there was any direct contract between the parties, that there had been any partnership between the defendants and others, or that the defendants had held themselves out to the plaintiff as members of the association.

Woods v. Argyll (Duke), 7 Scott, N. R., 885, 6 M. & G. 928.

so far as the defendant was concerned, it having been proved that the defendant had attended meetings for the purpose of forming the company, and had as chairman put resolutions carrying out that purpose, *and in pursuance of which the work was done*, it was held that these acts were proper to be considered by the jury as evidence from which they might find that the defendant held himself out as a partner, *even though the company was never formed according to its intended constitution.*[1] But where the defendant has not held himself out as a partner in order to fix his liability for a debt created by one with whom he has agreed to enter into partnership, it must not only be proved that there was an agreement to share the profits and losses, but also that the persons entered into some business under such agreement.[2] The proposition previously stated, that the venture must be joint, was well illustrated in a Michigan case, in which two persons entered into an arrangement by which one agreed to deliver to the other certain hay, which the latter agreed to transport to market and sell the same if he could, at not less than a certain fixed price per ton. From the amount received he was to deduct the expenses of freight and trouble, and pay the balance over to the other party. All excess, above the minimum sum fixed as the price at which the hay should be sold, received therefor, was to be equally divided between the parties. If he failed to sell the hay, he was to store it for the other party, and wait for his freight until the hay was sold; and it was held that this did not constitute the parties partners *inter se* or *inter alia.*[3]

In a Colorado case, certain cattle were delivered to the plaintiff and two others, to be kept for a time, when they were to be sold by the defendant under an agreement that, after deducting the first cost of the cattle, he was to retain one-half of the remainder of the proceeds, the other half to be equally divided between the plaintiff and the other persons. It was held that there was no community of profit and loss, or ownership, and, consequently, no partnership. Upon performance of the contract by the plaintiff and such persons, who were to have the care and herding of the cattle, each became entitled to his separate share of the proceeds of the cattle, and each could have maintained a separate action for the defendant's failure to perform, consequently there was an entire absence of any of the elements req-

[1] Lake v. Argyll (Duke) 14 L. J. (N. S.) 295.

[2] Lucas v. Cole, 57 Mo. 143.

[3] Morrison v. Cole, 30 Mich. 102.

uisite to create a partnership.[1] In a Maine case, where an agreement was entered into under which A was to furnish money, teams and supplies for cutting and hauling certain timber, and B was to superintend the same, A was to have three-fourths of the profits besides stumpage and interest on his advances, and B one-fourth. It was held that they were not partners.[2]

Profits as a measure of compensation.

SEC. 51. The result of these authorities appears to be that, when two persons agree simply to share the profits of a trade or adventure, they will be partners in those profits; but that, if one be a mere servant or agent of the other, and receive his share of the profits in lieu of wages, then, as there is no mutuality between the parties, they are not partners. And the distinction seems not to be unreasonable; for, if, on the one hand, it be said that A and B agree to divide the profits, and, on the other, that A agrees to give B one-half of the profits as a remuneration for his trouble, these two modes of expression convey very different notions of the rights existing between the parties. In the former case, the natural inference is that A and B have equal rights in *all* that concerns the profits, though one only may possess the capital. In the latter case, the inference is that A has the sole control over the entire concern, subject to account to B for his share of the profits. It seems clear that B, in the two situations supposed, will be invested with very different rights and privileges. But though such may, at first sight, appear to be the result of the majority of decided cases on this subject, the principle which Lord Eldon applied to the decision of these nice questions, appears to have arisen from a different and certainly a more subtle and refined view of this branch of partnership law. And it must be admitted that his Lordship's *dicta* on this subject have received the sanction of the most eminent practitioners at the bar. His Lordship seems to consider the mere words of the agreement, in reference to the profits, and not the actual situation of the parties, to be the criterion of partnership in these cases; and he rests his opinion on the various decisions on the subject. "The cases," he says, "have gone farther to this nicety, upon a distinction so thin, that I cannot state it as established upon due consideration, that, if a trader agrees to pay another person for his labor in the concern a sum of money, even in proportion to the prof-

[1] Beckwith v. Talbot, 2 Col. T. 639. also, to the same principle. Morrison v.
[2] Braley v. Goddard, 49 Me. 115; See Cole, 30 Mich. 102.

its, equal to a certain share, that will not make him a partner; but, if he has a specific interest in the profits themselves, as profits, he is a partner."[1] And, again—"It is clearly settled, though I regret it, that if a man stipulates that, as the reward of his labor, he shall have, not a specific interest in the business, but a given sum of money, even in proportion to a given *quantum* of the profits, that will not make him a partner; but, if he agrees for a part of the profits, as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner."[2] And again—"The ground is settled, that, if a man, as a reward for his labor, chooses to stipulate for an interest in the profits of a business, instead of a certain sum proportioned to those profits, he is, as to third persons, a partner."[3]

These *dicta* of Lord Eldon, although corroborated by the observations of other judges,[4] do not seem to have been warranted by any express decision anterior to his Lordship's own judgments. They are, however, generally admitted to be correct statements of the law on this subject, and are the foundation of some decisions, which it is necessary to notice in this place.[5]

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[1] Ex parte Hamper, 17 Ves. 404.

[2] Id. 412.

[3] Ex parte Rowlandson, 1 Rose, 91; and see Ex parte Watson, 19 Ves. 459.

[4] See the *dicta* of Lord Ellenborough in Mair v. Glennie, 4 M. & S. 240; but that case was decided after ex parte Hamper.

[5] Thus, in Ex parte Langdale (18 Ves. 300), the question was, whether the brewers who had supplied the bankrupt with beer were to be considered as partners, in respect of their participation of the profits, under their agreement; which, according to their representation, was, that they were to pay half his rent, supplying him with beer at 4*l.* 5*s.* *per* barrel—the usual price being 3*l.* 8*s.* The bankrupt's account of the agreement was, that the brewers were to have, out of the profits, 17*s.* *per* barrel for the half of the rent, the bankrupt taking the rest, of which 5*s.* was for drawing the beer, and 1*s.* for collecting the money. Lord Eldon said, he could not refuse to let this case go to a jury. The agreement to sell their beer to him at a higher price than to others, would not make them partners; but the bankrupt's representation was very different. If the actual contract gave a claim upon the profits, or the application of them, that was partnership. If there was no claim upon the profits, or the application of the profits, then it was not partnership.

Again, in Ex parte Wheeler (Buck. 48), Lord Eldon, in holding a person to be a partner, proceeded on the principle that he received an annuity, not merely with reference to the profits, but out of the profits.

Again, in Ex parte Digby (2 Mont. & A. 735), the question was, whether B was partner with A, under the following circumstances: It appeared that the business was carried on in the sole name of A, and that B had been retained by him as a clerk, or agent, at a salary of £100 a year; and that afterward, by a new arrangement between the parties, B was to have a moiety of the profits of the business, as a compensation for his services. There was, however, no agreement in writing constituting him a partner, nor any entry in the books of the business, from which that circumstance could be implied; and it did not appear, that he brought any capital into the concern, or had any interest in the stock in trade, which was purchased with the separate money of A; and, while the alleged partnership was going on, B carried on a separate

In Hotchkiss v. English[1] an agreement was entered into, under which one party was to sell rights under a patent owned by the other, and to have one-half the profits for selling; and the court held that they were not partners. In all cases, in order to constitute a partnership there must be a reciprocal agreement by the parties, *not only to unite their stock but to share in the risks of the business*, and, although goods are bought by several persons under an agreement to hold them in aliquot shares, and with the intention of subsequently being used as partnership stock, yet, until the agreement to become co-partners is consummated, they are treated as mere joint owners of the goods and not as partners.[2]

In a recent case in New York,[3] A advanced money to B (an attorney) to buy prize claims, under an agreement that B should collect the claims and have half the profits for his services, and it was held that they were not partners. But where one engages in the management of a business, *ostensibly* as a partner, he will be held liable as such to those who do not know his real relation to the firm, although he is not a partner in fact.[4]

In an early Massachusetts case,[5] the defendant entered into an arrangement with one Dinnett to loan him four thousand dollars and let him have the use of it three years, to be employed in trade by himself, or in partnership with such person as he might select, the net profits to be equally divided between them, Dinnett's share of the profits to be

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trade on his own account, as a dealer in hops. There was contradictory evidence with respect to B's own declarations on the subject. He sometimes said, he was a partner in the business, and, at other times, that he was only an agent of A; but it appeared, that, subsequent to the new arrangement made with him by A, by which he was to have a share in the profits of the business, he acted as a referee in a matter of controversy between A and a customer of the house, and received a fee from A for so acting. Upon these facts, notwithstanding that the case of Smith v. Watson, 2 B. & C 401, was cited as an authority the other way, the Court of Review held, that a partnership existed between A and B.

Where A and B carrying on business together as attorneys, agreed that B should receive annually out of the profits the sum of £300, but he was not in any manner to be liable to the losses of the business, and was to have a lien on the profits for any losses he might sustain, by reason of his liability as a partner, the Court of Exchequer inclined to the opinion, that this was a partnership *inter se*, but it was unnecessary to decide the point. Bond v. Pittard, 3 Mees. & W. 357.

Where trustees, by virtue of a deed of assignment made to them by their debtor, carry on the trade of their debtor upon trust out of the profits thereof, after paying the expenses of the assignment and of carrying on the business, to retain and pay the surplus profits to and among themselves, and the other creditors executing the deed, the trustees and creditors executing the deed are partners in the business carried on for the purposes of such trusts. Owen v. Body, 5 Ad. & Ell. 28.

[1] 4 Hun. (N. Y.). 369.

[2] Baldwin v. Burrows, 47 N. Y. 199.

[3] Prouty v. Smith, 51 N. Y. 594.

[4] Slea v. Matthews, 50 N. Y. 166.

[5] Bailey v. Clark.

in full satisfaction for his services. It was held that they were not partners *in fact*, whatever might be their liability to third persons, and it may be said that a mere participation in the profits of a business does not make the parties partners *inter se*. As to third persons, the relation may be raised by operation of law, but as between the parties, the actual intention of the parties will alone create the relation.[1]

[1] Hazard v. Hazard, 1 Story (U. S. C. C.), 871.

CHAPTER II.

OF THE CONTRACT — (*Continued.*)

SEC. 52. Receiving interest or annuity for money lent to the firm does not make the person receiving it a partner.
Note 1. Money loaned to be used as capital.
Note 1, pp. 95, 100, 103. Tendency of American courts to adopt English rule.
Note 1, pp. 98, 101. English rule as embraced in Bullen v. Sharp, and other cases.
Pennsylvania doctrine—Hart v. Kelley, p. 100.
Illinois—Smith v. Knight; Lintner v. Milliken. p. 101.
Ohio—Harvey v. Childs, p. 100.
SEC. 53. Rule in Grace v. Smith.
SEC. 54. When the amount is uncertain or dependent on accidents of trade.
SEC. 55. Contingent interest in profits.
SEC. 56. May be partnership in any lawful business.
SEC. 57. Cannot be partnership in mere personal office.
SEC. 58. Particular adventures.
SEC. 59. Trade must be lawful.
SEC. 60. Must not involve breach of the law.
SEC. 61. Rule in Booth v. Hodgson.
SEC. 62. Money advanced for formation of illegal partnership.
SEC. 63. Courts of equity will not aid parties—Aubert v. Maze.
SEC. 64. Rule in Watts v. Brooks.
SEC. 65. Debts arising from notes illegally issued.
SEC. 66. Effect of repeal of certain English statutes.
SEC. 67. Contract intended to evade usury laws.
SEC. 68. Rule in Morse v. Wilson.
SEC. 69. Rule in Morisset v. King.
SEC. 70. Rule in Gilpin v. Enderbey.
SEC. 71. Rule in Fereday v. Hordern.
SEC. 72. Contrary rule in Brophy v. Holmes.
SEC. 73. When persons are restricted by law from entering into partnership.
SEC. 74. Partnership in business when either is not legally qualified.
SEC. 75. Cases illustrating.
SEC. 76. Partnership in business requiring license.
SEC. 77. Must infringe the law in order to be void.
SEC. 78. Rule in Brown v. Duncan.
SEC. 79. Rule founded on principles of policy.

Receiving a fixed and certain interest, or an annuity for money lent to firm, does not make the person receiving it a partner.

SEC. 52. A person receiving interest or an annuity, certain as to amount and duration, for money lent to a firm, enjoys no mutuality of profit with the firm, and, consequently, is not a partner. Cases of this kind generally occur either upon the retirement of a partner leaving a sum of money in the firm, or upon the decease of a partner who bequeathes an annuity to his widow out of the profits.[1] It has been

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[1] D. Eyre, C. J., in Waugh v. Carver, 2 H. Bl. 235. "This case has been extremely well argued, and the discussion of it has enabled me to make up my mind, and remove the only difficulty I felt, which was, whether, by construing this to be a partnership, we should not determine, that, if there was an annuity granted out of a banking-house to the widow, for instance, of a deceased partner, it would make her liable to the debts of the house, and involve her in a bankruptcy. But I think this case will not lead to that consequence."

Money loaned to be used as capital — share of profits for use of.—In New York it is held that a loan of money to be used in the business of a firm, under an agreement that the lender shall share in the profits of the business, makes him a partner *per se* as to the creditors of the firm, although he is not in fact a partner and has no control over the business. Leggett v. Hyde, 58 N. Y. 272; 17 Am. Rep. 244; Mason v. Partridge, 66 N. Y. 633, and there can be no question but that this was formerly the rule sustained by a long line of authorities. But this doctrine has been much modified latterly in England as well as by the courts of several of the States of this country, and the weight of modern cases supports the rule that *a loan of money to a firm, to be used in the prosecution of their business under an agreement that as a consideration therefor the lender shall be paid a share of the profits, does not per se make him a partner, or liable to third persons* as *such*, unless he has held himself out as a partner, or permitted others to do so. Dean v. Harris, 32 L. T. (N. S.) 33; Mulroo v. Court of Wards, L. R. 4 P. C. 419; Gilpin v. Enderby 5 B. & Ald. 594; Cox v. Hickman, 8 H. L. Cas. 268; Grace v. Smith, 2 Wm. Bl. 998; Hart v. Kelley, 83 Penn. St. 286; Fariday v. Hordern, Jac, 144; Delaney v. Timperlake, 23 Minn. 383; Alfonso v. De La Torre, 24 W. R. 510; Williams v. Soutter, 7 Iowa, 445; Hallett v. Desbau, 14 La. An. 529; Smith v. Knight, 71 Ill. 148; Harvey v. Child, 28 Ohio St. 31. Particularly is this the case when it appears that the primary object is to give security to the lender, as a creditor of the firm, or as a measure of compensation for the loan, Mulroo v. Court of Wards, L. R., 4 P. C. 419, even though there is an agreement that the lender may, if he so elects, become a member of the firm within a certain period, if he has not elected to do so. In Davis, Ex parte, 4 De G., J. & S. 528; 33 L. T. (N. S.) 639. A loaned B £2,000, as capital, to enable him to develop a coal mine and iron mines, the lease of the mines to be deposited with A as security; for the advances A was to be paid 3*d* per ton on all coal and iron stone, by way of commission. B was to receive a salary which was not to commence until A's advances were all repaid. After such advances were repaid and all the rents and royalties and cost of raising and preparing the same, A was to be entitled to three-fourths, and B to one-fourth the residue. B worked the mines under the name of a company. It was held that they were not partners. Ellis v. Ward, 21 W. R. 100; Irwin v. Bidwell, 73 Penn. St. 244. A right to participate in the profits of a business is a strong test of partnership, and there may be cases where it would be decisive, upon the question of liability to third persons; but as to whether there is a partnership *in fact*, is one that necessarily depends upon the *intention* of the parties. Mulroo v. Court of Wards, *ante;* Eastman v. Clark, 55 N. H. 238. The rule relative to loans to firms, or individual members thereof, may be said to be *that a loan, which is in fact a loan, to be repaid in any event with interest, however exorbitant, does not create a quasi partnership between the lender and borrower, unless profits are expressly pointed at as the fund for its repay-*

clearly decided, that, if a person retire from a firm, leaving money in the hands of the firm, for which he receives interest at £5 per cent, and an annuity for a term certain, then (laying aside the question of usury), he is only a lender to the partnership, and not a partner.

Rule in Grace v. Smith.

SEC. 53. In Grace v. Smith,[1] Smith and Robinson entered into a partnership for seven years. After a few months, their part-

ment. That is, *the fact that a share of the profits is given to the lender as a consideration for its use does not create a quasi partnership unless the repayment of the principal is made to depend upon the success of the venture.* Lindley on Part., vol 1, p. 40; Grace v. Smith, *ante;* Gilpin v. Enderbey, 5 B. & Ald. 964 Fariday v. Hordern, Jac. 144; Mulroo v. Court of Wards, *ante;* Cox v. Hickman, 8 H. L. Cas. 268; Dean v. Harris, 32 L. T. (N. S.) 33; Hart v. Kelly, 83 Penn. St. 286; Delaney v. Timberlake, 23 Minn. 383; Pleasants v. Fants, 22 Wall. (U. S.) 116; Smith v. Knight, 71 Ill. 148; 22 Am. Rep. 95; Harvey v. Childs, 28 Ohio St. 319; 22 Am. Rep. 387. In Pleasant v. Fants, 22 Wall. (U. S.) 116, in a suit to charge the defendant as a partner with one K, for debts incurred by him, it was held that the fact that the defendant had procured a loan for him to be used in the purchase of cotton, and that the defendant voluntarily had promised to give him a share of the profits, if any were made, for his assistance in procuring the loan, did not constitute them partners. In a recent English case, Meyer v. Shacher, 38 L. T. Rep. (N. S.) 97, by an agreement between the plaintiff and the trading firm of S. Brothers, the plaintiff agreed to pay them 2000*l.*, which was to be invested in the purchase of a steamer to be used for the purposes of trade. For this sum the plaintiff was to receive interest at the rate of five per cent and to have an one-eighth interest in the steamer, *i.e.*, to have one-eighth of the annual results after all expenses of equipment, ten per cent on the value of the steamer for depreciation, and the five per cent for interest, had been deducted therefrom. The plaintiff also agreed to pay to S. Brothers the sum of 4000*l.* within a year from the date of the agreement, and upon making the latter payment was to become interested in all the business of the firm of S. Brothers to the extent of three-sixteenths of the whole, and was to cease to have the said one-eighth interest in the steamer. The plaintiff paid to them various sums at different times, but never enough to cover the 4000*l.* agreed to be paid. It was held that this agreement did not constitute the plaintiff a partner with the firm of S. Brothers in respect of the steamer. If an arrangement is entered into by which one person furnishes capital and another furnishes labor, the profits to be equally divided, and the person performing the labor is to pay interest on one-half of the capital, a partnership as to third persons exists, although it is expressly agreed between the parties that they shall not be partners; Bringham v. Clark, 100 Mass. 430; Wood v. Valette, 7 Ohio St. 178; Edwards v. Tracey, 62 Penn. St. 387; Marks v. Stern, 11 La. An. 509; Noyes v. Cushman, 35 Vt. 396; Whitney v. Luddington, 17 Wis. 141; Wright v. Davidson, 13 Minn. 449; Fitch v. Harrington, 13 Gray (Mass.), 472; Pratt v. Langdon, 97 Mass. 97; Weaver v. Tapscott, 9 Leigh (Va.), 424; Sheridan v. Medara, 10 N. J. Eq. 475. But an agreement between a patentee and a third person that, in consideration of the right to make and sell the patented article, such person will give him one-half the profits, does not render them partners; Wheeler v. Farmer, 38 Cal. 203. So it has been held that when A leases to B a manufacturing establishment, B to furnish capital and labor and give A one-half the profits; the books to be open to inspection by B, and the profits to be divided periodically, a partnership *inter se* and as to third persons is created; Ward v. Beath, 23 Wis. 254; Dalton City Mfg. Co. v. Dalton Mfg. Co. 33 Ga. 243. But, where one person purchases goods, and gives another a certain proportion of the profits for selling

[1] 2 Sir W. Bl. 99.

nership was publicly dissolved. The terms of the dissolution were, that all the stock in trade, and debts due to the partnership, should be carried to the account of Robinson only; that Smith was to have back £4200 which he brought into the trade, and £1000 for the profits then accrued since the commencement of the partnership; that Smith was to lend Robinson £4000,

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them, it is held that no partnership relation is created; Darley v. Hall, 5 Bush (Ky.), 549; Edwards v. Tracy, 62 Penn. St. 374; Strong v. Place, 4 Robt. (N. Y.) 385; Munson v. Hall, 6 Grant's Ch. App. Cas. 63; Reynolds v. Hicks, 1 Ind. 115; Bullor v. Paillas, 10 Martin (La.), 86; Atherton v. Felton, 44 N. H. 56; Pomeroy v. Sigerson, 22 Mo. 177; Smith v. Wright, 5 Sandf. (N. Y.) 119; Bradley v. White, 10 Metc. (Mass.) 304; Allen v. Dunn, 15 Me. 294. In Whitney v. Luddington, 17 Wis. 140, L agreed to lease to W and T, for eleven months, a steam saw-mill, in which the latter were to make certain improvements and repairs, and to run the mill with due diligence, and L was to advance $1,000 for making such improvements and repairs, and to bear one-third of the expense of the same above that sum. The lumber, when manufactured, was to be shipped to Chicago to some one whom L should designate, to be sold; and the proceeds, after paying freight, to be applied as follows: seventy-five cents per M feet to be paid L on account of rent of the mill; $1.75 per M to be paid W and T as expenses of manufacturing the lumber; from the residue L was to be paid any advances made by him for logs to stock the mill, with interest. After all expenses for logs and for manufacturing, shipping, and selling the lumber, were paid, W and T were to pay L one-fourth of the net proceeds of the business. It was held that, under this contract, L, W and T were partners, and jointly liable as such for repairs to the mill. In Schoeffler v. Schwarting, 17 Wis. 320, S, the owner of a printing office, advertised that he had taken one W. into partnership. After W's death he had the property inventoried and appraised, and gave his notes for the purchase-money of W's interest to the latter's administrators. Afterward S denied the partnership, in defending an action on the notes, and produced two witnesses who recollected that, ten or twelve years before, shortly after the alleged partnership commenced, W in a casual conversation admitted that he was not a partner of S. The witnesses could give no reason why they could recall the conversation, and they could remember none of the circumstances in connection with it. It was held that the court below erred in deciding that no partnership existed. An agreement by which one advances money to another, upon condition that he or any person whom he may nominate shall be received as a partner within a certain time, does not make the person making the advances a partner, before the time for making the election has arrived. Davies, Ex parte, 4 De G., J. & S. 528; Ellis v. Ward, 21 W. R. 100; Irwin v. Bidwell, 72 Penn. St. 244. When a loan is made to a person or a firm, and a proportion of the proceeds of the business is given to the lender, he cannot be charged as a partner, *if from the whole agreement it appears that the primary object was to give security to the lender as a creditor of the person or firm.* Mulroo v. Court of Wards, L. R., 4 P. C. 419. In this case, however, the court said: "A right to participate in profits is a strong test of partnership, and there may be cases where from such participation alone, it may, as a presumption of fact, be enforced; but in all cases, whether such relation does in fact exist, *depends upon the intention of the parties.*" An agreement between two persons to divide the profit *or* loss upon a sale of goods which are to be bought and paid for by one of them, does not create a joint property. Alfero v. De La Torre, 24 W. R. 510.

The doctrine that he who shares in the profits of a business shall be held chargeable as a partner, whether he is so in fact or not, is unreasonable, unjust and never had any foundation either in reason or policy. The idea that he shall be held chargeable because he takes so much from the funds from which the debts of the firm should be paid is utterly baseless, because, until after all the obligations of the firm are provided for, there are no profits to divide. Particularly is this so as to all the obli-

part of this £5200, or let it remain in his hands for seven years, at £5 per cent interest, and an annuity of £300 *per annum* for the same seven years; for all which, Robinson gave a bond to Smith. Robinson advanced to Smith £600, for two years' payment of the annuity, and other sums, by way of interest and gratuities, and other large sums, at different times, to enable him to pay the partnership

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gations assumed during the period that the agreement to divide the profits exists. To say that one who loans money to enable the firm to prosecute the business shall be held chargeable as a partner to third persons, if he is to have a share of the profits as compensation for the favor, either in whole or in part, is unjust, because it subjects him to liability to those who have not relied upon it, and because, if no profits are made, he receives nothing, and consequently has taken nothing which should properly have gone to the creditors. If profits are earned, then the fund, during that period, is ample for the payment of creditors.' It is impolitic, because it prevents business men from making advantageous loans for the prosecution of their business, and thus retards rather than accelerates business. In England the rule has been repudiated, and many of the courts in this country are advancing in the same direction.

In Bullen v. Sharp, L. R., 1 C. P. 86, S, being about to commence business as an underwriter at Lloyd's, through the agency of one Fenn, in consideration of the defendant (the father of S) engaging with Fenn to hold a sum of 5,000*l.* available for his son for the purpose of carrying out the arrangement, gave the defendant the following memorandum: "In consideration of your guaranteeing me to the extent of 5,000*l.* in my business of underwriter, until by such business I shall make or acquire from the profits thereof, 5,000*l.* after providing for all known losses, I hereby promise and agree to pay to you during your life, in case I shall so long live, an annuity of 500*l.*, being equal to 10*l.* per cent per annum on 5,000*l.*; and, further, that, if at the end of three years from the date hereof, it shall appear that one-fourth of the net average annual profits during that period made by me in the said business shall amount to more than 500*l.*, the said annuity shall thenceforth be increased to a yearly sum equal to one-fourth of such net average annual profits made by me in the said business during the said three years;" and the memorandum concluded with these words: "moreover, in no case are you to be considered as a partner with me in the said business of an underwriter." It was held by the Exchequer Chamber, in accordance with the judgment of the court of common pleas, that the above memorandum did not constitute the defendant a partner with his son. By a settlement afterward made on his marriage, S assigned to the defendant and one D, as trustees, "all and singular the sums of money, earnings, *profits*, and emoluments which are now in the hands of Fenn, and all such as shall hereafter come into the hands of Fenn, on account or in respect of the said underwriting business." The deed also contained a power of attorney authorizing the defendant and his co-trustee to receive the *whole proceeds of the business;* and the first trust was, to pay the defendant 500*l.* a year, with an additional sum when the profits of the business should have realized a given sum, and a covenant, that, when the accumulated profits have reached 8,500*l.* and continued at that amount without reduction for two years, the trustees should re-assign to S "the said moneys and *profits* arising from the aforesaid underwriting business."

In an action upon a policy signed by Fenn in the name of S, a special case was stated in which were set out the above-mentioned memorandum and marriage settlement, and by which it was agreed that the court should draw any reasonable inferences of fact; upon these facts it was held by the majority of the Exchequer Chamber, reversing the judgment of the court below, that the marriage settlement did not, either alone or in conjunction with the memorandum, render the defendant liable as a partner with S in his underwriting business.

Channel, B., in the course of an opinion delivered by him in the case, said: "In all cases, the reason for which a man is held to be liable as being a partner in a business, for contracts not per-

debts, Smith having agreed to receive all that was due to the partnership, and to pay its debts, but at the hazard of Robinson. Robinson having become bankrupt, and an action being brought against Smith, for goods sold and delivered to the partnership, and the jury having found that the annuity was not payable out of the partnership profits, the question was, whether Smith could be considered as a dormant

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sonally entered into by him, is to be found in the fact of the relation of principal and agent being assumed to exist between partners. Whatever doubt the cases of Grace v. Smith, 2 W. Bl. 998, and Waugh v. Carver, 2 H. Bl. 235, may have given rise to, must be taken, I think, to be set at rest by the case of Cox v. Hickman, 8 H. L. C. 268, in the House of Lords. Of course we are bound by the ratio decidendi. It is to be collected principally from the judgments of Lord Cranworth and Lord Wensleydale, with whose opinions the other learned lords who took part in the decision entirely agree. I think that henceforth we may take it that the true test, where a person is sought to be made liable on the ground of his being a partner, is, to see whether he has constituted the other alleged partner his agent in respect of the partnership business; and that, taking a part of the profits, though cogent evidence of this, is not conclusive. *Mere participation in the profits is not sufficient to make a man bound by alleged partnership contracts, if the facts show that he had not constituted the other his agent.* Now, in the present case, taking the facts stated in the case to be the actual facts, I cannot see any agency constituted. It is clear, in the first place, that care was expressly taken that it should not be done; and certainly none can be implied from the conduct of the defendant, on the ground of his having held himself out as a partner, for, it is stated that the plaintiffs did not at the time of the insurance know the facts upon which it is now sought to make the defendant liable. In what other way, then, could authority be conferred? Only, as it seems to me, if the facts showed that the business was really the business of the defendant, carried on for his benefit, and not for that of his son, or for his benefit together with that of his son. In that case, having accepted the benefit of contracts made on his behalf where beneficial, he would be precluded from repudiating the authority of the person making them where they proved unprofitable. Such a state of things does not, however, appear from the case, as the facts are there stated. It was the business of the defendant's son. The defendant received an annuity of 500*l.*, in consideration of his guarantee or advance of 5,000*l.* If the business had prospered, the surplus would have gone to benefit the son; always assuming the facts stated to be the real facts, and not colorable. It is true that the defendant, as one of the trustees of the marriage settlement referred to in the case, was to receive the profits; but, in considering the effect of this, we must look at the trusts of the deed and the nature of an underwriter's business. The trustees had not to manage the business, as the trustees of the creditor's deed in Cox v. Hickman, 8 H. L. C. 268, had; they had to apply the funds, first, in payment of 500*l.* a year to Sharp, sen., the defendant. This, if we accept the statement in the case as to its origin, is a mere debt incurred by Sharp, jun., in obtaining capital to start him in his business. So far, there is a mere mortgage of profits, which according to Cox v. Hickman, will not make the mortgagee liable. Next, there is to be a payment of 500*l.* a year to Sharp, jun., on which, I think, nothing turns, in considering the liability of Sharp, sen. Then comes the trust for the accumulation or reserve fund. This is to provide for the losses which in this particular business are to be expected in some years to exceed the profits, and which must be paid out of capital or accumulated profits of previous years. Can the fact that the profits are to be paid to the trustees for such a purpose as this make the business that of the trustees, any more than an agreement to pay them to a particular bank would make the bankers partners? If profits had been made, and the money accumulated, no doubt those funds could have been made available for the benefit of creditors; but the question here is, no profits having been made, can the acceptance by the trustees of the trust to

partner, after the dissolution. The Court of Common Pleas held he could not. De Grey, C. J.—"If any one advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits; he relies on them for repayment; and there is no difference whether that money be lent *de novo*, or *left behind*

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take the profits and hold them for such a purpose, without any powers of management, make the business that of the trustees and carried on on their behalf? I think it cannot."

In Dean v. Harris, B took a lease of coal mines, and not having capital to work them, entered into an agreement with H to the following effect: H was to advance 2,000*l.*, to be repaid with interest at ten per cent per annum, security to be given by deposit of the lease; after payment of rents and royalties, and a salary to B, the profits were to be divided in the proportion of three-fourths to H, and one-fourth to B; H to be free from all liability, except for money advanced. H died, and creditors sought to make his estate responsible for debts contracted by B in the mining business. It was held that there was no evidence of a partnership, and the estate was not liable. The rule that sharing the profits is the criterion of a partnership has been entirely repudiated in England. See Wheatcroft v. Hickman, 8 H. L. Cas. 268; In re English and Irish Church Society, 1 W. R. 681; 8 L. T. (N. S.) 724. *The test there is, whether the alleged partner constituted the other his agent for carrying on the business. Partners are mutual agents and principals.* In this country, agents and servants employed in a business may participate in profits as a compensation for services, without incurring the liability of partners. But, as a general rule, the courts here hold, that an agreement to furnish money and share in the profits makes one a partner, and liable for the debts of the partnership, independent of any private agreement. Leggett v. Hyde, 58 N. Y. 272; Manhattan Brass Co. v. Sears, 45 id. 797; Parker v. Canfield, 37 Conn. 250. But in several of the American States the English doctrine has been adopted. England v. England, 11 Alb. L. J. 55; Eastman v. Clark, 53 N. H. 276; Lintner v. Milliken, 47 Ill. 178; Hart v. Kelley, 83 Penn. St. 286; Delaney v. Timberlake, 21 Minn. 383; Harvey v. Childs, 28 Ohio St. 319; 22 Am. Rep. 387; and Smith v. Knight, 71 Ill. 148; 22 Am. Rep. 95. In Harvey v. Childs, *ante*, one Potter having contracted for two car loads of hogs, applied to the defendant to loan him the money to pay for them, which he did, under an arrangement that the defendant should take possession of the hogs at their place of destination, sell them, and after reimbursing himself for his loan, the profits should be equally divided between them. The defendant, however, in *any* event, was to be reimbursed for the money advanced. The money ($2,500) was given to Potter, who, instead of paying for the hogs, bought them upon his own credit. The defendant sold the hogs in pursuance of the arrangement, and appropriated the money to reimburse himself the sums advanced. No profits were made. The plaintiff, of whom the hogs were purchased by Potter, brought an action against the defendant to recover their price, upon the ground that he was a partner with Potter in the transaction. It was held that he could not recover, the court recognizing the doctrine of the English cases, before referred to, as embodying the true doctrine and tests of partnership as to third persons. "The relation of the parties," said Day, J., was that of debtor and creditor, of bailor and bailee, and not that of partners. They had no mutual interest in the hogs in common, *as principals or proprietors, nor was either acting as principal for himself and agent for the other.* If, however, that relation could be said to exist after the hogs were delivered to Childs, there is no ground for an inference that the debt to Harvey, previously contracted by Potter, was incurred upon the authority of Childs." See similar in facts and doctrine, Adams v. Funk, 58 Ill. 219.

In Hart v. Kelley, 83 Penn. St. 286, Paxson, J., said, "The rule of law formerly prevailing, that participation in the net profits of a business made a participant liable to third parties, as a partner, has been greatly modified in England and in this country. Thus in Dean v. Harris, 33 L. T. (N. S.) 639, and

in trade by one of the partners who retires. I think the true criterion is, to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment. The jury have said this is not payable out of the profits; and I think there is no foundation for granting a new trial." Blackstone, J., concurred, and thought the true question in these

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Dean v. Butterfield, id., Butterfield, who was a person of small means, applied to Harris to advance him money for the purpose of developing certain mines. Harris consented to lend Butterfield 2,000*l*., upon certain terms, to wit, that B having entered into an agreement to take a lease of the Lycett mines, that the said mines be worked under the style and firm of The Lycett Mining Co.; that the said H find money to work the mines to an extent not exceeding 2,000*l*.; that the said money shall be repaid with 20 per cent interest; the said H to be paid 3*d*. per ton on all coal and iron stone, by way of commission. The said B. to be paid 200*l*. per annum by way of salary, but not to take date until the sum or sums advanced by said H. be repaid; said B to promote the interest of the concern, and continue in receipt of salary so long as he should conduct the business to the satisfaction of H. After payment of the above, and costs of raising and preparing, and delivering to market, the product of said mines, said H shall be entitled to three-fourths of the profits, and all the net proceeds of the concern to be disposed of in the like proportion; said H to be free from all liability except in respect of the money advanced by him. The Vice-Chancellor held, that there was no partnership, saying, "All that H did was consistent with his character as capitalist, assisting B in carrying on business. All that is said to constitute a partnership. If it could, it would be most unsafe for any man to lend a tradesman any sum of money and to look after the best means he could get for its repayment. Malbroo v. Court of Wards, L. R., 4 P. C. 419, is perhaps a stronger case than Dean v. Harris. To the same point is Cox v. Hickman, 8 H. L. Cas. 268." In Pennsylvania, by statute, Purdon 1,121, pl. 15, it is provided that a loan of money, taking a share of the profits of a business in lieu of interest, shall not render a person liable as a partner except as to the money loaned. In commenting upon the question whether a participation in the profits under such circumstances constituted a partnership, Paxson, J., said, "The participation in the profits might make him one, but not necessarily so. *It would depend upon the intention of the parties as expressed by the terms of their agreement.* There were to be no profits divided until the advances were repaid."

In Lintner v. Milliken, *ante*, certain parties, partners in Decatur, having an idea that money could be made in the manufacture of cultivators, but having no capital to engage in the business, induced a banker in that city to advance the necessary funds An agreement was entered into by which the manufacture should be carried on by the parties applying for pecuniary aid, who should sell the machines, collect the proceeds, and return to the banker his advances, and account to him for one-third the profits. The banker advanced something over $8,000. Receiving no returns, he brought an action against the other parties therefor, which was sought to be defeated upon the ground that they were partners, and an action at law could not be maintained. But the court held that no partnership existed, and that their relation was merely that of borrower and lender.

In Smith v. Knight, *ante*, the question was raised directly between a third person and the person sought to be charged as partner. In that case one Hennersheets was doing a general commission business in Chicago, and to aid him Knight, Baker & Co. agreed in writing to advance money to him from time to time, not to exceed in the aggregate at any one time $7,000. Hennersheets was to repay the advances with interest at ten per cent per annum on the average balance advanced, and, after deducting a certain amount of office expenses, to divide the balance of commissions *equally* between them, share and share alike. But it was expressly agreed that they were not to be liable for any of the losses of the business. As a further security for the advances, Hennersheets assigned to the defend-

cases was, whether the profit or premium was certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case it was a *loan* (whether usurious or not, was not material to that question), in the latter, a *partnership*.

In the case of Grace v. Smith, the annuity was payable simply in consideration of the money lent. Nothing was said as to its being payable in consideration of the annuitant's relinquishing the profits

ants his books, accounts, notes, drafts, or claims which he had or might thereafter have against any person or persons for advances, commissions or otherwise, and upon request, to deliver them over to them. There was no stipulated time during which the arrangement should continue. The court held that they were not partners, and that the defendants could not be held liable for debts created by Hennersheets in the business. The case of Leggett v. Hyde, *ante*, was different from the foregoing cases, in that the money was advanced as capital in a general business, and was to be returned with a share of the profits made during the time, at the end of a year. Under such circumstances, as was said by Day, J., in Harvey v. Childs, *ante*, "It may well be implied that the business was to be conducted on behalf and by the authority of the person advancing the money and sharing the profits, for it is to the *continuing* trade, in the ordinary way, that he looks for his profits."

In all cases a person seeking to charge one as a partner, by operation of law, takes the burden of establishing the relation, and must establish it by proof that warrants the inference that the persons were either partners *inter se* or as to third persons. Harvey v. Childs, *ante;* Warren v. Chambers, 12 Ill. 124; Smith v. Knight, *ante*. From the cases referred to it will be seen that there is a strong tendency on the part of the courts in this country to follow the modern doctrine of the English courts, and predicate the test of partnership upon the question whether the relation of principal and agent exists rather than upon a mere participation in profits, and the justice of the doctrine commends itself in opposition to a rule that has been productive of much hardship, and that has measurably inconvenienced business men in raising capital with which to carry out their enterprises.

The New York courts hesitate to adopt the rule, because it feels itself bound by a long line of decisions. Leggett v. Hyde, *ante*. The same objection stood in the way of the English courts (Cox v. Hickman, *ante*), but the court brushed it aside, and the new rule was regarded with so much favor that Parliament enacted it into the statutes, rendering it impossible for the courts to recede from it. Its adoption by the courts of this country would prevent much conflict and confusion, and greatly aid the business interests of the country. That the rule will ultimately be generally adopted by our courts would seem to be indicated by the late cases involving the question, previously referred to.

The circumstances attending the loan, the purpose and intention of the parties to be gathered from what was said and done, the nature of the business, etc., are proper to be considered. Thus, in Parker v. Canfield, 37 Conn 250, 9 Am. Rep. 317, the defendant and one Hutchinson became interested in business with one Andrews. From time to time, during 1865, they furnished him with capital under an arrangement that each of them (Canfield & Hutchinson) should furnish $5,000, and should have one-sixth of the profits of the business, and that the arrangement continue until September 1, 1868. In January, 1866, they applied to counsel to draw up an agreement between them, and then ascertained that this arrangement would make them partners. Then it was agreed that the money invested by Canfield & Hutchinson should be treated as a loan, and the notes and agreements were accordingly drawn. The court held that the facts shew that the defendants were both partners *inter se*, and as to third person while acting under the *verbal* agreement, and that, after the writings were drawn embodying the agreement entered into in January, 1866, they ceased to be partners *inter se*, but still remained liable as partners as to third persons, and consequently liable for the plaintiff's debt that was created after the writings were made.

of the firm. But, even if an annuity were granted expressly "in lieu of the profits," as these words would, of themselves, negative the presumption that the annuity was paid out of the profits, or that the parties intended to be partners, it seems clear, that a person would not be held a partner, who receives an annuity in lieu of the profits, but which neither varies in its amount with the profits, nor depends, in its duration, on the term of the partnership. And it may be remarked, that, in a case where a person retired upon an annuity, receiving also a percentage on the profits of the trade, this person was held to be a partner, by reason of the latter stipulation, and not of the former.[1] If, however, a person were to receive an annuity in lieu of the profits of a trade, and determinable on the event of the trade ceasing, it seems clear that he would be considered a partner with the grantor of the annuity.[2]

When the amount is uncertain, or dependent on accidents of trade.

SEC. 54. So, if a person, in compensation for money lent with or lent to a firm, receives an annuity varying in its amount with the profits, he is clearly a partner in the concern. Thus, where, upon his retirement from the business, A, one of several partners, assigned all his share of the trade to trustees, upon trust to pay an annuity of £50 a year to himself for life, and after his death to his wife for life, and, upon the death of the survivor, in trust for their infant children: And it was stipulated that, if the proceeds of A's share should not be sufficient to pay the annuity of £50 a year, then that it should abate proportionably; or, on the other hand, if his share so assigned should amount in value to £5,000, then that the annuity should be increased to £100; Lord Eldon held, that A was still a partner in the concern; that he certainly must be taken to have retired from the business, reserving an interest in the profits of the trade; for the annuity he reserved was not merely an annuity, the amount of which was calculated with reference to the then present profits, but it was to be paid out of the profits, and to be subject to abatement or enlargement as the profits might fluctuate. His partnership, therefore, was never determined.[3] So, where A & B who carried on business as brewers in partnership, having borrowed a sum of money of C, joined with C in executing a deed, by the express terms whereof a partnership stock was created, in which they had all a joint property, but it was agreed

[1] Young v. Axtell, cited 2 H. Bl. 242.
[2] See Bloxam v. Pell, 2 W. Bl. 999.
[3] Ex parte Wheeler, Buck, 48.

that C was not to have any definite aliquot proportion of the profits, but he was to have an account of the profits, so as to get £2,000 or £2,400 a year, as the case might be, out of the clear profits; it was held, that C was a partner.[1]

Contingent interest in profits.

SEC. 55. A contingent interest in the profits will make a man a partner *pro tanto*, though he may have parted with every other interest as a partner. Thus, where a retiring partner assigned all his share in the concern, which was still to continue liable to the fluctuations of trade, to two of the remaining partners, in trust for his infant children in such shares as he should appoint, and, in default of appointment, upon trust for the children, to be divided amongst them when the youngest should attain to twenty-one, it was held, that the contingent interest which the father had in the share so assigned depending on the death of any of the children under twenty-one, was such an interest reserved by him in the concern as prevented the determination of the partnership.[2]

May be partnership in any lawful business.

SEC. 56. Not only all traders, but other persons who do not come strictly under that denomination, may be partners. One might suppose, from the words of Lord Mansfield, that he considered it essential to the constitution of partnership, that the partners should be amenable to the bankrupt laws; for, in a case in which he decided that a conveyancer was liable as a partner, his words are: "incident to conveyancing, is the *receiving of money* to place out upon securities—receiving it from the lender to advance to the borrower, and acting for both parties respectively. From that the profit arises; not from procuration-money, but from the money lying in their hands before it is placed out; and, when placed out, from charges and fees for drawing and engrossing the conveyances."[3] But, liability to the bankrupt

[1] Ex parte Chuck, 8 Bing. 469.
[2] Ex parte Wilson, Buck, 48.
[3] Willett v. Chambers, Cowp. 817.

A valid partnership cannot exist in an illegal enterprise, as for the sale of obscene publications. Sterry v. Clifton, 9 C. B. 110. Or generally for any enterprise that is prohibited by statute, or that is *malum in se*. Such partnerships are void, as being prohibited by the express provisions of law, or because they are against public policy. Aubert v. Mazi, 2 B. & P. 371. Thus, a partnership formed for the purpose of trading with an alien enemy; Evans v. Richardson, 8 Mer. 469; Griswold v. Waddington, Johns. (N. Y.) ; for selling liquor without a license, for keeping a gaming house, for keeping a bawdy house, for smuggling, robbing, stealing, or doing any other unlawful or immoral act. Sterry v. Clifton, *ante*. See Wood's "Law of Master and Servant," chapter on ILLEGAL CONTRACTS. It might be supposed that the interposition of the courts would never be sought to enforce a partnership formed for felonious purposes, but Mr. Evans in his notes to

laws is not a necessary ingredient in a partnership. Therefore, it has been held that there may be a partnership between attorneys or between farmers.[1] And perhaps it may be laid down

Pothier's Obligations, Vol. 2, p. 3, gives an instance where a suit was instituted by a highwayman against his companion, to compel him to account for his share of the plunder. The case is also published in the European Mag. 1787, Vol. 2, p. 360.

Contracts that have for their object the encouragement of manifest crimes, such as murder, theft, perjury, personal outrage, prostitution, etc., can never receive the aid or sanction of the courts, Marchioness of Annandale v. Harris, 2 P. Wms. 339; Priest v. Parrott, 2 Ves. 160; Walker v. Perkins, 3 Burr. 1568; and the same may be said of every transaction involving the violation of a plain public or private duty, as a contract involving a violation of the revenue laws of the country; Holmes v. Johnson, Cowp. 341; Biggs v. Lawrence, 3 T. R. 454; or a fraud upon the government. Bartle v. Coleman, 4 Pet. (U. S.) 184. In Wallis v. Baldwin, Doug. 450, a person who contracted to keep horses for the government, contracted with another person, who was under contract to supply him with forage, to commute a part of the forage, for money, and the contract was held void, as a fraud upon the public. "No power of words," said Lord Mansfield, "can so head this case as to make it appear otherwise than as a foul agreement between the parties. The question is not whether the plaintiffs may not find out a method of cheating the government, although they should take the forage, *but whether what they have done is not a method of cheating the government.*" It is a well-settled rule of law, that to all contracts, tending to contravene the law, statutory or common, or which are repugnant to justice, or are opposed to public policy, the maxim *ex turpi contractu actio non oritur*, applies. And this is the case, whether the contract provides for the doing of an act which it is the duty of a person not to do, or for omitting to do an act which the law makes it his duty to do. Wood's Law of Master and Servant, 390; Devlin v. Brady, 36 N. Y. 551; Winter v. Kinney, 1 id. 365; Cumpston v. Lambert, 18 Ohio, 81; Ayer v. Hutchins, 4 Mass. 370; Randle v. Harris, 6 Yerg. (Tenn.) 509. "Public morals, public justice, and the well-established principles of all judicial tribunals," said Baldwin, J., "alike forbid the interposition of courts of justice to lend their aid" to the enforcement of the rights of partners engaged in an unlawful or immoral business. Bartle v. Coleman, 4 Pet. (U. S.) 184. In that case an officer and agent of the government contracted with a person for the rebuilding of Fort Washington, and by the terms of the contract was to have a share of the profits of the job. The frauds upon the government, by which at least a part of the profits were to be realized, were detected and prevented. B, who took the job, brought a bill against a partner in the transaction, for his share of the loss sustained in the prosecution of the work. The court held that it could not and would not lend its aid to protect partners in such transactions. But, if a business is in part lawful, and in part unlawful, it is held that the courts will take jurisdiction over that part of it which is lawful, and appoint a receiver therefor to settle the affairs of the firm; Anderson v. Powell, 44 Iowa, 20; but where the business is wholly unlawful, or *malum in se*, the courts will not interfere to aid either party. As where the business is prohibited. Harris v. Runnels, 12 How. (U. S.) 79; Nourse v. Pope, 13 Allen (Mass.), 87; Bank of Rutland v. Parsons, 21 Vt. 199; Coburn v. Odell, 30 N. H. 546. The fact that a penalty is imposed for the doing of certain acts does not necessarily render the act illegal, unless from the whole statute it is evident that the penalty was not intended as the measure of punishment. National Ex. Bank v. Moore, 2 Bond (U. S.) 170; Griffith v. Wells, 3 Den. (N. Y.) 226; Rossman v. McFarland, 99 Ohio St. 369. If the act is intended to be prohibitory, all contracts made in contravention of it are illegal and absolutely void. Kennett v. Chambers, 14 How. (U. S.) 39; Brackett v. Hoyt, 29 N. H. 264; Lester v. Howard Bank, 33 Md. 558; Wil-

[1] 1 H. Bl. 37. *Potest denique societas contrahi unius rei, veluti si prædium communi consensu conducatur, et fructus inde quæsiti sint communes.* Vinn. Comm. lib. 3, tit. 26, s. 1.

generally, that a partnership may exist in any business or transaction which is not a mere personal office, and for the performance of which payment may be enforced. Thus, where two ship

liams v. Tappan, 33 N. H. 209. The validity of a contract will depend upon the state of the law at the time when the contract was made, and if it is subsequently made illegal, by statute, all acts done under it *up to the time when the statute took effect*, will be valid. Bradford v. Jenkins, 41 Miss. 328; Mays v. Williams, 27 Ala. 267; McCauley v. Brooks, 16 Cal. 11; Bailey v. Miner, 35 Ga. 350; Darling v. Rogers, 22 Wend. (N. Y.) 483; Bagg v. Jerome, 7 Mich. 145; Judah v. Trustees, etc., 16 Md. 56. In order to be invalid and illegal, the partnership *must necessarily involve the violation of a statute, or the common law, or be contra bonos mores*, and if it is of a character that it may, or may not be so, according to circumstances, it will be presumed that it only involved the doing of that which is lawful, and not only its illegal purpose, but actual illegal acts, must be shown, to take it outside the pale of legal protection. Lewis v. Davison, 8 M. & W. 654; Avery v. Halsey, 14 Pick. (Mass.) 174. A partnership, in order to be illegal, must contemplate a business in violation of the laws of its domicile. The fact that it contemplates the violation of the laws of another state or country does not render it illegal, as a contract which involves the running of a blockade established by another government; or the violation of the revenue laws of another country.

Mr. Lindley, Vol. 1, p. 153, in discussing the questions incident to this topic, summarizes thus:

1. It is not illegal for persons, however numerous, to enter into an ordinary contract of partnership.

2. It is not illegal for all those persons to agree that one of them shall retire, and that a person who is not a member of the firm, but who is willing to become one, shall take his place.

3. It is not illegal for partners, however numerous, to agree once for all that any partner who is willing to retire shall be at liberty so to do, and to introduce in his place any person selected by himself.

4. It is not illegal for an out-going partner of a firm established on this last principle, to retire in favor of an in-coming partner, upon any terms to which they both agree, provided those terms are not themselves illegal.

5. It is not illegal for an out-going and in-coming partner to agree that the latter shall pay the former more or less than he paid when he entered the firm.

6. It is not illegal for the members of a partnership to assume a name, Ex parte Grisewood, 5 Jur. (N. S.) 1191, and to agree that the management of its affairs, both external and internal, shall be intrusted to a select few, and that those few shall have the power to make rules which the others will obey.

If these propositions are assented to, it will, it is conceived, be found impossible to establish the illegality at common law of unincorporated joint-stock companies with transferable shares. See Walburn v. Ingilby, Cooper, temp. Brougham, 270. To say that such a partnership is illegal, because it assumes to act as a corporation is untrue, because none of the above acts are characteristic of corporations. What distinguishes corporations from other bodies is their independent personalty, and no society which does not arrogate to itself this character can be fairly said to assume to act as a corporation. Besides this, it is by no means clear that it is illegal at common law to assume to act as a body corporate. See 6 Man. & Gr. 107, E. C. L. R. 46, where Tindal, C. J., says, "I am not aware that presuming to act as a body corporate was an offense at common law." To assert that unincorporated companies with transferable shares are mischievous and dangerous, and therefore illegal, is to assert a proposition the truth of which has not yet been established, and which therefore cannot be admitted as the basis of a judicial inference. This ground of illegality would probably not have been relied upon so much had it not been for the technical rules of pleading requiring all the members of a firm, however numerous, to be made defendants to actions and suits against the firm. This rule undoubtedly created difficulties in dealing with large bodies of persons unless they were incorporated; but if the question is reduced to this, viz., whether the rule, or a company to which it is inapplicable, most deserves to be characterized as mischievous, the question must surely be answered in favor

agents[1] agree to share in the commission on all ships coming to their respective ports, after deducting expenses; and also in the discount on the bills of tradesmen employed in the repairs

of the company and against the rule. The rule, however, being established as law, the judges felt bound to adhere to it, and then finding it difficult to deal with unincorporated companies, declared them mischievous and illegal. As will be seen hereafter, the difficulty presented by the rule in question has been, to a great extent, removed.

Consequences of illegality.—If a partnership, when it is formed, will be illegal, any contract to form it must be illegal also. Upon this ground it was held in Duvergier v. Fellows, 5 Bing. 248, that a bond for the payment of money upon the formation by the obligee of an illegal company was invalid; and in Williams v. Jones, 5 B. & C. 108, that no action lay for the recovery of a premium agreed to be paid by the defendant on being taken into partnership with the plaintiff, and which partnership was illegal. It does not, however, follow from the fact, that an agreement to form a given partnership or company is illegal, that those who subscribe to its formation cannot recover back their subscriptions. If money is paid by A to B to be applied by him for some illegal purpose, it is competent for A to require B to hand back the money if he has not already parted with it. See Taylor v. Lendy, 9 East, 49; Varney v. Hickman, 5 C. B. 271. Although, therefore, the subscribers to an illegal company have not a right to an account of the dealings and transactions of that company and of the profits made thereby (see Harvey v. Collett, 15 Sim. 332), they have a right to have their subscriptions returned; and even though the money subscribed have been laid out in the purchase of land and other things for the purpose of the company, they have a right to have that land and those things re-converted into money, and to have it applied as far as it will go in payment of the debts and liabilities of the concern, and then in repayment of the subscriptions. In such cases, no illegal contract is sought to be enforced, but, on the contrary, the continuance of what is illegal is sought to be prevented. In a recent case (Sheppard v. Oxenford, 1 K. & J. 491; see, too, Butt v. Monteaux, id. 98. If in these cases the companies were really illegal, they must be regarded as modifying the general proposition, that a court of equity will not assist a person to get back property which he has transferred to another for some illegal purpose. See Brackenbury v. Brackenbury, 2 J. & W. 391; Groves v. Groves, 2 Y. & J. 163, a company was started for working mines in Brazil. The members subscribed each a certain sum and received a sort of script certificate specifying the number of shares to which each was entitled. Mines, buildings, plant and shares were bought, and at a meeting of the subscribers the defendant and another were appointed sole directors and trustees of the property of the association. Disputes having arisen, a bill was filed against the defendant (his co-trustee being dead) by one of the shareholders in behalf of himself and the others for an account of the moneys received and paid by the directors, and of the debts of the association, and for the payment of those debts out of its assets, and for a division of the profits among the shareholders, and for an injunction to prevent the defendant from selling the property, and for a receiver. It was contended that the company was illegal, and that no relief could be given; but it was held that the defendant as trustee could not dispute the trust on which he had accepted the property, and a demurrer to the bill was overruled, and a receiver and manager was appointed. If a partnership is illegal, shares in it cannot be recognized, and contracts for the sale of such shares are themselves illegal. Therefore, a broker employed to buy shares in an illegal company cannot recover the price he may have paid for them from the person for whom he bought them; Josephs v. Pebrer, 3 B. & C. 639; nor can the latter, if he has paid the broker and the shares have been bought, recover back any part of the money so paid, although the broker may have been guilty of a fraudulent overcharge; Buck v. Buck, 1 Camp. 548; but if the purchaser of the shares has paid the broker for them, the broker cannot retain the money against the

[1] Waugh v. Carver, 2 H. Bl. 235; and see Bovill v. Hammond, 9 D. & R. 186; 6 B. & C. 149.

of the ships; and also in the warehouse rent taken by each party for the ships' coming into port; it was held, clearly, that a partnership might well exist between such persons. "A ship-agent," ob-

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seller. Bousfield v. Wilson, 16 M. & W. 185.

Again, as a contract for the sale of shares in an illegal company is itself illegal, it follows that a purchaser of such shares who may have paid for them cannot recover back his money if it should ultimately turn out that the company is no company at all, but a project which has failed. See Kempson v. Saunders, 4 Bing. 5, E. C. L. R. 13. In the next place, if a firm is illegal, its members cannot maintain any action or suit in respect of any transaction tainted with the illegality. For example, if a partnership is formed for selling smuggled goods, it cannot recover the price of any smuggled goods which it may have sold. See Briggs v. Lawrence, 3 T. R. 454. But the illegality of a partnership affords no reason why it should not be sued. It cannot indeed be effectually sued by any person who, being aware of all the facts, seeks to enforce a demand arising out of a transaction tainted with the illegality which affects the firm; but the illegality of the firm does not *per se* afford any answer to a demand against it arising out of a transaction to which it is a party, and which transaction is legal in itself. Unless the person dealing with the firm is *particeps criminis*, there can be no *turpis causa* to bring him within the operation of the rule *ex turpi causa non oritur actio;* and he not being implicated in any illegal act himself, cannot be prejudiced by the fact that the persons with whom he has been dealing are illegally associated in partnership. See Brett v. Beckwith, 3 Jur. (N. S.) 31, M. R. So, if a partnership or company has been established by fraud, and persons have been induced to join it by false and fraudulent representations, still the fraud so perpetrated affords no answer to a creditor of the firm (Henderson v. The Royal British Bank, 7 E. & B. 356), unless that creditor has himself been party to the fraud. See Batty v. M'Cundie, 3 C. & P. 203. Moreover, where a company has been concocted in fraud, and where it has been engaged in illegal transactions, the innocent shareholders thereof are nevertheless liable amongst themselves to contribute, if necessary, to the payment of the debts of the company; for such shareholders are not so *in delicto* that no one of them is entitled to call on the others to share losses to which he and they are liable. See Longworth's Ex. case, 1 Johns. 465. The most important consequence, however, of illegality in a contract of partnership is, that the members of the partnership have no remedy against each other for contribution or apportionment in respect of the partnership dealings and transactions. However ungracious and morally reprehensible it may be for a person who has been engaged with another in various dealings and transactions to set up their illegality as a defense to a claim by that other, for an account of them and for payment of his share of the profits made thereby, such a defense must be allowed to prevail in a court of justice. Were it not so, those who—*ex hypothesi*—have been guilty of a breach of the laws, would obtain the aid of the law in enforcing demands arising out of that very breach, and not only would all laws be infringed with impunity, but, what is worse, their very infringement would become a ground for obtaining relief from those whose business it is to enforce them. For these reasons, therefore, and not from any greater favor to one party to an illegal transaction than to his companions, if proceedings are instituted by one member of an illegal partnership against another in respect of partnership transactions, it is competent to the defendant to resist the proceedings on the ground of illegality. See Holman v. Johnson, 1 Cowp. 243; Thomson v. Thomson, 7 Ves. 470; Cousins v. Smith, 13 id. 544. There are indeed some old cases in which this defense was not allowed to prevail, Dover v. Opey, 2 Eq. Ca. Ab. 7; Watts v. Brooks, 3 Ves. 611; but they have been long overruled. See the cases cited *infra*. Moreover, if the illegality is brought to the notice of the court, it will of its own accord decline to interfere between the parties, although there may be no desire on their part to urge such an objection. Evans v. Richardson, 3 Mer. 469. When partnerships of marine insurers were illegal, it was held that if one member of a firm of such insurers paid all the losses sustained by the firm, he could not re-

served Eyre, C. J., "employs tradesmen to furnish necessaries for the ship; he contracts with them, and is liable to them; he also makes out their bills in such a way as to determine the charge of commission

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cover any part of the money paid from his copartners, Mitchell v. Cockburn, 2 H. Blacks. 380; and that if the premiums were received by one only, the others could not obtain their shares from him. Booth v. Hodgson, 6 T. R. 405. So, where there was an express covenant to pay such shares, the covenant was held to be invalid by reason of the illegality which tainted it, Lees v. Smith, 7 T. R. 338; and even where an arbitrator had awarded what was to be paid by one partner to the other, it was held that the award could not be enforced. Aubert v. Maze, 2 Bos. & P. 371. These cases are of undoubted authority, and are always referred to as such, although the particular ground of illegality on which they rested no longer exists. It has indeed been held, in one or two cases of illegal partnership, that if one partner has paid losses at the special request of the other, who promised to pay his share afterward, an action for such share may be sustained, see Petrie v. Hannay, 3 T. R. 418; Faikney v. Reynous, 4 Burr. 2070; but these cases cannot be reconciled with others, and must be taken to be overruled. In a comparatively recent case, the plaintiff and the defendant entered into an illegal agreement for bringing out an opera, and dividing the profits arising from it. By the agreement the plaintiff was to pay the singers, and the defendant was to provide a theater and pay the dancers. This was done, but instead of profits, there were losses, and on the whole account a balance was found due to the plaintiff. A bill for the balance was given by the defendant, and it was proved that the balance was made up of different sums paid by the plaintiff at the defendant's request. It was nevertheless held that the original agreement being illegal, the plaintiff could not recover the balance in question, either on the bill or the common money counts. De Begnis v. Armistead, 10 Bing. 107; see Fisher v. Bridges, 2 E. & B. 642; E. C. L. R. 77; reversing S. C., 2 id. 118. The doctrine thus clearly established at law is recognized and acted on in equity; for no suit for an account is sustainable by one member of an illegal partnership against another, in respect of its dealings and transactions. Knowles v. Haughton, 11 Ves. 168; Armstrong v. Armstrong, 3 M. & K. 45; Harvey v. Collett, 15 Sim. 332.

Ewing v. Osbaldiston, 2 M. & Cr. 53, is a strong instance of this. There the plaintiff and defendant agreed to become partners in a theater. The plaintiff advanced part of the money he had agreed to advance, and the defendant applied it in part payment for a lease of the theater. The lease was afterward assigned to him alone. The defendant did not perform his part of the agreement, and the plaintiff accordingly filed a bill against him. The bill prayed that it might be declared that the plaintiff and the defendants were partners in the theater, and in the lease thereof, and that the agreement made between the plaintiff and the defendant might be performed, and, if necessary, that the partnership might be dissolved, and the usual accounts taken. The agreement, however, was illegal, by 10 Geo. II, c. 28, and the bill was dismissed with costs; an appeal was dismissed with costs also. It was decided, on appeal, that the agreement being illegal, it was impossible for the court to decree its specific performance; and that if the plaintiff sought to recover back the money he had paid, he could not do so in that suit, as (even if he had a lien on the property for the money, which the court denied) the bill did not seek to enforce such lien. Moreover, if it can be shown that the purpose with which a partnership was formed was illegal, the consequences of illegality will follow, however skillfully the true purpose may have been concealed, Stewart v. Gibson, 7 Cl. & Fin. 707; Armstrong v. Armstrong, 3 M. & K. 53; and parol evidence may be given to show the existence of the illegality, however formally the partnership agreement may have been drawn up, and however successful the parties may have been to make that agreement legal on the face of it. See Collins v. Blantern, 2 Wils. 341, and 1 Sm. L. Ca. and the notes there. In order, however, that illegality may be a defense, it must affect the contract on which the plaintiff is compelled to rely, in order to make out his right to what he asks. It by no means follows that, from the circumstances that money has been obtained in breach of some law, that therefore whoever is in possession

to the ship-owners. With respect to the commission, indeed, he may be considered as a mere agent, but, as to the agency itself, he is as much a trader as any other man; and there is as much risk of profit

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of such money is entitled to keep it in his own pocket. Thus, where an illegal assurance was effected through a broker, and a loss occurred, and the underwriters paid the amount of the loss to the broker on account of the insured, it was held that the insured was entitled to recover this money from the broker, although there would have been no remedy against the underwriters had they refused to pay. Tenant v. Elliott, 1 Bos. & P. 3; Farmer v. Russell, id. 296; Bousfield v. Wilson, 16 M. & W. 185; Nicholson v. Gooch, 5 E. & B. 999.

Tenant v. Elliott, *ante*, and other cases, having decided that if A and B are parties to an illegal contract, and B in pursuance thereof pays money to C for A's use, A can recover this money from C, it follows that if two partners, A and B, enter an illegal agreement with C, and in pursuance of this agreement C pays money to D for the use of A and B, not only can A and B recover this money from D, but if he pays it over to either one of the two partners, that one must account to the other for his share of it. This must also be the case if C, instead of paying the money to D, pays it over at once to A or B. In other words, it follows from Tenant v. Elliott and that class of cases, that if an illegal act has been performed in carrying on the business of a legal partnership, and gain has accrued to the partnership from such act, and the money representing that gain has been actually paid to one of the partners for the use of himself and copartners, he cannot set up the illegality of the act from which the gain accrued as an answer to a demand by them for their share of what he has received. Upon this principle it was held in Sharp v. Taylor, 2 Ph. 801, recognized in Sheppard v. Oxenford, 1 K. & J. 491, that a partner was entitled to an account against his copartner of moneys actually come to the hands of the latter, from the employment of a ship in a manner not permitted by the navigation laws; and in Sheppard v. Oxenford, 1 K. & J. 491. See, too, Butt v. Monteaux, id. 98, that the directors of an illegal company can be made to account for the money received by them on behalf of the company and for the use of its members.

An executor or administrator of a deceased partner cannot protect himself from accounting for the estate of the deceased by setting up against his creditors, legatees, or next of kin, the illegality of the transactions in which the deceased may have been concerned. See Joy v. Campbell, 1 Sch. & Lef. 339; Hale v. Hale, 4 Beav. 369. That has nothing to do with their claims, and the reasons upon which the maxim *ex turpi causa non oritur actio* is founded, evidently have no application to such a case. Even if the executor was one of the deceased's copartners, and was thus mixed up with him in the illegal transactions, still if the share of the deceased in the gains arising from them has actually been placed to his credit in the partnership books, and has come or might have come to the hands of the executor as such, he must account for that share. See Joy v. Campbell, 1 Sch. & Lef. 328. But if there has been no account settled, it would seem that the executor may in his character of partner rely on illegality, and decline to come to any account in respect of the gains in question. See Ottley v. Browne, 1 Ball. & Bea. 360; and compare Sharp v. Taylor, 2 Ph. 801.

But notwithstanding Tenant v. Elliott, Sharp v. Taylor, and other cases of that class, it is settled that if money comes to the hands of a person in trust for another, the latter cannot recover such money if the trust which he seeks to enforce is itself illegal. Thus in Ottley v. Browne, 1 Ball. & Bea. 360, and see Ex parte Mather, 3 Ves. 372, A, who was a shareholder with B and others in two companies, wished to become a banker, and in order to evade a statute which rendered it illegal for a banker to be a partner in commercial undertakings, A assigned his shares to B in trust for himself. B, who carried on a separate trade, was made bankrupt, and his assignees sold all his shares in the above companies, and also the shares held by him in trust for A. A then filed a bill against B's assignees, praying that they might be declared trustees of these last shares for him, A, and that they might be ordered to pay the value thereof to him, or that he might be at liberty to prove for such value against B's estate; but the bill was dismissed with costs, on the ground that it sought

and loss to the person with whom he contracts, in the transactions with him, as with any other trader. It is true, that he will gain nothing but his discount, but that is a profit in the trade; and there may be losses to him as well as to the owner."

It is observable, that, in the preceding case, the agreement was only to share the *net profits* of the commission, after deducting certain expenses. In a more modern case,[1] it was contended that a partnership could not subsist in the gross sum received for commission. An action was brought by the assignees of certain bankrupts for work and labor by them, before their bankruptcy, in drawing and making out policies of insurance, and in and about causing divers persons to insure ships and goods, and for premiums advanced, etc. At the trial, it appeared that the bankrupts, who were merchants in London recommended the defendant to consign goods to the house of Ruxton & Co., at Rio Janeiro, for sale; the latter were to remit the proceeds to the bankrupts, who were to pay over the same to the defendant. The bankrupts, upon receiving advices from Ruxton & Co. that the goods were sold, advanced money to the defendant, on account; to recover which this action was brought; Ruxton & Co. afterward failed without remitting the proceeds. It appeared, however, that the bankrupts and Ruxton & Co. divided equally the commissions on the sale of all goods recommended by the one house to the other. Upon this it was argued that the bankrupts were partners *quoad hoc* with Ruxton & Co., and that the receipt of the proceeds of the goods was, therefore, a receipt by the bankrupts, and the advance by them to the defendant was a payment on account, for which they were liable. The judge who tried the action acquiescing in that opinion, the jury found a verdict for the de-

to enforce a secret trust, which was directly against a positive law.

The same principle is illustrated by Thomson v. Thomson, 7 Ves. 470. There A agreed with B to pay him an annuity or the value of it for a consideration which rendered the agreement illegal, *i. e.*, the sale of a command of the ship belonging to the East India Company; and it was also agreed that when A retired from the command he should procure his successor to pay the said annuity or its value. A, on his retirement, received from the East India Company a considerable sum of money under a regulation made for the purpose of putting a stop to the sale of the commands of their ships. B then claimed to have this money invested by A, so as to secure the due payment of the annuity or to have the money applied in payment of the value of the annuity. The court admitted that there was an equity against the fund if the plaintiff could get at it through a legal agreement; and that, if the company had paid the money to a third person for the use of the plaintiff, the plaintiff might have recovered from that third person; but the court held that as it was impossible for the plaintiff to reach the money, except through an agreement which was illegal, the court could not assist him, and the bill was consequently dismissed."

[1] Cheap v. Cramond, 4 B. & Ald. 663.

fendant, which the Court of King's Bench refused to disturb; Lord Tenterden, C. J., observing that the present case could not be distinguished in principle from Waugh v. Carver, and that, although in that case there was a previous deduction of a definite part of the commission before the division took place, yet that was an unimportant fact, and that a division of gross proceeds might very well constitute a partnership. However, an agreement to share the profits of a business means *prima facie* an agreement to share the net profits.[1]

It may here be observed that there are some societies not engaged in trade, but which, not partaking of a corporate character, are dealt with in a court of equity as partnerships; as private societies for the relief of the members in case of sickness, etc.[2] There are likewise certain societies, as clubs, which are not constituted for any purposes of profit, but which are exposed to liabilities similar in many respects to those of a partnership.[3]

Cannot be partnership in mere personal office.

SEC. 57. It seems that there cannot be a partnership in a mere *personal office*. It has been ruled that the office of a sheriff's bailiff is particular and personal, and there can be no such thing as a partnership between two such officers, so that the act of one shall bind the other.[4] Perhaps, the office of replevin clerk is of the same nature. It is clear, that, if a replevin *clerk* become a partner with another in the business of attorney, the latter does not thereby become a partner as replevin clerk.[5] On the other hand, it has been ruled that Windsor Herald and Blue Mantle Pursuivant at Arms are in the situation of co-partners; so far, at least, as to maintain a joint action for the profits of any business which is begun while they are jointly on duty.[6]

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[1] See D. Parke, B.; Bond v. Pittard, 3 Mee. & W. 360.

[2] Beaumont v. Meredith, 3 Ves. & B. 180.

[3] If a member of a club orders goods for the benefit of all, every member who concurs in the order, or afterward approves of it, is liable, unless it appears that the creditor, at the time of sale, gave credit to that member only. Delauny v. Strickland, 2 Stark. 416. But where a club is constituted upon ready-money principles, as the clubs of London generally are, that is to say, by means of subscriptions and ready-money payments for meals and refreshments, etc., then it is considered that a fund is already furnished, to which tradesmen give credit; and, therefore, the members of such a club individually are not liable for debts incurred by the committee, for work done or goods supplied for the club. Flemyng v. Hector, 2 Mee. & W. 172; Caldicott v. Griffiths, 8 Ex. 898; Reg. v. Whitmarsh, 15 Q. B. 600; Bear v. Bromley, 18 id. 271; Flemyng v. Hector, 2 M. & W. 172; The St. James Club, 2 De G. M. & G. 383; Todd v. Emly, 8 M. & W. 505.

[4] Ions v. Perchard, 2 Esp. 507.

[5] Brandon v. Hubbard, 4 Moore, 363. See Clarke v. Richards, 1 You. & C. 351.

[6] Townsend v. Neale, 2 Camp. 190.

Particular adventures.

SEC. 58. Again, as has already appeared from many examples, persons without being partners generally in trade may be partners in a particular adventure. Thus, where A and B were in partnership under the firm of A & Co., and C was not in partnership, A & Co. agreed with C to purchase coffee on a joint account, A & Co. to have the management of it, and C to have a share in the profits. The coffee having been purchased, and C having paid for his share, it was held that A & Co. and C were partners in this particular adventure, and, as C was to share the profits, C was likewise liable for the loss.[1] So, where two persons agreed to share the profit and loss of certain goods which were in the hands of a factor for sale, it was held that this agreement constituted a partnership between them, although one guaranteed to the other the solidity of the factor's house.[2] So, a number of persons associating together, and subscribing sums of money, for the purpose of obtaining a bill in Parliament to make a railway, have been held partners in the undertaking.[3] But, on this subject, it is needless to multiply examples.

Trade must be lawful.

SEC. 59. *Lastly*, in order to complete the contract of partnership, it must be formed for the purpose of some *lawful trade, business or adventure.* By this is intended that it must be consistent *with the laws of the land.* Formerly, it was held that if the foundation of a contract was not *malum in se*, but only *malum prohibitum*, an action might be maintained on it, if the *malum* did not appear on the record. On this principle, the case of Faikney v. Reynous[4] was decided, in which it was held, that, if a person pay money for another in consideration of a transaction prohibited by act of Parliament, but not *malum in se*, and take a bond for the re-payment of the money, he may recover in an action on the bond, notwithstanding the statute. This doctrine was carried still further in the subsequent case of Petrie v. Hannay,[5] where two persons having jointly engaged in a stock-jobbing transaction, and incurred losses, and employed a broker to pay the differences, one of them, who had repaid the broker, with the *privity and consent* of the other the whole sum, was allowed to recover a moiety from that other, notwithstanding the 7 Geo. 2, c. 8. So, also, in one case the Court of Chancery directed an account between two

[1] Ex parte Gellar, 1 Rose, 297.
[2] Salomons v. Nissen, 2 Term Reports 675.
[3] Holmes v. Higgins, 1 Barn. & Cres 74; 2 D. & R. 196.
[4] 3 T. R. 418.
[5] Ib. Lord Kenyon *diss.*

persons who had contracted to be jointly concerned in ship insurances, contrary to the 6 Geo. 1, c. 18, s. 12, Lord Loughborough, observing that though he would not *execute* the contract against law, yet he should do great injustice if he did not decree an account of transactions which had arisen out of the contract.[1]

But the doctrine laid down in the cases just cited has long been exploded; and it is now clearly settled that whether the subject of a contract be *malum prohibitum*, or *malum in se*, there can be no partnership founded upon it, so as to give the contractors a remedy either against each other, or against third persons, at law or in equity.

Must not involve breach of the law.

SEC. 60. Even before the case of Petrie v. Hannay, Lord Kenyon decided that an underwriter of a policy of insurance could not, upon the loss of the vessel, recover a moiety of the loss from a person who had agreed to take half the risk, because, upon the plaintiff's own showing, there was a partnership in the insurance, contrary to the statute. "This party," said Lord Kenyon, "cannot apply to a court of justice to enforce a contract founded in a breach of the law."[2] So, in the case of Mitchell v. Cockburne,[3] where A and B had engaged in partnership for the insurance of ships, contrary to the statute 6 Geo. 1, c. 18, and A had paid the whole of the losses incurred, it was held that he could not maintain an action against B to recover a share of the money that had been so paid. And the case of Mitchell v. Cockburne was fully confirmed by that of Aubert v. Maze.[4] There, the cause having been referred to an arbitrator, he found that the plaintiff was indebted to the defendant in a certain sum, "being one moiety of divers sums of money paid by the defendant for and on account of losses on policies of insurance, underwritten by agreement between the said plaintiff and the said defendant, at their joint risk, and for their joint benefit." He accordingly awarded that sum to the defendant, subject to the opinion of the Court of Common Pleas, as to whether the defendant was entitled to recover the money so paid on account of an illegal partnership. The court held that he was not; and set aside the latter part of the award.

Rule in Booth v. Hodgson.

SEC. 61. It will be observed, that in the preceding cases the actions were all brought in *affirmance* of the illegal contract; but if a part-

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[1] Watts v. Brooks, 3 Ves. 612.
[2] Sullivan v. Greaves, Park Insur. 8.
[3] 2 H. Bl. 379.
[4] 2 B. & P. 571.

nership be contrary to law no action can be founded on it by the parties implicated, even if it be brought in *disaffirmance* of the contract. Thus, in Booth v. Hodgson,[1] an action was brought by the assignees of Browne, a bankrupt, against the bankrupt's co-partners, to recover certain sums received for premiums on policies of insurance in which the bankrupt and the defendants were jointly interested as partners, though the policies had been effected in the sole name of the bankrupt. It was urged, in behalf of the plaintiffs, that the statute 6 Geo. 1, c. 18, only prohibited contracts of insurance made by partners; but that here the assurances were made by one person only; and that, although, if the object of the action had been to *enforce* any contract of insurance made in violence of the statute, the act would have furnished a decisive answer to it, yet that objection did not apply here, because the action was brought in *disaffirmance* of the partnership insurances. But the Court of King's Bench held that the plaintiffs were not entitled to recover. "It is a maxim in our law," said Lord Kenyon, "that a plaintiff must show that he stands on a fair ground, when he calls on a court of justice to administer relief to him. Now, is that the case with these plaintiffs? They avow that they have insured in direct violation of the statute; all their claim arises out of this transaction, which is contrary to the act of Parliament, and yet they wish the court to give effect to it." Grose, J.—"The plaintiffs wish to consider the case as if the partnership had never existed, and then they say, taking this to be an insurance only by Browne, it is a valid contract, and his assignees may recover the premiums received on his account. But we cannot decide on a part of a case; and, taking the whole together, an *assumpsit* cannot be raised from one part of the case when the other parts of it negative an *assumpsit*." Lawrence, J. —"As between Browne and the assured, it would be unjust that the former should be permitted to set up the secret partnership; but as between him and his partners, he cannot be suffered to disaffirm the partnership. There seems to be no justice on the part of the plaintiffs, who wish to receive all the premiums without accounting to the other partners, by endeavoring to imply a promise contrary to the truth of the case."

Money advanced for formation of illegal partnership cannot be recovered back.

SEC. 62. Upon the same principles, where the illegal contract of

[1] 6 T. R 405. But marine insurances by partnerships are now lawful, the 6 Geo. 1, being in this respect repealed by 5 Geo. 4, c. 114, see pp. 37, 38.

partnership is not executed, but executory only, none who were parties to it can, by action or otherwise, recover the money advanced for the purpose of establishing the partnership.[1] Therefore, where money was advanced to S. by B., one of several partners, out of the partnership funds, on account of payments to be made on policies of assurance underwritten by S. on account of himself and B., in pursuance of a previous agreement between them to become sharers in profit and loss on such policies, and S. became bankrupt, it was held, that the surviving partners of B. could not prove the moneys so advanced as a debt under the commission against S.[2]

Courts of law or equity will not aid parties to—Aubert v. Maze.

SEC. 63. It remains to be observed, that courts of equity, following the principles of these later decisions of courts of law, will dismiss so much of a bill as seeks an account of illegal partnership transactions. Much doubt had been thrown upon the case of Watts v. Brookes, by the observation of Lord Eldon in Aubert v. Maze, his Lordship saying, that if Watts v. Brookes was to be considered as a case in which it was dryly decided that, if a master, in the course of taking an account, find certain sums paid on account of any of these illegal transactions, he may, on the ground of consent to such payment, view them in the same light as the other items of the account; it did not appear to him, Lord Eldon, that that case proceeded upon a principle sufficiently consistent with the act of Parliament, to justify the adoption of it. And afterward, the case of Watts v. Brookes was expressly overruled by the decision of Sir William Grant, in Knowles v. Haughton.[3]

Rule in Watts v. Brooks.

SEC. 64. The object of the bill, in that case, was to establish a partnership between the plaintiff and the defendant, in the business of brokers and underwriters, praying an account and payment of a moiety of the profits. The plaintiff went into evidence to prove the partnership, which was denied by the answer, the defendant insisting that the partnership between the parties, as underwriters, could not legally subsist. The counsel for the plaintiff cited the case of Watts v. Brookes, insisting that the object of the statute was only to avoid the contract as against the assured, and that the statute was satisfied by the appearance of only one name. Sir William Grant, however, on the authority of Sullivan v. Greaves, and Mitchell v. Cockburne,[4] dis-

[1] Per Lord Ellenborough, 1 M.& S.755.
[2] Ex parte Bell, Ibid.
[3] 11 Ves. 168; 2 Hov. Supp. 253.
[4] *Ante*, p. 33.

missed so much of the bill as sought an account of the profits of the underwriting business, and directed an account of the other business upon the footing of partnership.

Debts arising from notes illegally issued.

SEC. 65. Upon the principles on which the later decisions on this subject have been founded, it has been held that a debt arising from notes issued in violation of the statutes passed for the protection of

[1] In a subsequent case, however, Sir William Grant seems to have recurred to the old principles. The plaintiffs, Marsh and Ebsworth, were partners in the trade of Spanish wool brokers in London; and the defendants were partners in the trade of Blackwell-hall factors. By a parol agreement entered into between the plaintiffs and defendants, it was agreed, that any parcels of wool offered in the market, on which a profit might be expected, should be purchased on account of the defendants by the plaintiffs; and that, on the resales thereof, which the plaintiffs were afterward to make, the profit and loss thereon should be shared between the plaintiffs and defendants in thirds. The plaintiffs made several purchases in consequence of this agreement, and the whole of the money arising from the resales was received by the defendants, the plaintiffs receiving no part of such money. The bill prayed an account of the partnership transactions, and payment of what should be found due to the plaintiffs, and for a receiver to collect the outstanding debts of the copartnership. The defendants, by their answer, insisted (amongst other things) "That the plaintiffs did and do still carry on the business of wool-brokers in partnership, in the city of London aforesaid, under the style or firm of Marsh & Ebsworth, and that such business of wool-brokers is buying and selling of wools on account of other persons; and that those who act as such brokers are restricted by a bond given by them to the Lord Mayor of the city of London, and by an oath which they take on obtaining a license from the mayor and aldermen of the city of London to act as brokers within the same city, from buying and selling wools in their own names and on their own account." But Sir Wm. Grant, M. R., directed the account as prayed. March v. Blakesly, Rolls, Nov. 30, 1812. Neither a court of law of equity will aid in the enforcement of claims growing out of a partnership established for illegal purposes, or for the prosecution of a business that is immoral or contrary to public policy. Thus, a partnership for the keeping of a bawdy house, for the publication of obscene books or pictures, or any purpose contrary to law or injurious to public morals, would be absolutely void, and neither party could have any redress against the other in reference to any matter growing out of such business. Watson v. Fletcher, 7 Gratt. (Va.) 1. Where a government contract is taken by a firm, of which the agent of the government is a member, a court of equity will not compel a settlement of the concerns growing out of such contract. Barth v. Colman, 3 Cr. (U. S. C. C.) 283. For instances in which partnerships have been held illegal, see True v. Sanborn, 44 N. H. 48; McWilliams v. Bryan, 21 La. An. 211; Oppenheim v. Louis, 9 id. 963; Adams v. Creditors, 14 La. 461.

Agreements between partners. — A clause in a co-partnership agreement, wherein each partner agrees not to transact on his individual account, within twenty miles of the village in which such co-partnership is to do business, the kind of business for the transaction of which it is created, is unobjectionable. Any number of persons may lawfully form a co-partnership to buy the produce of the country and sell merchandise at any specified place. If such co-partnership is in fact formed (though not so expressed in the articles) for the purpose of preventing competition in the markets in which the firm may operate, and with the intention of keeping secret from the public the existence of the agreement, and if its existence is thus kept secret, and an appearance of competition between the parties maintained by them toward the public, such executed intention of secrecy and deception taints the agreement itself, and renders it illegal and void. Fairbank v. Leary, Wis.

the Bank of England, cannot be proved under a commission of bankruptcy. And therefore, where A, a partner in the Leith Banking Company, which consisted of more than six partners, opened an office at Carlisle, and circulated there promissory notes drawn by the Company's cashier in Scotland, and made payable to the bearer, on demand, at the company's office in Leith (a proceeding then contrary to the Bank acts, which restricted partners exceeding the number of six from issuing notes payable on demand); it was held, upon the bankruptcy of a debtor of A, that A's proof should be reduced, so far as it was founded on the notes of the company, payable to bearer on demand, which were issued to the bankrupt by A.[1]

Effect of repeal of certain English statutes.

SEC. 66. We have endeavored to investigate the doctrines held by courts of law and equity regarding illegal partnerships in general, by an examination of cases which occurred under the 6 Geo. 1, c. 18; which statute, for the purpose of creating a monopoly for two corporations, namely, the Royal Exchange and London Assurance Companies, restrained all other corporations or partnerships from assuring ships or merchandise at sea, and from lending money on bottomry, and declared all policies of assurance and bottomry bonds of such other corporations to be *ipso facto* void, and all agreements by them for lending money on bottomry, usurious. But it seems unnecessary to enter into a particular examination of the cases which have been determined upon this branch of the act;[2] for, under the more enlightened policy of modern times, that injudicious enactment, the utility of which even lawyers have doubted, has been entirely abolished; and now, by the 5 Geo. 4, c. 114, so much of the 6 Geo. 1, c. 18, as restrains any corporation or body politic, society or partnership, or person acting in any society or partnership, from granting, signing and underwriting any policy or policies of assurance, or making any contract for assurance, of or upon any ship or ships, or goods or merchandise, at sea, or going to sea, or from lending money by way of bottomry, or as makes any such contract void, or declares that the same shall be adjudged usurious, or as imposes any forfeiture or penalty in respect of any such policy of assurance or contract, is repealed.

It will be proper, however, to mention several cases in which, under existing statutes, a contract of partnership may be void *ab initio*, so

[1] Ex parte Randleson, Mont. & M'A. 86.

[2] See Reed v. Cole, 3 Burr. 1512; Lees v. Smith, 7 T. R. 338; Harrison v. Miller, id. 340, n; Mitchell v. Cockburne, 2 H. Bl. 379; Everth v. Blackburne, 2 Stark. 66; Strong v. Harvey, 3 Bing. 304.

that no right of action or suit arises to the co-contractors in respect of it.

Contract intended to evade usury laws.

SEC. 67. It has been held that a contract originally entered into for the purpose of evading the usury laws, and not *bona fide* with the view of partnership, cannot be supported as a legal contract of partnership.

A lent B a sum of money to purchase some goods; B gave A his note of hand for the money, payable on demand; and it was agreed between them that A should have half the net profits of the goods, upon a resale of them, over and above the note of hand. The goods were sold at a profit of £5. Immediately after the sale, A demanded payment of the note, which, therefore, carried interest from the time of the demand. It was held that A could not recover the sum of 2*l.* 10*s.* (half the profits), in an action against B for money had and received. In behalf of A it was argued that this was not a usurious contract, because there was no certainty, upon the original agreement, of any interest beyond £5 per cent, but the whole rested in contingency, upon what would be the net profits arising from the resale of the goods; and if there had been no profit at all, the plaintiff would have had no interest whatever. But, per Lord Mansfield, "There is no contrivance whatever by which a man can cover usury. Here are two brokers: one, who is the defendant, wants to buy goods that were upon sale, and the other agrees to lend him money for that purpose; but he is to lend it upon the terms of being paid both principal and interest from the time the loan commenced. It is true, no rate of interest is reserved in the note; but it is made payable on demand. Within two hours after the sale, he demands the money, and then the note begins to carry interest. He was not bound by the agreement to give credit for a moment; so that there was no sort of risk whatsoever. Both parties, from their situation, knew there would necessarily be a profit. It seems to me, therefore, that the intention of the contract was to get more than principal and legal interest upon the note, which is usury within the meaning of the statute.[1]

[1] Jestons v. Brooke, Cowp. 793. Probably, however, this transaction would now be held valid within the stat. 3 & 4 Will. 4, c. 98, sect. 7, that act, according to Vallance v. Siddell, 6 Ad. & Ell. 932, extending to notes payable on demand. In Cooper v. Tappan, 9 Wis. 362, it was agreed that a partner should receive as his share of the business, two hundred and fifty dollars every six months, in consideration of $2,000 advanced to the concern, whether the business made any profit or not, and that if there was any danger of losing the money, he might enter judgment and collect it. The court held that this did not constitute a partnership, but was an usurious contract.

Rule in Morse v. Wilson.

SEC. 68. In the subsequent case of Morse v. Wilson,[1] there was no fraud on the part of the lender of the money, and the court adverted to the usury alone. In that case A lent a sum of money to B, a trader, on bond, conditioned for the repayment of the money with legal interest; but at the time of executing the bond it was agreed that B should pay A not only the interest, but also the surplus profits of his trade (if any), after payment of the interest; it was held that A could not recover on this bond, because the intent of the parties was, not that a partnership should subsist between them, but solely, that A should have more than £5 per cent for his money. Lord Kenyon — "The simple question is whether this is not an agreement to receive more than the £5 per cent allowed by law for the forbearance of a loan. Most unquestionably it is; and it is therefore void. It has been argued, however, that this was not a usurious contract, because the principal was put in hazard, as it was liable to the partnership creditors; but it was no farther hazarded than in the case of every other loan, namely, by the risk of the borrower's insolvency; for, as between the plaintiff and the partners in the business, he was not liable to contribute to the losses in the trade."

The only question, in cases of this kind, will be, whether or not it was the intention of the parties to enter into an agreement having the semblance of a partnership agreement, with a view to evade the usury laws. Mr. Justice Buller, in the foregoing case, seems not to have adverted to the intention of the parties; and, moreover, he seems to have thought that, if A agree to share in the profits, but not the losses of a trade, and by these means secure his principal as between the parties themselves, that is usurious, although his principal be liable to the demands of third persons.

The better opinion, however, is that an agreement having the form of a partnership agreement, but in which profits beyond the legal rate of interest are reserved to one of the parties, is legal, unless it appears to have been executed by way of shift or contrivance to cover usury, because, at all events, the principal, for which such profits and interests are taken, is hazarded to third persons.[2]

Rule in Morisset v. King.

SEC. 69. Lord Mansfield and the other judges seem to have acted

[1] 4 T. R. 353.

[2] The members of a firm are not liable for money borrowed at usurious rates. Hutchins v. Turner, 8 Humph. (Tenn.) 417; Cooper v. Tappan, 9 Wisconsin 362.

on this principle in Morisset v. King;[1] and it may be remarked that, under the peculiar circumstances of that case, it made no difference as to the general principle, that the person advancing the money was not the actual partner. An action of debt was brought on a bond conditioned for the due performance of certain articles of partnership. The articles recited that Mary Morisset had lent Daniel King the sum of £100, to be repaid to her at the end of four years, *without interest;* but the consideration was that the said Daniel King, his executors and administrators, should find and provide for Mary Dubois, daughter of the said Mary Morisset (the obligee), meat and drink in the house where he dwelt or should dwell, for four years, if the said Mary Dubois should so long live; and that she should, during the said term, board with him; and that she should be co-partner with Mary King, wife of the said Daniel King, in the business of a milliner, and should, all that time, bear one moiety of the losses, charges (except housekeeping), shop-rent, and materials necessary for carrying on the trade (which the said Daniel King did agree to provide); and they should be partners, and each do their utmost to carry on the trade, and should equally divide the *profits*; and also, that the said Daniel King should lodge the said Mary Morisset, she paying him £10 a year; and at the end of the four years Daniel King was to repay the £100; and, in case of the death of the said Mary Dubois, to pay the principal, together with *lawful* interest for the £100, to the said Mary Morisset. The defendant pleaded the statute of usury, but the court of King's Bench gave judgment for the plaintiff, Lord Mansfield observing that it was impossible to say that King might not receive so much advantage by this partnership as to be worth the consideration. That the plaintiff's daughter *might have been drawn into a bankruptcy* by means of this agreement, which might have been more severe to her than the penalty of the statute. Mr. Justice Foster and Mr. Justice Wilmot concurred with the Chief Justice.

Rule in Gilpin v. Enderbey.

SEC. 70. Later decisions have confirmed the doctrine now under discussion. Thus, in Gilpin v. Enderbey,[2] an action was brought by Enderbey against his co-partner, Gilpin, on a covenant contained in their deed of partnership. By the indenture it was covenanted that they, the plaintiff and defendant, should become partners in the business of army clothiers for ten years; that Enderbey should advance £20,000

[1] 2 Burr. 891.

[2] (In error), 5 B. & Ald. 954; 1 D. & R. 570.

as part of the capital for carrying on the business, and that Gilpin should find a like sum; that Enderbey, during the continuance of the partnership, should have out of the profits, if sufficient, or, if not, out of the capital, 2,000*l.* yearly, for his share of the profits; and it was further covenanted that, on the determination of the partnership by effluxion of time, the said sum of 20,000*l.* should be repaid to the plaintiff Enderbey by six equal installments, together with interest. The defendant pleaded that, before the making of the indenture, it was corruptly and against the form of the statute agreed between the plaintiff and defendant that the plaintiff should lend and advance to the defendant the sum of 20,000*l.*; and that the plaintiff should forbear and give day of payment thereof to the said defendant for the space of ten years thence next ensuing; and that the defendant, for the loan of the said sum of 20,000*l.*, and for the forbearing and giving day of payment thereof, should yearly, during the said term of ten years, pay to the plaintiff the sum of 2,000*l.*, by equal half-yearly portions, on the 24th of March and 24th of September in each year; and that for securing the re-payment of the sum of 20,000*l.*, with such payments half-yearly to the plaintiff, the plaintiff and defendant, by way of shift, should execute a certain instrument in the form of a deed of partnership, according to the form and effect of the indenture in the declaration mentioned; that, in pursuance of the agreement, the plaintiff advanced the 20,000*l.* on the terms aforesaid, and the deed was executed accordingly. And the defendant averred that the sum of 2,000*l.*, so to be paid yearly for the loan of the said 20,000*l.*, exceeded the rate of 5*l.* per cent, contrary to the form of the statute, whereby the said indenture was void in law. In delivering the judgment of the court, Lord Tenterden said: "If the deed discloses the real facts and the intention of the parties to it, this is not the case of a loan of money by Enderbey to Gilpin, but a contract of partnership between them, of a peculiar kind. If the deed does not disclose the real facts and the intention of the parties, but was executed only as a contrivance to cover a loan of 20,000*l.*, for ten years, at 10*l.* per cent, the deed was undoubtedly void." His Lordship added that this was a fact that ought to have been found affirmatively by a jury, to enable the court to declare the deed void. No such fact having been found, they were bound to consider the deed as speaking the language of truth; this contract, therefore, though probably an unusual one, was a partnership; and if there was a partnership, there was no loan of money by Enderbey to Gilpin, and no usury.

Rule in Fereday v. Hordern.

SEC. 71. The case of Fereday v. Hordern[1] was decided on the same principles. There, the Feredays and Turton, partners in trade, in consideration of 4,000*l.* paid to them by Hordern, in augmentation of their capital, agreed to admit him into partnership with them for a term. It was agreed that Hordern should receive, in lieu of profits, a clear sum of 550*l.* per annum; and all the property of the concern was charged with the payment of this sum quarterly, and of the 4,000*l.* at the determination of the partnership. The Feredays and Turton were to pay rent, taxes, wages, and the other outgoings of the trade, which was to be carried on by them, and in their names only; and Hordern was not to be required to attend to it. Hordern was at liberty to retire on giving twelve months' notice, and on his retiring, or at the end of the term, the 4,000*l.* and the arrears (if any), or the 550*l.* per annum, were to be paid to him by the Feredays and Turton by installments, to be secured by their bonds, and they were to indemnify him from the debts of the partnership. Lord Eldon in giving judgment said, that this was stated to be usury under the device of a partnership agreement. But he thought it impossible to consider it usurious. Horden became a partner, and though he was not under any liability as between himself and the plaintiffs, yet he was liable for all the debts of the concern, as to all the rest of the world. He thought, therefore, that it could not be made out to be a case of usury; and the answer did not admit any other circumstances upon which relief could be given.

Contrary rule in Brophy v. Holmes.

SEC. 72. The preceding authorities are directly opposed by that of Brophy v. Holmes,[2] decided by Sir Anthony Hart, while Lord Chancellor of Ireland, but it is conceived that the last-mentioned case is not of such weight as to be deemed to overrule the well-considered decisions which have been already noticed.

In Brophy v. Holmes, the plaintiff, a merchant of Dublin, entered into an agreement with the defendant Holmes, who was the captain of a vessel trading to the West Indies, to provide him with a cargo to be carried to certain ports mentioned in the agreement, and disposed of to the best advantage; and with the proceeds Holmes was to purchase other goods with which he was to return, and to make sale of the return cargo for their joint benefit; the property to be equally di-

[1] Jac. 144. And see Armstrong v. Armstrong, *post*, p. 50. [2] 2 Molloy, 1.

vided. Brophy alone was to advance all the necessary funds, and in consideration of this, and of Holmes having the management of the adventure, Brophy was not to suffer any loss. Holmes proceeded on his voyage, but previously to his departure transferred to Brophy certain securities in order to bear him harmless in case of necessity. The adventure proved unfortunate, and a considerable loss accrued, exceeding the value of the securities. Brophy, then, in pursuance of the agreement, applied the securities in exoneration of the loss. Upon the death of Holmes, his administratrix disputed the validity of the agreement, and brought an action against Brophy to recover the amount of the securities; Brophy, on the other hand, insisted that the whole loss was by the agreement to fall on the intestate; and it was not disputed that the amount of the securities fell short of the entire loss upon the shipments. The action having been referred to arbitration, and the arbitrators having decided in favor of the administratrix, Brophy filed his bill for an injunction, and for relief on the footing of the agreement. Sir Anthony Hart dismissed the bill with costs, holding that the agreement was void, either as usurious, or *nudum pactum*. His Lordship observed that it was impossible to say that there was any thing inequitable in this transaction, but that an agreement might be equitable, and yet usurious; and that, if it was usurious, the law would determine against it, and that he knew that the case of Gilpin v. Enderbey did not please Lord Eldon. His Lordship added that the agreement was not so much unconscionable as *nudum pactum;* that the plaintiff might have had some relief, if he had shaped his case as a partnership case, submitting to bear half the loss; but that, as he had proceeded solely on the ground of indemnity, he could not now treat the case as one of partnership.

Upon this case we may venture to remark that it is irreconcilable, not only with the particular case of Gilpin v. Enderbey, but with that general principle under which it is unnecessary, as between the partners themselves, that they should all be bound to share in the losses of the partnership.

When persons are restricted by law from entering into partnership.

SEC. 73. Persons exercising particular professions or trades are frequently restricted by statute in their common-law right of engaging in partnerships. We may, in the first place, mention, that by the 57 Geo. 3, c. 99, s. 3, it is enacted that "no *spiritual person* shall by himself, or by any other for himself, or to his use, engage in or carry

on any trade or dealing for gain or profit, or deal in any goods, wares, or merchandises, by buying and selling for hire, gain, or profit, in any market, fair, or other place, upon pain of forfeiting the value of such goods, etc.; and every bargain and contract so made by him, or by any to his use in any such trade or dealing, contrary to this act, shall be utterly void and of none effect." It is obvious that under this statute no contract made by a trading partnership, whereof any of the members are spiritual persons, can be enforced in a court of law. Accordingly, it was held, in Hall v. Franklin,[1] that a plea of this statute was a good defense to an action brought by the public officer of a joint-stock banking company, in which certain clergymen were shareholders, against the defendant, as the drawer and indorser of a bill of exchange. The effect of this decision has to a certain extent been remedied by the stat. 1 & 2 Vict., c. 10, which legalizes all contracts theretofore made, or to be made *before the end of the ensuing session* (1839), by associations and partnerships, in which spiritual persons are engaged, provided that such associations and copartnerships consist of more than six members or shareholders, and carry on their trade, whether as bankers, or otherwise, "by means of boards of directors or managers, committees, or other officers, acting on behalf of all the members or shareholders of, or persons otherwise interested in such associations or copartnerships."

This statute, it will be observed, does not interfere with the case of ordinary partnerships carried on by spiritual persons,[2] nor does it protect joint-stock companies beyond a certain period.

Partnership in business when either is not legally qualified.

SEC. 74. A partnership between persons as attorneys, where any of them are not duly qualified, is illegal. The stat. 22 Geo. 2, c. 46, s. 11, recites that "divers persons, who are not examined, sworn, or admitted to act as attorneys or solicitors in any court of law or equity, do, in conjunction with or by the assistance or connivance of certain sworn attorneys and solicitors, and by various subtle contrivances, intrude themselves into, and act and practice in the office and business of attorneys and solicitors, to the great prejudice and loss of many of his Majesty's subjects, and the scandal of the profession of the law;" and enacts that, "if any sworn attorney or solicitor shall act as agent for any person or persons not duly qualified to act as an attorney or solicitor aforesaid, or *permit or*

[1] 3 Meos. & W. 259.

[2] By the stat. 37 Geo. 3, c. 99, spiritual persons may keep schools and may farm to the extent of 80 acres.

suffer his name to be anyways made use of, upon the account or for the profit of any unqualified person or persons, or send any process to such unqualified person or persons, thereby to enable him or them to appear, act, or practice in any respect as an attorney or solicitor, knowing him not to be duly qualified as aforesaid, and complaint shall be made thereof in a summary way to the court from whence any such process did issue, and proof made thereof upon oath, to the satisfaction of the court, that such sworn attorney or solicitor hath offended therein as aforesaid, then and in such case every such attorney or solicitor so offending shall be struck off the roll, and forever after disabled from practicing as an attorney or solicitor; and in that case, and upon such complaint and proof made as aforesaid, it shall and may be lawful to and for the said court to commit such unqualified person so acting as aforesaid to the prison of the said court, for any time not exceeding one year."

Cases illustrating the doctrine.

SEC. 75. Various cases have been decided upon the construction of this statute. Where A, who had been an attorney for many years, engaged B, who at one time had been clerk to an attorney, but for some years had been a certificated conveyancer, to conduct his business, and had agreed to allow him a moiety of the profits of the business instead of a fixed salary; and the names of A and B were painted on the door of the office, where the business was carried on, and bills were made out in their joint names; and B received instructions from the clients, and suits were instituted and carried on, in consequence of such instructions: it was held that this case was clearly within the act, inasmuch as the attorney had allowed his name to be used for and on account of an unqualified person; and the court ordered the attorney to be struck off the roll, and the clerk to be committed to prison for a month.[1] So, where A had, under the cover of the names of B and C, attorneys, successively, practiced for his own profit, with their knowledge, as attorney in several causes, and during part of the time B acted as A's clerk, receiving a weekly salary, of which entries were made in his account book; and, after B had quitted his employment, C took possession of the office which had been previously occupied by the former, and permitted A to practice in his name, the court upon these facts struck B and C off the roll of attorneys, and committed A to prison for three months.[2] And in

[1] In re Jackson, 1 B. & C. 270.

[2] In re Clark, 3 D. & R. 260.

another case, where an attorney's clerk carried on the business in the name of the attorney, the latter living at some distance, and receiving a proportion of the profits for occasionally superintending the concern, Mr. Justice Richardson said that this constituted a partnership between them, and was consequently an illegal contract.[1]

But it seems that the statute does not extend to an allowance made to the widow or children of a deceased partner, out of the profits of the trade. Henry Candler,[2] an attorney and conveyancer, died, leaving a widow, who was his executrix, and ten children. By a deed executed shortly after his death, between Henry Candler, his eldest son, and Mary Candler, the widow, Henry Candler, in consideration of love and affection toward his mother and family, and in compliance with the wish and hope expressed by his father, etc., covenanted to carry on his father's business, so long as any of the other children of his father and mother should be living, unmarried, and under twenty-one; and within two months after the taking of every yearly account, to pay to Mary Candler, her executors, administrators, or assigns, a moiety of the clear net gains and profits; and also, to permit her to have free access to the books of account, to devote the whole of his time and attention to the business, to make out accounts annually, and to deliver to her a balance-sheet of the net gains and profits. Mary Candler covenanted to provide him with such sums as should be wanted by him, in order to carry on the business; and also to use her utmost endeavors and influence to induce her friends and connections to employ him. The business was for some time carried on upon the footing of this deed, till a claim was made by a creditor of Henry Candler upon his estate. In the argument of that claim the question arose collaterally whether this instrument was legal under the 22 Geo. 2, c. 46, s. 11. Lord Eldon seemed to be clearly of opinion that it was. "If," said he, "we are to construe the enacting part by the recital, there is no doubt that this lady did not intrude herself into, or act and practice in the office of an attorney or solicitor; but the point contended for, I suppose, would be, that her taking the profits would be evidence that she had done so. The meaning of the clause undoubtedly is this (whether the terms used have gone further, is another question) that qualified persons should not permit their names to be used by others, so as to enable them to appear as attorneys; and the question, therefore, is, whether the words 'permit or suffer his name to be anyways made use of, upon the

[1] Hopkinson v. Smith, 1 Bing. 13; 7 Moore, 242. [2] Candler v. Candler, Jac. 225.

account or for the profit of,' etc., are not to be construed in connection with the other words, 'thereby to enable him or them to appear, act or practice', etc., so as to prevent it from going beyond the mischief that it was intended to provide for." His Lordship concluded by observing that, if the act were construed by help of the recitals, he was of opinion that this transaction was not within its meaning; that, however, was properly a question for a court of law.

In a case which occurred in the Court of King's Bench, subsequently to this decision of Lord Eldon, Lord Tenterden gave it as his opinion that the word *thereby* applies merely to the sending of process to the unqualified person, and not to the whole of the preceding sentence.[1] But this, it is apprehended, will not affect any question similar to that of Candler v. Candler, supposing the act, as in this case it clearly ought, to be construed by means of the recitals.[2]

Under the provisions of the stat. 53 Geo. 3, c. 127, s. 8, proctors allowing their names to be used by persons not entitled to act as proctors, are to be struck off the roll; but in this case, there is a saving in favor of "any allowance or allowances, sum or sums of money, that are or shall be agreed to be made to the widows or children of any deceased proctor or proctors, by any surviving partner or partners of such deceased proctor or proctors."

Various statutes have been passed at different times, for the regulation of the trade of a pawnbroker,[3] the effect of which is to restrict the right of entering into partnership in that trade. The leading enactments on this subject are contained in the stat. 39 & 40 Geo 3, c. 99, which regulates the rates to be taken by pawnbrokers, the form of tickets to be given by them (which are to contain the name and place of abode of the pawnbroker), and the description of goods which may be pawned. And by the 23d section of that act, it is enacted that all and every person or persons who shall carry on the trade or business of a pawnbroker shall cause to be painted or written in large legible characters over the door of his or their shop the Christian and surname or names of the person or persons so carrying on the said trade or business, together with the word "pawnbroker" or "pawnbrokers," as the case may be. In the case of Armstrong v. Armstrong,[4] Robert Armstrong, who carried on the business of a pawn-

[1] 1 B. & C. 272.

[2] Co. Litt. 79. a. And see Copeman v. Gallant, 1 P. W. 314, Mr. Cox's note.

[3] Stat. 1 Jac. 1, c. 21; 30 Geo. 2, c. 24; 25 Geo. 3, c. 48; 36 Geo. 3, c. 87.

[4] 3 My. & K. 45; Armstrong v. Lewis, 2 Cromp. & M. 274.

broker, joined with one Warner in executing an indenture for carrying on the business of pawnbrokers in copartnership, for the term of fourteen years. The deed was expressed to be made in consideration of 2,000*l.* advanced by Warner, who was to have 50*l.* quarterly out of the profits. There was an express provision that the trade should be carried on by Armstrong, who was to have power to employ such journeymen, servants, and apprentices, as he should think proper; but it was not stated that Warner was to be a secret partner, though, upon the whole, the inference was that he was not to appear actively employed in the business. After the execution of the deed the business was carried on solely by Armstrong, but Warner advanced several further sums by way of capital, on which he received 10*l.* per cent. These further advances were regularly indorsed upon the indenture of copartnership, and amounted, together with the original sum of 2,000*l.*, to 4,300*l.* Upon the death of Armstrong and Warner it became a question in certain suits, instituted between the parties interested under their respective wills, whether the representatives of Warner were entitled to the 4,300*l.*, in right of their testator as a partner with Warner; and this depended upon the preliminary question, whether the partnership between Armstrong and Warner was legal, within the meaning of the statutes relating to pawnbrokers. Upon the hearing of the causes before Sir John Leach, his Honor directed certain issues to the Court of Exchequer, for the purpose of trying the legality of the partnership; and the point in issue being ultimately argued before the Court of Exchequer Chamber,[1] that court gave it as their opinion that the deed of partnership taken by itself was valid, as there was nothing in it to show that a "secret" or "suppressed" partnership was intended; but that if there was any collateral agreement or understanding between the parties, to carry on the partnership in violation of the acts of Parliament, that agreement would be void, and would confer no rights on either party as against the other. The case being then remitted into equity, Sir John Leach declared it to be his opinion, upon the whole evidence in the cause, that there was a collateral agreement or understanding that Warner should be a secret partner with Armstrong. His Honor accordingly declared the partnership between those parties to be illegal, and dismissed the claim of Warner's representatives. The causes were ultimately heard upon appeal before Lord Brougham, who affirmed the decree of

[1] Armstrong v. Lewis, 2 Cromp. & M. 274.

Sir John Leach. His Lordship, in the course of his judgment, not only adverted to the illegality of the partnership, with reference to the acts relating to pawnbrokers, but treated the transaction as clearly usurious. "No man," he said, "can so far abstract himself from his common feelings, so far shut his eyes to the plainest indications of common sense, as to hesitate one instant in what light he shall regard the transaction between Messrs. Armstrong and Warner. To call it a partnership at all is incorrect, indeed, is an abuse of terms. It was a loan transaction much rather than a partnership; but to escape the usury laws, and obtain relief here, the party must treat it as partnership. Money is advanced, large interest is stipulated for, under the name of share of profits, but a share fixed at not under 10*l.* per cent, and the party advancing the money treats his partnership deed exactly as a security for the loan."

Partnership in business requiring license.

SEC. 76. Again, the principles now under discussion are applicable to partnerships in theatres not duly licensed according to statute. In the case of Ewing v. Osbaldiston,[1] it appeared, that the Surrey Theatre was licensed pursuant to the stat. 25 Geo. 2, c. 36, "for public music and dancing, and other public entertainments of the like kind;" but that by virtue of the statutes 10 Geo. 2, c. 28, and 28 Geo. 3, c. 30, no person can "act, represent, or perform for hire, gain, or reward, any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage," within twenty miles of London, except within the city and liberties of Westminster, and with license from the Lord Chamberlain. It was in evidence, however, that sometime previous to the contract between the plaintiff and the defendant, the regular drama had been performed at the Surrey Theatre; and that the plaintiff, with knowledge of that fact, and being fully aware that the performance of ordinary theatrical entertainments at that place was contrary to law, entered into an agreement with the defendant, for a partnership in acting plays at that theatre. Upon a bill filed by the plaintiff to enforce the agreement, it was held by Sir L. Shadwell, V. C., and afterward on appeal by Lord Cottenham, C., that such a bill was not sustainable, for that the contract was altogether void, as being contrary to statute.

Must infringe the law or the rule does not apply.

SEC. 77. But it must here be remarked, that the preceding decisions

[1] 2 My. & Cr. 153. See De Begnis v. Armistead, 10 Bing. 107.

relative to illegal partnerships arose in cases where the partners had, in the formation of their partnership, infringed certain acts of Parliament made with the express view of protecting the public. But the omission to comply with the directions of an act of Parliament, where the consequence is not directly at variance with the intention of the Legislature, as concerns the protection of the public, will not, it seems, render the partnership illegal, so as to deprive the partners of the right to recover on a contract made by them with third persons.

Rule in Brown v. Duncan.

SEC. 78. Thus, in the case of Brown v. Duncan,[1] the plaintiffs, Brown, Clark, and others, carried on a trade in partnership as distillers. The name of Clark, however, was not inserted as one of the partners in the distillery, in the excise book or license, as required by 6 Geo. 4, c. 81, s. 7. Moreover, Clark carried on by himself the business of a retail dealer in spirits, within two miles of the distillery, contrary to the 4 Geo. 4, c. 94, ss. 132, 133. One Glennie having applied to the plaintiffs to appoint him their agent for the sale of their whisky in London, they agreed to do so, provided he obtained a guaranty. The defendant, at Glennie's request, then entered into a guaranty to the plaintiffs, for the due payment of all sums of money for which Glennie might become indebted to them as such agent, and for which he should not duly account. An action having been brought on this guarantee, the defense set up was, that the whole trading of the plaintiffs was, under the circumstances, illegal, and that they could not recover the price of the spirits distilled by them, nor even upon the guaranty given to secure the due accounting of their agent for money arising out of such sale. But the court decided for the plaintiffs. Lord Tenterden observed that there was *no fraud* on the part of the plaintiffs on the revenue, although they had not complied with the regulations which had been adopted for conducting the trade in a way most expedient for the benefit of the revenue; and that the case of Hodgson v. Temple and Johnson v. Hudson[2] were in favor of their right to

[1] 10 B. & C. 93; Lloyd & Welsby, 91.

[2] 5 Taunt. 181; 11 East, 180. In the former of these cases, a distiller had sold spirits to a rectifier, who was also a retailer, with the knowledge that his vendee filled both characters; and had delivered the spirits, not at the place in which the retail trade was carried on, but at the place in which he carried on the business of a rectifier and to which they were delivered, not in the defendant's name, but in the name of another person. That was certainly a very strong case, because, there, as it was contended, that was clearly and knowingly, to a certain degree, violating the law. The Court of Common Pleas, however, thought the plaintiffs were entitled to recover.

recover. "These cases," said his Lordship, "are very different from those where the provisions of acts of Parliament have had for their object the protection of the public, such as the acts against stock-jobbing, and the acts against usury. It is different, also, from the cases where a sale of bricks, required by act of Parliament to be of a certain size, was held to be void because they were under that size. There the act of Parliament operated as a protection to the public, as well as to the revenue, securing to them bricks of the particular dimensions. Here, the clauses of the act of Parliament had not for their object to protect the public, but the revenue only. Neither is this one of that class of cases where an attempt is made to recover the price of prohibited goods. On the authority of the two cases which I have mentioned, we think the plaintiffs are entitled to retain their verdict."

The rule founded on principles of policy.

SEC. 79. It is evident, that, when courts of justice refuse to take cognizance of illegal contracts of partnership, the consequences must occasionally bear hard upon one of the parties concerned. But, in such cases, we must remember the words of Lord Mansfield: "The objection, that a contract is immoral or illegal, sounds, at all times, very ill in the mouth of a defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff. The principle being *e dolo malo non oritur actio.*"[1]

[1] Per Lord Mansfield, Holman v. Jackson, Cowp. 341.

CHAPTER III.

PARTNERS AS TO THIRD PERSONS.

SEC. 80. Of the contract *quoad* third persons.
SEC. 81. Community of profit.
SEC. 82. Rule in Bloxam v. Pell.
SEC. 83. Rule in Waugh v. Carver.
SEC. 84. Sharing in profits, primary test.
SEC. 85. Rule in Hesketh v. Blanchard.
SEC. 86. Presumption arising from sharing profits may be repelled.
SEC. 87. Suffering name to be used as partner.
SEC. 88. Actual partners liable although not known as such.
SEC. 89. Rule in Spencer v. Billings.
SEC. 90. Rule in Swan v. Steele.
SEC. 91. Rule in Parker v. Barker.
SEC. 92. Rule in Goode v. Harrison.
SEC. 93. Joint order for goods.
SEC. 94. Must be holding out to the plaintiff.
SEC. 95. Indorsement of papers.
SEC. 96. Interference with management of firm.
SEC. 97. Presumption not rebutted by proof that he is not in fact a partner.
SEC. 98. Presumption arising from establishment of quasi partnership.

Of the contract of partnership quoad third persons.

SEC. 80. We have already had occasion to observe that individuals become liable as partners *quoad* third persons, either by contracting the legal relation of partners *inter se*, or by holding themselves out to the world as partners. To speak correctly, these are the *only* means of incurring the liability in question. For, although it appears to be laid down, that they who are not partners *inter se* may, nevertheless, even without holding themselves out in that character, be partners *quoad* third persons;[1] this, surely, must be understood to mean, that they who *stipulate* not to be partners *inter se*, may nevertheless be liable to third persons. It is certainly clear, that a person may stipulate not to be a partner, and yet, contrary to his express intention, and by the very same instrument by which he stipulates, he may enter into such terms as by law constitute a partnership. He will then unquestionably be liable to third persons; but, on the sole ground,

[1] Wats. on Partn. 33; Gow on Partn. 10; Car. on Partn. 7.

that he has entered into a legal contract, which, as between himself and the world, controls the stipulation.[1] It must be admitted that this doctrine is inconsistent with the case of Hesketh v. Blanchard; but we shall endeavor, in a future page, to show that that decision stands on questionable principles.

Community of profits.

SEC. 81. It is clear, from what appears in the foregoing section, that the main feature in the contract of partnership is the communion of profit between the parties. Without that quality, a partnership cannot exist; and with it, a case can hardly be stated in which a partnership shall not exist.[2] Persons, therefore, who are known to share the *profits* of a trade, are *prima facie* liable as partners to all who deal with them in respect of that trade, whatever be the private agreement between them.[3]

Rule in Bloxam v. Pell.

SEC. 82. One of the earliest cases on this subject is that of Bloxam v. Pell,[4] in which the parties, *by their agreement*, seem to have intended a dissolution of the partnership; yet, as Pell, the retiring partner, retained an interest in the *profits*, and as the legal presumption of partnership with Brooke was not rebutted, Lord Mansfield held that Pell was a dormant partner and liable to third persons. The facts were these: Brooke and Pell had commenced partnership for seven years. At the end of the first year they agreed to dissolve partnership, but no express dissolution was had. The agreement stated, that Brooke, being desirous to have the profits of the trade to himself, and Pell being desirous to relinquish his right to the trade and profits, it was agreed, that Brooke should give Pell a bond for 2,485*l.*, which Pell

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[1] Consider Geddes v. Wallace, 2 Bligh, 270; Rowland v. Long, 45 Md. 439; Mason v. Partridge, 66 N. Y. 633; Zaeppel v. Baumgardner, 6 L. Bar. (Penn.) 141; Miller v. Price, 20 Wis. 120; Leggett v. Hyde, 58 N. Y. 272.

[2] Catskill Bank v. Gray, 14 Barb. (N. Y.) 471; Pattison v. Blanchard, 5 N. Y. 196; Heimstreet v. Howland, 5 Den. (N. Y.) 68; Merrick v. Gordon, 20 N. Y. 93; and a mere community of interest in the property does not create this relation. Brigham v. Dana, 29 Vt. 1; Chase v. Barrett, 4 Paige's Ch. (N. Y.) 148; Conklin v. Barton, 43 Barb. (N. Y.) 436; Loomis v. Marshall, 12 Conn. 86; Niehoff v. Dudley, 41 Ill. 406; Berthold v. Goldsmith, 24 How. (U. S.) 436; Woodard v. Cowing, 41 Me. 9; Mears v. James, 2 Nev. 342; Martin v. Tidwell, 36 Ga. 332; Allen v. Davies, 13 Ark. 28; Winship v. Bank of U. S., 5 Pet. (U. S.) 529; Eastman v. Clark, 53 N. H. 276; Bowman v. Bailey, 10 Vt. 170; Brandred v. Muzzey, 25 N. J. 262.

[3] Ward v. Valette, 7 Ohio St. 172; Benedict v. Hettrick, 35 N. Y. Superior Ct. 405; Campbell v. Dent, 54 Mo. 325; Leggett v. Hyde, 58 N. Y. 272; Manhattan Brass Co. v. Sears, 45 id. 797; Duryea v. Burt, 28 Cal. 569; Martin v. Tidwell, 36 Ga. 332; Penniman v. Munson, 36 Vt. 164; Rowland v. Long, 45 Md. 439; Robbins v. Laswell, 24 Ill. 387.

[4] 2 Sir W. Bl. 999.

had brought into the trade, with interest at 5*l.* per cent, which was accordingly done. And it was further agreed that Brooke should pay to Pell 200*l.* per annum for six years, if Brooke so long lived, as in lieu of the profits of the trade; and Brooke covenanted that Pell should have free liberty to inspect his books. Brooke became a bankrupt before any thing was paid to Pell. And this action being brought for a debt incurred by Brooke in the course of trade, Lord Mansfield held that Pell was a secret partner.

Waugh v. Carver.

SEC. 83. The decision in Bloxam v. Pell was sanctioned by the observations of Lord Chief Justice De Grey, in Grace v. Smith;[1] but the foregoing principles were very fully discussed and completely established in the celebrated case of Waugh v. Carver,[2] in which it was decided that persons are answerable to the world as partners, if they participate in the profits of a trade, although they may have entered into an express agreement not to be partners *inter se.* That was an action of *assumpsit* for goods sold and delivered, work and labor done, etc., in which a verdict was found for the plaintiff, subject to the opinion of the court on a case which was in substance as follows:—"In February, 1790, articles of agreement were executed between the defendants Erasmus and William Carver, of Gosport, in the county of Southampton, merchants, of the one part, and Archibald Giesler, of Plymouth, in the county of Devon, merchant, of the other part; whereby, after reciting that the respective parties had received appointments from various foreign ship-owners, merchants and insurers, to act as their agents in the south of England, and that it had been agreed that Giesler should remove from Plymouth and establish himself at Cowes; and that the respective parties should allow to the other certain portions of each other's commissions and profits, in manner thereafter more particularly mentioned and expressed; the said Giesler covenanted, promised and agreed to and with E. and W. Carver, that the said Giesler would, when required so to do by the said E. and W. Carver, remove from Plymouth, and establish himself at Cowes, for the purpose of carrying on a house there in the agency line, on his own account; but, in consequence of the promised assistance and recommendations of the said E. and W. Carver, would well and truly pay to the said E. and W. Carver one full moiety or half part of the commission agency

[1] 2 W. Bl. 998. [2] 2 H. Bl. 235.

to be received on all such ships or vessels as might arrive or put into the port of Cowes, or remain in the road to the westward thereof, within the Needles, of which the said Giesler should procure the address, and likewise one full moiety or half part of the discount on the bills of the several tradesmen employed in the repairs of such ships or vessels. And the said E. and W. Carver, for the considerations thereinbefore mentioned, covenanted with the said Giesler, that they would well and truly pay to the said Giesler, his executors, administrators, or assigns, three-fifth parts or shares of the commission or agency to be received by the said E. and W. Carver, on account of all such ships or vessels, the commanders whereof should, in consequence of the endeavors, interference or influence of the said Giesler, proceed from Cowes to Portsmouth, and there put themselves under the direction of the said E. and W. Carver; and likewise one and one-half per cent on the amount of the bills of the several tradesmen employed in the repairs of such ships or vessels, together with one-fourth part of such sum or sums as should be charged or brought into account for warehouse rent, on the cargoes of such ships or vessels, respectively, and also one-sixth part of said sum or sums as should be charged or brought into account for warehouse rent on the cargoes of such ships or vessels as should be landed at Cowes aforesaid. And also, that they, the said E. and W. Carver, would well and truly pay unto the said Giesler one-fourth part or share of the commission or agency to be received by the said E. and W. Carver, on account of all such ships or vessels that should arrive or put into the port of Portsmouth, or remain in the limits thereof, under the care and direction of the said E. and W. Carver, and likewise one-half per cent on the amount of the bills of the several tradesmen employed in the repairs of such ships or vessels. The articles then provided that one-fifth part of the commission or agency on each ship should be first retained by the party under whose care such ship or vessel should be, as a full compensation for clerks, boat hire, and all other incidental charges and expenses in regard of such ships or vessels respectively; after which deduction, the then remaining balance of such commissions or agency should be divided between the said E. and W. Carver, and the said Giesler, in the proportion thereinbefore mentioned. The articles then, after providing for the term of the contract, and that neither party should be connected with other houses in ship agency during that term, contained the following clause: "And it is hereby likewise covenanted, declared,

and agreed, by and between the said E. and W. Carver, and the said Archibald Giesler, that each party shall separately run the risk of, and sustain, all such loss and losses as may happen on the advance of moneys, in respect of any ships or vessels under the immediate care of either of the said parties respectively; it being the true intent and meaning of these presents, and of the parties hereunto, that neither of them, the said E. and W. Carver and A. Giesler, shall at any time or times during the continuance of this agreement, be in anywise injured, prejudiced, or affected, by any loss or losses that may happen to the other of them, or that either of them shall in any degree be answerable or accountable for the acts, deeds or receipts of the other of them, but that each of them, the said E. and W. Carver, and A. Giesler, shall, in his own person, and with his own goods and effects, respectively, be answerable and accountable for his own losses, acts, deeds, and receipts." In pursuance of these articles, Giesler removed from Plymouth, and settled at Cowes, where he carried on the business of a ship-agent in his own name, and contracted for the goods, etc., which were the subject of action; and the question was, whether the defendants were partners, on the true construction of the articles. On the part of the plaintiffs it was urged that, looking to the terms of these articles, it was impossible to express more clearly an agreement to participate in the profits of the business of ship-agents, and to establish a joint concern between the houses, and that such a participation in the profits made them partners. That it might be objected that there was a proviso that neither party should be answerable for the losses of the other; but this certainly would not be binding on the creditors. For the defendants it was urged that this was no partnership *quoad* the world, because on the authority of Puffendorf, there was no partnership between the parties; it was merely a purchase of Giesler's profits, by giving him a share of Carver's, to prevent a competition between them. The Court of Common Pleas held that the defendants were liable as partners; and Eyre, C. J., concluded a learned and elaborate judgment with the following observations: "It is plain upon the construction of the agreement, if it be construed only between the Carvers and Giesler, that they were not, nor ever meant to be, partners; they meant each house to carry on trade without risk of each other, and to be at their own loss. Though there was a certain degree of control at one house, it was without an idea that either was to be involved in the consequences of the failure of the other,

and without understanding themselves responsible for any circumstances that might happen to the loss of either. That was the agreement between themselves. But the question is whether they have not, by parts of their agreement, constituted themselves partners in respect to other persons. The case, therefore, is reduced to the single point, whether the Carvers did not entitle themselves, and did not mean to take a moiety of the profits of Giesler's house, generally and indefinitely as they should arise, at certain times agreed upon for the settlement of their accounts. That they have so done, is clear upon the face of the agreement; and, upon the authority of Grace v. Smith, he who takes a moiety of all the profits indefinitely shall, by operation of law, be made liable to loss. I cannot agree that this was a mere agency, in the sense contended for on the part of the defendants, for there was a risk of profit and loss. If, therefore, the principle be true, that he who takes the general profits of a partnership must, of necessity, be made liable to the losses, in order that he may stand in a just situation with regard to the creditors of the house, then this is a case clear of all difficulty. For though, with respect to each other, these persons were not to be considered as partners, yet, they have made themselves such, with regard to their transactions with the rest of the world. I am, therefore, of opinion, that there ought to be judgment for the plaintiff."

The principles laid down in Waugh v. Carver have been followed in all subsequent cases on the same subject. Thus, Rogers entered into the following agreement with Thomas: "I do agree to give T. half the profits he makes on my goods, instead of a commission, after shipping, freight, and every expense paid; I pay T.'s passage out. February 9th, 1809." It was proved that T. had a specific interest in the profits, under the name of commission. It was held, that, although by the agreement, the parties intended to avoid a partnership, yet Thomas was a partner in the profits, *quoad* third persons.[1]

Sharing of profits, primary test.

SEC. 84. In the preceding cases although the parties manifested, by their agreement, an intention not to contract the relation of partnership, yet it was held that such intention could not prevail against an express stipulation to share the profits—a stipulation which, as we have already seen, is the primary test of a partnership between the parties, and renders them liable to third persons. But the authorities have

[1] Ex parte Rowlandson, 1 Rose, 89; Ex parte Hamper, 17 Ves. 403.

gone still further, and it has even been held that an agreement to share the profits of an adventure, although not so expressed as to create a partnership between the parties, may, nevertheless, create a partnership as between them and the world.[1]

Rule in Hesketh v. Blanchard.

SEC. 85. In Waugh v. Carver there are several expressions of Lord Chief Justice Eyre[2] which lead to this conclusion; and on the authority of those expressions, the case of Hesketh v. Blanchard[3] was decided, in which it was held that the agreement might constitute the parties partners, *quoad* third persons, although under the circumstances it did not place them in that situation *inter se*. The plaintiff brought his action against the executors of Robertson, for goods sold and delivered, and on the common money counts, and with respect to the count for money paid, etc., the case appeared to be this: The plaintiff was a draper and tailor, with whom the testator, who had been the captain of a vessel in the African trade, had had dealings for several years. In the spring of 1800, the plaintiff applied to Robertson, who was then about to sail for the coast of Africa, for orders; who declined giving him any, saying he knew of something else which would answer better; but as he had no sufficient credit for himself, nor ready money, he requested the plaintiff to go with him to one Corfe, a butcher, and order certain quantities of beef and tripe, to take with him on the voyage, promising that if any profit should arise from them, the plaintiff should have one-half for his trouble. Corfe accordingly furnished the articles, to the value of 75*l.*, and sent them on board Robertson's ship, by the desire of the plaintiff and Robertson, both of whom he made debtors for the goods; and being examined as a witness at the trial, he also swore that he would not have trusted Robertson alone. After the goods were shipped, Robertson desired the plaintiff to make an insurance. The plaintiff afterward paid Corfe the whole sum, and Robertson being since dead without having come to any settle-

[1] A similar doctrine is held in this country. Leggett v. Hyde, 58 N. Y. 272; Rowland v. Long, 45 Md. 439; Duryea v. Whitcomb, 30 Vt. 390; Manhattan Brass Co. v. Sears, 45 N. Y. 797; Taylor v Terme, 3 H. & J. (Md.) 506; Fitch v. Harrington, 13 Gray (Mass.) 472; Edwards v. Tracy, 62 Penn. St. 381; Bearce v. Washburn, 43 Me. 564; Brownlee v. Allen, 21 Mo. 123; Baring Bros. v. Crofts, 9 Met. (Mass.) 294; Fitch v. Hall, 16 How. Pr. (N. Y.) 185; Wood v. Valette, 7 Ohio St. 172; Sheridan v. Medara, 10 N. J. Eq. 269; Bromley v. Elliott, 38 N. H. 287; Bartlett v. Jones, 2 Strobh. (S. C.) 472; Oakley v. Aspinwall, 2 Sandf. (N. Y.) 7; Heimstreet v. Howland, 5 Den. (N. Y.) 68.

[2] And see per Sir John Cross, 1 Mont. & Ayr. 48; and per Erskine, C. J., 1 Dea. 344.

[3] 4 East, 144.

ment with the plaintiff, he brought this action to recover the money so paid. At the trial it was objected by the defendant's counsel, that as the parties were to divide the profits, if any, they must necessarily be equally liable to any loss, and, therefore, the agreement constituting a partnership, the action was not maintainable by one partner against the other. The point being reserved for the opinion of the Court of King's Bench, they decided that there was no partnership between the parties, and that the action was maintainable; and, per Lord Ellenborough: "The distinction taken in Waugh v. Carver and other cases applies to this; *quoad* third persons it was a partnership; or the plaintiff was to share half the profits; but, as between the parties themselves, it was only an agreement for so much, as a compensation for the plaintiff's trouble, and for lending Robertson his credit." In the case just cited, the claim of the plaintiff was just; and the court being desirous, if possible, of giving effect to the action, conceived it to be necessary to adjudge that the plaintiff and Robertson were not partners. Now it is evident that there was a clear cause of action, unconnected with any accounts; and therefore, according to the modern doctrine, such action was maintainable, even supposing a partnership to have existed between the parties. Perhaps, therefore, if the case were now to be decided, the court would come to the same conclusion upon different grounds; for, upon a careful examination of the facts, it is difficult to say that the parties were not partners generally in the adventure, although, under the circumstances, the goods were probably intended to be the separate property of Robertson. It can hardly be said in this case, that the plaintiff was a mere agent, even though he might look to his share of the profits as a compensation for his trouble, and for lending his credit. His trouble and his credit were the effects which he supplied to the partnership.

Presumption arising from sharing profits may be repelled.

SEC. 86. Upon the whole, notwithstanding the doctrine laid down in Hesketh v. Blanchard, and some other cases, the general result of the authorities seems to be, that persons who share the profits of the concern are *prima facie* liable as partners to third persons, but that they may repel the presumption of partnership, by showing that the legal relation of partnership *inter se* does not exist. With reference to the last of these two positions, it may be observed, that in Hoare v. Dawes, the defendants, who were charged as dormant partners, rebutted the presumption of partnership by showing that they had

no communion of profit with the broker. So, where a person was charged as a dormant partner in the profits of a lighter, but it turned out that he was to have only half the gross earnings as wages, it was held that he was not a partner with the lighterman, and therefore not liable for the repairs.[1]

Suffering name to be used as partner.

SEC. 87. If a person suffer his name to be used in a business, or otherwise hold himself out as a partner, he is so to be considered, whatever may be the agreement between him and the other partners. In such case, he will be equally responsible with the other partners, although he may receive no profits; for the contract of one is the contract of all.[2] This rule of law arises, not upon the ground of the real transaction between the partners, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing.[3] The rule is perhaps most frequently applied in cases where the name of a clerk who receives a salary, but who has no specific interest in the profits, appears in the firm. It is, however, a universal rule. Thus, in Young v. Axtell,[4] which was an action to recover 600*l.* and upward, for coals sold and delivered by the plaintiff, a coal merchant, an agreement between the defendants was given in evidence, stating that the defendant, Mrs. Axtell, had lately carried on the coal trade, and that the other defendant did the same; that Mrs. Axtell was to bring what customers she could into the business, and that the other was to pay her an annuity, and also 2*s.* for every chaldron that should be sold to those persons who had been her customers, or were of her recommending. The plaintiff also proved that bills were made out for goods sold to her customers in their joint names; and the question was, whether Mrs. Axtell was liable for the debt. Lord Mansfield said, he should have rather thought, on the agreement only, that Mrs. Axtell would

[1] Dry v. Boswell, 1 Camp. 330.

[2] Per Lord Ellenborough, Guidon v. Robson, 2 Camp. 302; Stearns v. Haven, 14 Vt. 540; Sherrod v. Langdon, 21 Iowa, 518; Casco Bank v. Mills, 16 Me. 155; Matthews v. Felch, 25 Vt. 537; Hicks v. Cram, 17 id. 454; Campbell v. Hard, 6 Mo. 217; Irvin v. Conklin, 36 Barb. (N. Y.) 66; Fisher v. Bowles, 19 Ill. 396; Griff v. Bodausque, 18 La. An. 631; Markham v. Jones, 7 B. Mon. (Ky.) 457; Wright v. Powell, 8 Ala. 561; Smith v. Bannister, 28 N. H. 252; Vibbard v. Roderick, 51 Barb. (N. Y.) 629; Young v. Smith, 25 Mo. 341; See *ante*, notes on pp. 6, 11, 12, 75, 76.

[3] Per Eyre, C. J., Waugh v. Carver, 2 H. Bl. 235. But see Ex parte Matthews, 3 Ves. & B. 125.

[4] 2 H. Bl. 242.

be liable; not on the account of the annuity, but the other payment, as that would be increased in proportion as she increased the business. However, as she suffered her name to be used in the business, and held herself out as a partner, she was certainly liable; though the plaintiff did not, at the time of dealing, know that she was a partner, or that her name was used. And the jury accordingly found a verdict for the plaintiff.

Actual partner liable, though not known as such.

SEC. 88. It appears from this case, that it is not necessary for a person charging a nominal partner, to have been aware of the partnership at the time of the contract. And this doctrine seems satisfactory when we consider that the object of the rule is to prevent the extension of unsound credit.

Rule in Spencer v. Billing.

SEC. 89. Persons bearing the same name, as relations, and each being in trade, though not in partnership, are peculiarly liable to the consequences of this rule, where they are in the habit of transacting business with each other. Thus, where James Spencer carried on business in Manchester, under the firm of James Spencer & Co., and his brother William carried on business in Cateaton street, London, under the firm of Spencer & Co., it was ruled that William, by accepting bills drawn upon James Spencer & Co., and directed to the house in Cateaton street, held himself out to the world as a partner with James, and became liable accordingly.[1]

Rule in Swan v. Steele.

SEC. 90. Where a person is a partner in a house which also carries on a separate business, in which he is not a partner, it seems that he will, in some cases, be amenable to the rule. Thus, in Swan v. Steele,[2] the house of Wood and Payne were partners in the cotton trade and partners in grocery. Both trades were carried on at the same house and under the same firm. Steele was a dormant partner in the cotton trade, but not in the other; yet, under the circumstances of the case, he was held to be bound by an indorsement made in the common name of the firm, in relation to the grocery concern. It seems, therefore, to follow, that, if Steele had held himself out to the world as a partner in one firm, he would, *a fortiori*, have been adjudged a partner in the other, supposing the creditor to have no notice of his limited interest.

[1] Spencer v. Billing, 3 Camp. 310. [2] 7 East, 210; 3 Smith, 199.

Rule in Parker v. Barker.

SEC. 91. Slight circumstances will, it seems, be sufficient to satisfy a jury that a person has held himself out to the world as a partner. An action for money had and received was brought for the purpose of trying whether the plaintiff had been a trader within the meaning of the bankrupt laws. At the trial it appeared that the plaintiff resided under the roof of Greenwood, his brother-in-law, who had long been a trader. Greenwood persuaded the plaintiff to enter into partnership with him. There was a long negotiation between them, and many conversations with creditors were proved, in which the plaintiff sometimes said he had become a partner—sometimes, that he was about to become a partner, with Greenwood. There was no evidence of any express agreement, nor of any interference in the business by the plaintiff, except that he had gone once in company with Greenwood to a dyer's and having inquired about some goods that were left with him to be dyed, spoke of them as the joint property of himself and Greenwood. It appeared also that the partnership, if any, only lasted from the 22d of March till the 9th of May. Upon this evidence the jury found a verdict for the defendant, thereby establishing that the plaintiff was a partner with Greenwood, and therefore liable to the bankrupt laws; and the Court of Common Pleas held the verdict to be right.[1]

Rule in Goode v. Harrison.

SEC. 92. The following facts are stronger to establish a partnership: Goode and Bennion, in April, 1818, called upon one Fair, a broker, at Manchester; Goode introduced Bennion to Fair as a friend of his from Liverpool, and said, "we want goods." Fair went with them to Harrison, and introduced them to him as the firm of Goode & Bennion, and they bought goods of Harrison and others, to a large amount. Some of the invoices were made out to the firm of Goode & Bennion, others to John Goode and T. Bennion, and were seen by them. The goods were forwarded to the address of Goode & Bennion; Goode also in the hearing of Bennion said, that if the goods they then bought would answer the purpose, in a very short time they would have 500 pieces of one sort, and 500 of another sort. Goode & Bennion had a counting-house in Liverpool; the name of Goode appeared on the private door, but the name of Bennion did not appear at all on the counting-house. In January, 1819, Fair received

[1] Parker v. Barker, 1 Brod. & Bing. 9; 3 Moore, 226.

a letter in the handwriting of Goode, ordering more goods. The pronoun *we* was used throughout, and the conclusion was, "I am for G. & B., very respectfully yours, John Goode." Fair, in consequence of this letter, bought goods from Harrison, which were forwarded to the direction of Goode & Bennion; Harrison also drew a bill of exchange for the amount of these goods upon Goode & Bennion. Fair did not see Bennion from the time of his being in Manchester, in April, 1818, till the month of February, 1819, at which time Bennion asked Fair for the account current of Goode & Bennion, for goods bought when he and Goode came to Manchester, in April, 1818, and said at the same time, that the transaction in April, 1818, was the only one that he was engaged in with Goode, and that all that account should be paid. But Bennion did not, in 1818, say any thing to show that it was a single adventure, and a letter of his upon the subject was put in, which was in the following terms: "Liverpool, 20th April, 1819. Dear Sir—We shall be obliged by your purchasing for our account, 100 pieces of the fancied bordered gingham, etc. I remain, dear sir, for Goode and self, yours, T. Bennion." On the other hand, it was proved by a person who had been in the employ of Goode, and who kept the books till the end of April, 1818, but who then went with the goods, first purchased of Harrison, to Barbadoes, that he never knew Bennion's name to be used in the purchase of goods after April, 1818. Upon this evidence, the Court of King's Bench held clearly, that Bennion was chargeable as a partner with Goode in the second transaction as well as the first.[1]

Giving joint order for goods does not necessarily make them liable as partners.

SEC. 93. But the mere fact of persons giving a joint order for goods will not make them jointly liable as partners, if it appear upon the whole of the transaction, that the seller intended to accept their several responsibility only. In Gibson v. Lupton,[2] the two defendants, who were not general partners, gave a joint order to the plaintiffs' agent for the purchase of some wheat. The order contained these words, "payment for the same to be drawn upon *each* of us in the usual manner." In reply to this order, the plaintiffs wrote to the defendants, "we have made a purchase for your joint account." At the same time, they drew a separate bill upon each defendant for one-third of the price, each bill being for one moiety of the third. They afterward, on the wheat being shipped, drew like bills for the remain-

[1] Goode v. Harrison, 5 B. & Ald. 147. [2] 9 Bing. 297.

der of the price, having previously written, "we hold you both harmless for the advance up to the period of lading and invoice." The bill of lading, on coming into the possession of the defendants, was indorsed by each of them. Under these circumstances, the Court of Common Pleas held, that the defendants were only severally liable on the contract, each being responsible for the purchase of a moiety only of the cargo.

Must be holding out to the plaintiff.

SEC. 94. Again, if A, a trader, enter into a course of dealings with B in matters unconnected with his trade, as, for instance, in discounting bills merely, and in the course of such transactions introduces C as his partner, it has been held that this evidence is not sufficient to make C chargeable as a general partner, where he has not held himself out to the world as such. Thus, where, in an action of *assumpsit*, C was charged as a partner with A, on the authority of B, who informed the plaintiff before he furnished the goods that they were in partnership, and at the trial B's clerk proved that B had been in the habit of discounting bills for A, and that, on discounting a bill at one time for A, he had introduced C to him as his partner, but that the only connection in trade between B and the defendants was in discounting bills, Lord Kenyon said, that this evidence was not sufficient to charge C as A's partner; that the introduction of C to B should be taken *secundum subjectum materiam*, that is, as applying to the transaction in which A was concerned with B, the discounting of bills, to which transaction only it should be confined.[1]

Indorsement of papers.

SEC. 95. The signature of a person's name to the conveyance of a chattel is not necessarily an avowal of his partnership in such chattel, hence, in M'Iver v. Humble,[2] it was held, that an indorsement of a person's name on the certificate of a ship's registry, in order to aid a previous defective conveyance of his share, was not evidence to show that he was a partner with the other owners up to the time of the indorsement. Lord Ellenborough, in giving judgment in this case, observed, that, if the question of partnership had been sent to a jury, it would have appeared that the person who was charged as a partner in this action had, in 1809, ceased to be a partner, and his whole legal interest was intended to be conveyed out of him, but was defectively conveyed. "He then," added his Lordship, "ceased *in fact*

[1] De Berkom v. Smith, 1 Esp. 29.

[2] 16 East, 169.

to be a partner. Then, did he continue apparently to be a partner so as to induce the plaintiffs to credit him as such? There was no exhibition of partnership; no appearance of it to which the plaintiffs could have had access to induce them to credit him for these goods. It is urged, however, that his name now appears as owner on the certificate of registry. It is true, he was prevailed upon to join in the conveyance of the legal title to the ship, *pro majori cautelâ*, when he had in fact no longer any beneficial interest in it. But this was an *ex post facto* document, and could not have contributed to the exhibition and appearance of his ownership to the plaintiffs, and therefore does not range under that head of liability for their demand."

Interference with management of firm.

SEC. 96. Mere interference with the management of a partnership, unaccompanied by any circumstances from which a perception of the profits might be inferred, does not constitute a partnership *quoad* third persons. And, in a recent case, Mr. Justice Jebb observed that a stipulation that the house shall be governed by a person's advice does not constitute him a partner, nor give him a legal interest in the firm: it does not hold him out to the world as a partner, nor give him any share in the profits, nor empower him to dissolve, alter, or affect the partnership.[1]

Presumption not rebutted by proof that he is not in fact a partner.

SEC. 97. If a person be charged as a nominal partner, it is obvious, from the rule of law regarding nominal partners, that evidence of lending his name to the firm cannot be rebutted by showing that he had no interest as a partner; but where an action is brought by a firm without joining the nominal partner, and during the trial it comes out that there was a nominal partner at the time of the contract, the plaintiffs may rebut the presumption that such nominal partner was a real partner, by showing that he had no interest in the concern. Thus, where an action was brought for goods sold and delivered, and the son of the plaintiff proved the contract, and, upon his cross-examination, it appeared, that the father had held out to the world that his son was in partnership with him, and frequently gave receipts and made out bills in their joint names, it was held to be competent for the plaintiff to prove that the son was not a real partner at the time of the transaction.[2]

Presumption arising from establishment of quasi partnership.

SEC. 98. However, if there be a partnership as to third persons, the

[1] Barklie v. Scott, 1 Huds. & Bro. 83. [2] Glossop v. Colman, 2 Stark. 23.

presumption of law is, that there is a partnership between the parties,[1] and where a contract is made with persons in the character of partners, this is a contract on which they may bring a joint action, whether an actual partnership exist between them or not.[2] The term "holding oneself out as a partner," imports at least the voluntary act of the party so holding himself out, for else he might incur a painful responsibility through the fraud or the rashness of others. In cases where a person is charged as a partner on grounds of this nature, the circumstances which are usually given in evidence against him, such as the use of his name over the shop door, or in printed invoices, bills of parcels, and advertisements, are strong presumptive evidence of his acquiescence in the name and character of partner. Nevertheless, this evidence may be rebutted by showing, either that he absolutely disowned, or that he was entirely ignorant of these transactions. In some cases it will even be necessary for the *plaintiff* to show that the acts of the defendant, which he relies on as acts of partnership, were done with full knowledge and deliberation on the part of the latter.[3] If there be a stipulation that A shall appear as a partner, but shall be liable to no loss, A of course will not be liable as a partner to those who have absolute knowledge of such stipulation.[4]

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[1] Per Lord Ellenborough, Peacock v. Peacock, 2 Camp. 25.

[2] Bond v. Pittard, 3 Meeson & Welsby, 357

[3] See Fox v. Clifton, 6 Bing. 776; 4 M. & P. 713.

[4] Alderson v. Clay, 1 Camp. 404; Minnet v. Whiney, 5 Bro. P. C. 489. But see Brown v. Leonard, 2 Chit. 120.

CHAPTER IV.

OF THE DISSOLUTION OF THE CONTRACT.

SEC. 99. Of time of the dissolution.
SEC. 100. Partnership at will, presumption as to continuance of.
SEC. 101. Of the causes of dissolution.
SEC. 102. Assignment by one partner or the firm.
SEC. 103. Death of partner.
SEC. 104. Retirement of one partner dissolves the firm.
SEC. 105. Partnership for a term dissolved, how.
SEC. 106. Effect of dissolution.

Of the time of the dissolution.

SEC. 99. Except in the case of bankruptcy or felony the law fixes no absolute period at which the partnership *must* be dissolved, but leaves that matter to be regulated or not by the parties, as they think proper. Partnerships, therefore, with reference to their duration, may be distinguished by the terms of 1, Partnership at will, or unlimited; 2, Partnership for a term, or limited

Partnerships at will—presumption as to continuance of.

SEC. 100. A partnership *at will* is presumed to endure so long as the parties are in life, and of capacity to continue it.[1] A partnership for *a term* is presumed to endure for the term, provided the parties be in life and of legal capacity to continue it. The term is properly to be fixed only by the contract.[2] "But," as Lord Eldon observed, "there may undoubtedly be cases in which, though no written contract provides for the duration of the partnership, there may be an implied contract as to the term of its duration. For instance, partners may unquestionably so purchase leasehold interests as to imply an agreement to continue the partnership as long as the leases endure."[3] And Mr. Bell suggests that, where a lease so undertaken excludes assignees and sub-tenants, it would possibly be deemed evidence of an intention to continue the partnership during the lease.[4] However, the *mere* circumstance of partners having purchased leasehold interests is not evidence that they have entered into a contract of partnership commensur-

[1] Vinn. Comm. lib. 3, tit. 26, s. 5; Pothier, Contr. de Société, vol. 2, p. 555.
[2] 2 Bell's Comm. 643.
[3] Crawshay v. Maule, 1 J. Wils. 181; 1 Swanst. 521.
[4] 2 Bell's Comm. 643.

ate with the duration of the leases. "It might," said Lord Eldon, "with usual reason, be contended that the parties, by purchasing an estate in fee-simple, were to continue partners forever."[1] And even where a testator, entitled by leases of unequal duration to iron mines and works, by will gave a pecuniary legacy to C, "as a capital for him to become a partner with my executor, of one-fourth share in the trade of all those works, so long as the lease endures;" and by a codicil he gave to A, "three-eighths of the concern at the iron works, and of the premises at ——; so the partnership will stand at my demise: A, three-eighths, B, three-eighths, C, two-eighths;" it was held, that this did not create a partnership co-extensive with the duration of the leases.[2]

Of the causes of the dissolution.

SEC. 101. In investigating the causes of the dissolution of partnership *between the parties*, we will consider the subject with reference, *first*, to a partnership at will; *secondly*, to a partnership under articles, or for a term. A partnership at will may be dissolved at the express desire, or by the bankruptcy, outlawry, felony, or death of any of the parties. In the first of these cases, the partnership is dissolved immediately upon notice given, subject to the proper accounts.[3]

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[1] 1 J. Wils. 181; Featherstonaugh v. Fenwick, 17 Ves. 308; Alcock v. Taylor, Taml. 506.

[2] Crawshay v. Maule, 1 J. Wils. 181; 1 Swanst. 495.

[3] Nerot v. Burnand, 4 Russ. 260; Peacock v. Peacock, 16 Ves. 50. In article 1865 of the French Civil Code, one of the causes of the dissolution of partnership, which are there enumerated, is— "*La volonté qu'un seul ou plusieurs expriment de n'être plus en société.*" Upon this clause a learned commentator, M. Rogron, observes as follows: "*Cette dissolution de la société, par la volonté d'un seul des associés, n'a lieu que pour les sociétés dont la durée est illimitée* (1869). *C'est une exception au principe général consacré par l'art.* 1134, *portant que les conventions ne peuvent être révoquées que du consentement mutuel des parties; cette dérogation est fondée sur ce qu'une société illimitée, qu'une ou plusieurs parties continueraient malgré elles, deviendrait une source de contestations et désordres:* communio lites et jurgia generare solet."

Causes for which dissolution will be decreed.—A court of law has no power to dissolve a partnership, Barnstead v. Empire Mining Company, 5 Cal. 299, but a court of equity, for a proper cause, may not only dissolve the firm, but it may, where the facts warrant it, declare the partnership a complete nullity *ab initio*, and leave the parties thereto as though no contract for a partnership had ever been made, but such decrees are rare. Tattersall v. Groote, 2 Bos. & P. 135. Fraud on the part of one partner in the conduct of the business, as in keeping fraudulent accounts, Oldaker v. Lavender, 6 Sim. 161; being guilty of habitual drunkenness, gross negligence, habitual inattention to business, extravagance, incapacity for business, immoral conduct injuriously affecting the business, Norway v. Rowe, 19 Ves. 148; extravagance in the conduct of the business, as, making needless purchases of stock and running the firm heavily in debt therefor, being guilty of fraudulent conduct, as permitting the secret withdrawal of goods from the store for purposes inconsistent with good faith, Leighortner v. Weisenborn, 20 N. J. Eq. 172; and generally any such gross misconduct as renders it impossible or impracticable

In the words of Lord Eldon, "a partner, not for a term, has certainly a right to say, I instantly dissolve the partnership;" and where there is no express agreement between the partners, a dissolution may

for his copartners to go on with him in the business. Charlton v. Poutter, 19 Ves. 148; Smith v. Jeyes, 4 Beav. 502; Waters v. Taylor, 2 V. & B. 299; Leighhortner v. Weisenborn, *ante*. Coming under this head is such misconduct of whatever kind or degree, as destroys the mutual confidence of the partners in each other. Lord Thurlow, in Liardet v. Adams, Mont. Part. 112, note, says: "The court may see an equity in not suffering a dead body to be tied to a living one to the injury of both; but when a partner was not out of his senses, but had only a temporary illness, he thought the court would be very tender of dissolving the partnership. That as to misbehavior in one of the partners, he did not see what line could possibly be drawn, or what degree of misconduct was to be held a sufficient ground for dissolving the partnership." The court will not regard what may be called "squabbles" between partners, nor slight incompatibility of temper, nor misconduct in trifling circumstances which is not calculated to defeat the object of their association. Goodman v. Whitcomb, 1 Jac. & W. 598; Liardet v. Adams, *ante;* Marshall v. Coleman, 2 Jac. & W. 589; Roberts v. Eberhardt, Kay. 148; Wray v. Hutchinson, 2 M. & K. 235. But if the conduct of one of the partners has been such as to measurably defeat the ends of the partnership, or as to render it impracticable or impossible to continue it upon the terms and considerations upon which it was entered into, Waters v. Taylor, 2 V. & B. 299; Whitman v. Leonard, 3 Pick. (Mass.) 179; Arnold v. Brown, 24 id. 89; or if there has been a gross violation of good faith by one of the partners, Chapman v. Beach, 1 Jac. & W. 594; or if the business is "a bubble," and cannot be profitably or honorably conducted, Beaumont v. Meredith, 3 V. & B. 180; or has been brought into a state of hopeless insolvency, Bailey v. Ford, 13 Sim. 495; Harrison v. Tenant, 21 Beav. 482; Baring v. Dix, 1 Cox's Cas. 213; Jennings v. Baddclay, 3 K. & J. 78; Warner v. Cunningham, 3 Dow. 76; Electric Tel. Co. of Ireland, 22 Beav. 47; or if one of the partners has been declared a bankrupt, In re Wait, 1 Jac. & W. 609; Wilson v. Greenwood, 1 Swanst. 480; Ex parte Ruffin, 6 Ves. 126; Smith v. De Sylva, Cowp. 471; Hague v. Ralleston, 4 Burr. 2174; 15 Johns. (N. Y.) 82; Ex parte Williams, 11 Ves. 5; 17 Johns. (N. Y.) 535; or has made a valid and *bona fide* assignment of all his property for the benefit of his creditors. Rogers v. Nichols, 20 Tex. 719; Marquand v. N. Y. Manuf. Co., 17 Johns. (N. Y.) 525; Edens v. Williams, 36 Ill. 252; Cochran v. Perry, 8 W. & S. (Penn.) 262; Horton's Appeal, 13 Penn. St. 67. An assignment, however, made to a copartner of all his interest in the firm, to be applied to the payment of firm debts, does not operate a dissolution of the firm, Matter of Shepard, 3 Ben. (U. S.) 347; or, if his interest in the firm has been taken upon execution; or if dissensions among the partners exist to such an extent as to preclude all hope of advantage from a continuance of the partnership, Bishop v. Breckles, 1 Hoff. Ch. (N. Y.) 584; or if one of the partners refuses, or is unable to furnish his proportion of the capital, Turnipseed v. Goodwin, 9 Ala. 372; or withdraws it after it is put in, Smith v. Vanderberg, 46 Ill. 34. But if a partner has furnished *a part* of his proportion of the capital, and the business has been commenced, he cannot be excluded, because he fails to furnish the balance, Hartman v. Wehr, 3 C. E. Green (N. J.) ; or if one of the members is excluded from participation in the business of the firm, Gorman v. Russell, 18 Cal. 688; Werner v. Leisen, 31 Wis. 161; or if the articles of copartnership are violated, Meaher v. Cox, 37 Ala. 201; Dumont v. Ruprecht, 38 id. 137; and generally, when the state of feeling between the parties, or the circumstances, or the condition of the affairs of the firm are such as to justify an apprehension that the business cannot be longer advantageously prosecuted, and where a dissolution would be productive of no material injury to the members of the firm, a court of equity will decree its dissolution. Meaher v. Cox, 37 Ala. 401; Richards v. Baurman, 65 N. C. 162. Misconduct on the part of a partner, of itself, will not justify a court of equity in decreeing a dissolution, unless it also appears that, as a consequence thereof, the business can no longer be advantageously prosecuted, Meaher v. Cox, *ante;* or unless thereby

be brought about by any one of them, without the decree of a court of equity.[1] It was in one case urged before Lord Eldon that, by analogy to other known rules of law, such as that which relates to

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the mutual confidence of the partners in each other is measurably impaired. Smith v. Jeyes, 4 Beav. 502; Harrison v. Tenant, 21 id. 482. In some of the cases it is held that the misconduct must be such as not merely to shake the credit of the firm in the eyes of the world, but also such as to render it impossible for the partners to continue their business together according to the agreement into which they have entered.

In Anonymous, 2 K. & J. 441, one of the members of the firm attempted to commit suicide, and it was held a sufficient ground for a dissolution. Generally, however, it may be said that any misconduct that tends to impair the confidence of the members of the firm in each other, whether it is the result of misconduct in the prosecution of the business, or otherwise, that satisfies the court that the partners cannot place that degree of confidence in each other which each had a right to expect when the relation was entered into, will be regarded as sufficient, Harrison v. Tenant, 21 Beav. 482; unless it appears that the misconduct of the partner was for the very purpose of compelling a dissolution. Fairthorne v. Weston, 3 Ha. 387. As has previously been intimated, no definite rule for determining when a partnership will be dissolved, can be given, but in each case it is a matter resting largely in the sound discretion of the court in view of all the circumstances. Mere dissatisfaction with the business, or with his copartners on the part of one partner, is not regarded as sufficient, Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129; but difficulties of a nature so serious as to render a continuance of the company impracticable and injurious to one or all the partners, must generally be established. Jackson v. Geese, 35 Ga. 84; Ross v. Henderson, 77 N. C. 170. Whatever may be the causes alleged, if it appears that a dissolution would result in serious damage to the firm, or would involve it in serious inconvenience, as, where a large venture has been entered upon which cannot be arrested without serious loss, a dissolution will not be decreed, at least until a reasonable period arrives in the affairs of the firm, Richards v. Baurman, 65 N. C. 162; thus it will be seen that the instances in which a partnership is *ipso facto* dissolved are quite numerous, as:

1st. By expiration of the term, or special provisions of the contract.

2d. By mutual consent.

3d. By the death of one of the partners.

4th. By the bankruptcy of one of the partners or the firm.

5th. By a general assignment made by one of the partners or the firm.

6th. By the sale of the entire interest of one member of the firm, voluntarily or by judicial process.

7th. By the withdrawal of a member of the firm.

8th. By the introduction of a new member therein.

9th. By war, in certain cases.

10th. By reason of the business becoming unlawful.

11th. By the marriage of a *feme sole* partner.

And that it may also be dissolved by decree of a court of equity for a variety of causes, as:

The hopeless insanity of a partner.

The hopeless insolvency of the firm.

Because the business is unproductive.

By reason of the misconduct of a partner, as by reason of his extravagance, incapacity for business, negligence therein or inattention to the business; by reason of his absconding; being guilty of a felony, or any other misconduct calculated to injuriously affect the business or destroy the confidence of his copartners. So, too, because of dissensions among the partners, incompatibility of temper, or any cause that renders it impossible to prosecute the business according to the express or implied provisions of the contract. Habitual intoxication, extravagance or any misconduct that jeopardizes the interests of the firm, or tends to destroy the confidence of his copartners in him. Ross v. Henderson, 77 N. C. 148; Norway v. Rowe, 19 Ves. 148; Gratz v. Bayard, 11 S. & R. (Penn.) 41; Garretson v. Weaver, 3 Edw. Ch. (N. Y.) 385; Kennedy v. Kennedy, 3 Dana (Ky), 239.

Death of a partner.—The death of a

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[1] Ex parte Nokes, Wats. on Partn. 380; Mont. on Partn. 108.

notice to the tenant to quit, notice within a definite period of time ought to be given of an intention to dissolve the partnership. But his Lordship observed that though, in the case of a tenancy from

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partner operates as a dissolution of the firm *instanter*, unless provision is made in the partnership agreement to the contrary, Davies v. Christian, 15 Gratt. (Va.) 11; Scholfield v. Eichelberger, 7 Pet. (U. S.) 586; Gratz v. Bayard, 11 S. & R. (Penn.) 41; Knapp v. McBride, 7 Ala. 19; Goodburn v. Stevens, 5 Gill (Md.), 1; Williamson v. Wilson, 1 Bland (Md.), 418; Burwell v. Mandeville, 2 How. (U. S.) 560; Griswold v. Waddington, 15 Johns. (N. Y.) 82; White v. Union Ins. Co., 1 N. & McC. (S. C) 559; Remick v. Ewing, 42 Ill. 342; Smith's Estate, 33 Leg. Int. 149; and this is so even in case of the death of a special partner, Ames v. Downing, 1 Bradf. (N. Y.) 32; and the interest of the deceased partner in real estate passes to his heirs, subject to the obligations of the firm outstanding at the time of his decease. Platt v. Oliver, 3 McLean (U. S.), 27. Where there is a special provision for a continuance of the partnership after the decease of a partner, it may be continued either for the purpose of administration, liquidation or the general prosecution of the business. Powell v. Hopson, 13 La. An. 625; Taylor v. Castle, 42 Cal. 367. The surviving partner or partners have the legal right to the possession and control of the partnership property until its affairs are finally settled, and the courts will not interfere therewith, except he is guilty of mismanagement, or there is danger that the partnership effects will be wasted or squandered. Connor v. Allen, Harr. (Mich.) Ch. 371. A court of equity may, upon the consent and application of all the surviving partners and the executors or heirs of the deceased member, authorize a continuance of the firm for the benefit of infant heirs or the estate generally. Powell v. North, 3 Ind. 392.

Insanity of a partner.—Considerable discussion has arisen upon the question whether insanity *ipso facto* operates as a dissolution of the firm, and there are some respectable authorities sustaining the position that it does, 10 N. H. 161; at least, after an inquisition of lunacy finding the partner insane. Isler v. Baker, 6 Humph. (Tenn) 85. But the great weight of authority, as well as of reason, seems to be that, while insanity may be and is a good ground for a decree dissolving the partnership when it is permanent and incurable rather than temporary, yet it is optional with the other members of the firm whether to move for a decree or not, and if they continue to carry on the business without moving therefor, they cannot use the insane partner's capital, and yet deny him of his rights as a partner. Sayres v. Bennett, 1 Cox, 107; Sanders v Sanders, 2 Collyer, 276; Jones v. Noy, 2 My. & K. 125; Kirby v. Carr, 3 Y. & C. 184; Besch v. Frolich, 1 Ph. Ch. 127; Bagshaw v. Parker, 10 Beav. 532; Millersh v. Keen, 27 id. 236; Robertson v. Lockie, 10 Jur. 533. This question is one of great practical importance to the firm, as well as to the insane partner, because, if by his insanity the firm is dissolved, it is dissolved *eo instanti* upon his becoming so, and his estate ceases to be liable for any debts contracted *after* he became insane, whereas if it is not dissolved except by decree, his estate remains liable for all debts contracted prior to the decree of dissolution, which seems to be the rule. Besch v. Frolich, *ante*. Upon the other hand, if the partnership continues until the decree is made, the insane partner is entitled to a share of the profits of the business down to the date thereof, and such is the rule, and the courts have invariably refused to make their decrees retrospective. Besch v. Frolich, *ante;* Jones v. Noy, *ante*. In Sayres v. Bennett, 1 Cox, 107, the court say that "when the court dissolves a partnership on the ground of lunacy, it does not dissolve it with a retrospect to the time of disorder commencing, if the continuing partner shall have abstained for any period from coming to the court for a dissolution; *because, as the lunatic's capital has been embarked during such continuance of the business, he was entitled to his share of the profits.* It is not competent to a partner to take advantage of an infirmity with which his partner has been visited by the act of God, and after continuing the business for an indefinite time with the joint capital, to claim from the period when his partner's malady may have commenced the exclusive benefit of the profits of the business." In Jones v. Noy, *ante*, one of the members of the

year to year, the law fixed one positive rule for six months' notice, a rule, which might in many cases be very convenient, in others, as that of nursery grounds, most inconvenient; yet, as to trades in general,

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firm became insane and incapable of attending to business in May, 1824, and in August, 1826, died in a lunatic asylum. Noy continued to carry on the business with the joint capital until the close of the year 1825, when he sold it for 2,000*l*. The executors of the deceased partner brought a bill for an account up to the time when the business was sold, and of the money or other consideration received by the defendant from the sale, and for the share of the profits and the money belonging to the deceased partner's estate. The Master of the Rolls, in rendering judgment for the plaintiff, said: "It is clear upon principle, that the complete incapacity of a party to an agreement to perform that which was a condition of the agreement is a ground for determining the contract. The insanity of a partner is a ground for the dissolution of the partnership, because it is immediate incapacity; but it may not, in the result, prove to be a ground of dissolution, for the partner may recover from his malady. When a partner, therefore, is affected with insanity, the continuing partner may, if he think fit, make it a ground of dissolution; but in that case I consider with Lord Kenyon, that, in order to make it a ground of dissolution, he must obtain a decree of the court. If he does not apply to the court for a decree of dissolution, it is to be considered that he is willing to wait to see whether the incapacity of his partner may not prove merely temporary. If he carry on the partnership business in the expectation that his partner may recover from his insanity, so long as he continues the business with that expectation or hope there can be no dissolution. The question, therefore, here is, whether it is not to be considered that between May, 1824, when Hardstone was first affected with insanity, and 1825, when the business was sold, Noy carried on the business in the hope that the insanity of his partner would prove only temporary, and would not therefore render a dissolution necessary. I am inclined to think that Noy did carry on the business till 1825 in the hope of his partner's recovery; and I am further disposed to give to the plaintiff, the representative of Hardstone, the profits of Hardstone's share of the partnership up to the period at which the business was sold."

In Sander v. Sander, 2 Collyer, 276, the court expressly held that the dissolution only became operative *from the date of the decree.*

Where the insanity is of a temporary nature, the partnership will not be dissolved by a court of equity. Thus, in Huddlestone's case, cited in Pearce v. Chamberlain, 2 Ves. 33, one of the firm became a lunatic, and a bill was brought to set aside the partnership, but Lord Talbot refused to so decree, but compelled the orator to carry on the business for the benefit of himself and the lunatic. The Master of the Rolls, in the case of Pearce v. Chamberlain, *ante*, said: "I remember Huddlestone's case, and am pretty certain (though not very positive), that he was under a great dejection of mind so that a commission was applied for; but before that question came before the court, he had recovered himself and was desirous to carry on the partnership. The court said that these were accidents which could not be provided for; but that was no reason, when he had brought all his substance into trade, the other partner should say *that a temporary disorder* intervening should deprive him from going on with his business, and that he should put the whole benefit of the partnership into his pocket without accounting for it. The court held that he had not forfeited the benefit of the partnership, but should, notwithstanding that accident, be considered a partner. *That case depended entirely on the circumstance, that there was a prospect of his recovery.*" In Sayre v. Bennett, a MSS. case decided in 1784, and reported in 1 Montagu on Part., note 6, p. 16, articles of partnership were entered into in 1774, between the plaintiff and the defendant for fourteen years, and in these articles it was stated that plaintiff being minded to ease himself from the fatigue of the business, had taken defendant for his partner, and defendant was to be the acting partner, and was to transact all the business himself. Plaintiff was to have two-thirds of the profits and defendant the remaining third. The business was very considerable, and it was proved that the profits in one year were 4,600*l*., and that

there was no rule of this kind for the determination of partnership.[1] *Reasonable* notice, however, of which the jury will consider, must be given in all cases where the articles are totally silent on the subject,

upon an average they were 300*l.* a year. In 1783, the defendant, from his close application to the business, became insane, and was confined in a private madhouse; he afterward recovered his senses, and it was sworn by several persons who had lately seen him, that he was perfectly reasonable, and that he was capable of conducting common business. The fact, however, of his having been insane, was admitted by the defendant himself. The bill was brought to put an end to the partnership. Ambler and Lloyd, for plaintiff, argued that the lunacy of one of two copartners would determine their partnership, by analogy to other cases which had been repeatedly held to determine partnerships, as bankruptcy. That where there is once a bankruptcy the partnership is at an end; and though after some months there be a supersedeas of the commission, that will not restore the partnership. So an execution by which all the property of one of the partners is taken would determine the partnership; and if loss of property will put an end to a partnership, *a fortiori*, will the loss of a man's senses by which he is rendered incapable of conducting business, and the more so in the present case, because the defendant was to be the acting partner, and to transact the whole business. That it was said in this case that the defendant had recovered, but it was more than probable that he would relapse into his former insanity, as soon as he had the pressure of so great a concern again upon his mind. Where a man has been once out of his mind, there must be danger of his becoming so again, especially when the very cause of his former insanity must still exist, but in this case it was not satisfactorily proved that he ever had recovered; the evidence was very slight, and Doctor Munro, under whose care he had been, was not examined. Selwyn and Ainge, for defendant, insisted that no precedent could be produced where a court of equity had dissolved a partnership on account of the lunacy of one of the partners. If the defendant was mad at the present moment, he might be restored to his senses in a few weeks, and would then be entitled to the benefits of this partnership. Huddleston's case, cited in Pearce v. Chamberlain, 2 Ves. 33. This case should be considered as that of an infant: the court will carry on a trade for the benefit of an infant, and so it should for the benefit of a lunatic. If lunacy be a cause for dissolving a partnership, why should not a thousand other diseases which render personal attendance and application impossible? But whatever might be the case of an actual lunatic, the present case is very different. Here the defendant is recovered, and is capable and desirous again to take upon himself the conduct of the business. Sir L. Kenyon, Master of Rolls: "The point now in judgment is, I believe, a new point, and it is of great importance. If I thought any industry could give me any light upon the subject, I would let the cause stand over to inquire into it, but as I have no reason to hope I shall be able to find any thing upon the subject, and as I have not any doubt, I shall give my opinion now, in order that if that opinion is wrong, it may be the sooner reformed; if right, that the question may be put at rest. This I will venture to lay down as a general rule, where there are two partners, both of whom are to contribute their skill and industry in carrying on the trade, the insanity of one of them by which he is rendered incapable to contribute that skill and industry on his part, is a good ground to put an end to the partnership, not by the authority of either of the partners, but by application to a court of justice, and this for the sake of the partner who is rendered incapable, as well as of the other, for it would be a great hardship upon a person so disordered, if his property might be continued in a business which he could not control or inspect, and be subject to the imprudence of another. *If this then were the case, of one of the partners being insane at the present moment, I should not have a particle of doubt to decree the dissolution of the partnership, and to make a precedent,* for I confess I have not been able to find any. It is said that equity should appoint some person to carry on the business for the benefit of the lunatic, as they would have done for an infant, but

[1] 16 Ves. 57.

and the partnership is at will; in others the proper notice may be inferred from the articles.[1] The assignment of one partner's rights in the profits to his copartner, is *ipso facto* a dissolution, without any

I say, God forbid! Mr. Sayer would certainly never have entered into this partnership if he had conceived that by so doing, he should in any event have subjected his business to the management and control of a court of equity. The next question is, how far the present condition of the defendant brings this case out of the general rule which I have laid down? If it was clearly established before me, that Bennet had recovered his senses, and that there was no probability of his relapsing into lunacy, I think it would be too much for me to say, that the partnership should be dissolved, and, indeed, if Bennet was perfectly recovered, I think the partnership ought not to be dissolved. Huddleston's case was very different from this; that was only a temporary illness. It is called in the report a dejection of mind. This was much more, it was confirmed madness. The case of Pearce v. Chamberlain is an authority for the plaintiff with regard to the evidence of the defendant recovering; the case is certainly open to all the observations which have been made on the part of the plaintiff. I am astonished that Dr. Munro was not examined. The evidence that has been given is very loose and unsatisfactory. From this want of evidence, I feel myself under extreme difficulty how to apply the rules which I have laid down, and of which I have no doubt, to this particular case. In order, therefore, to ascertain the fact, I find myself under the necessity of directing such an inquiry as, I believe, was never directed before. Let it be entered to the master to inquire and state to the court, whether the defendant is in such a state of mind as to be capable of carrying on the business in which he is copartner with the plaintiff, according to the terms of the articles of copartnership. If upon this inquiry it should appear probable that the defendant may relapse to-morrow, I ought to put an end to the partnership, and not suffer the plaintiff's property to be made wild waste of by the defendant. However, if that should be the fact, *I think the dissolution of the partnership ought not to have a retrospect, because Bennett's part of the stock has run a risk*, and he ought to have more than interest for his money to compensate that risk. Besides, I think the partnership could not be determined by plaintiff's will."

By mutual consent.—A partnership may be dissolved by the mutual consent of the parties before the term of its duration has expired, but a firm limited as to time cannot be dissolved without the consent of *all* the parties. Sanderson v. Milton Stage Co., 18 Vt. 107; Bishop v. Breekles, 1 Hoff. Ch. (N. Y.) 534; Gansevoort v. Kennedy, 30 Barb. (N. Y.) 279; Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129; Ferrero v. Buhlmeyer, 34 How. Pr. (N. Y.) 33.

A partnership at will may be dissolved at any time.—But, where there is no limitation as to time, either or any partner may put an end thereto at any time. It is a mere partnership at will, and may be ended at will, and without assigning any reason therefor. Featherstonhaugh v. Fenwick, *ante;* Skinner v. Tinker, 34 Barb. (N. Y.) 333; Pine v. Ormsbee, 2 Abb. Pr. N. S. (N. Y.) 375; Millish v. Keen, 7 W. R. 629; Peacock v. Peacock, 16 Ves. 50; Miles v. Thomas, 9 Sim. 606; Carlton v. Cummings, 51 Ind. 478; but, in contemplation of law, until the affairs of a partnership are settled and its outstanding debts are discharged, it is treated as continuing so far as respects the winding up of the concern, Brown v. Higginbotham, 5 Leigh (Va.), 583; so, if an immediate dissolution would likely result in great damage to the firm, so as to amount to what is termed irreparable mischief, a court of equity would restrain an immediate dissolution, Chavany v. Van Sommer, 1 Penn St. 512 *n.*; Blissett v. Daniel, 10 Ha. 493; notice of an intention to dissolve need not be given. In such a case, it may be put an end to *instanter*. Thus in Master v. Kirton, 3 Vesey, 74, a bill was brought for a dissolution of a partnership, and an account and restraint from using the partnership name, the defendant demurred on the ground that the partnership existing only by the fact of their acting together, the prayer that the court might do what they have the right to do for

[1] Wheeler v. Van Woert, 2 Jur. 252.

express notice or agreement to dissolve the partnership; for since the partnership, as between the parties, results from the agreement to share in profits, it ceases as soon as such right is determined.[1] Again,

themselves was nugatory. The Lord Chancellor overruled the demurrer, saying, that here is an account to be taken and the defendant to be restrained. In Tattersall v. Groote, 2 Bos. and Pull. 131, Lord Eldon, Ch. J. (after stating the case): These articles purport to be an agreement between two gentlemen conversant in the different branches of the medical profession; and one of them has thereby decided for himself, that it was worth his while to give 420*l.* to the other on the establishment of a joint concern. It was competent to him to decide on the prudence of such a measure, taking into consideration the probability of the connection being of long continuance or not. It is very evident from the covenant which provides that the practice of midwifery shall belong wholly to Mr. Tattersall, after the dissolution of the partnership, that he might derive a sufficient inducement for entering into it from the hope of being soon able to establish his character in that branch, and then to dissolve the partnership and set up for himself. He declined entering into articles for a definite period of time. In Ex parte Nokes, 6 June, 1801, Cooke's MS., the Lord Chancellor said: "A partner not for a term has certainly a right to say, I instantly dissolve the partnership. Where there is no express agreement subsisting between the partners, a dissolution may, therefore, be brought about by any one of them without the decree of a court of equity." In Crawshay v. Collins, 15 Vesey, 218, the Lord Chancellor says: "In the instance of a partnership, without articles, the respective proportions of capital contributed by the partners, and the trade being carried on either for a certain period, or the connection dissolvable at pleasure, the time being expired, or, in the other case, notice to determine being given, the firm is dissolved." In Peacock v. Peacock, 16 Ves. 49, there was a motion to restrain the defendant from receiving partnership debts, etc. The Lord Chancellor said: "Under the circumstances of this case it is clear, that this court cannot prevent the defendant from forthwith dissolving this partnership. As it is a partnership without any agreement for continuance, it may be dissolved at any time, subject to the proper accounts." An issue was directed to try the fact of partnership. The verdict established that the plaintiff was a partner. The motion was renewed, the defendant having declared, that the said partnership is and shall be "dissolved upon this day." Sir Samuel Romilly and Mr. Leach, in support of the motion. Reasonable notice must be given to dissolve a partnership subsisting for an indefinite period; what notice, must depend upon circumstances; particularly the nature of the business. Consider the inconvenience that may be the consequence of such a notification, that the concern is from that instant at an end; having nothing in the nature of notice, which is necessary for winding up the concern. Mr. Hart and Mr Heald, for the defendant. These parties to this voluntary engagement, not having fixed any limitation of the period of its duration, are not bound beyond the respective will of each. The connection must be dissolved at the instant that either thinks fit so to declare. The law of this country does not raise the obligation of reasonable notice without defining in some way what it shall be. They had the power of obviating the inconvenience by express stipulation either for continuance or notice; not taking that course, the conclusion is, that they intended the choice of the determination, as of the commencement, of their connection to be mutual. Sir Samuel Romilly, in reply. The uncertainty of reasonable notice is no objection; and the mercantile law affords several instances, as, what shall be reasonable notice to discharge an indorser; what the reasonable time for presenting a bill. So what can be more uncertain than the right of the lord of a manor to a reasonable fine? The notice is capable of being reduced to certainty by the custom of the particular trade, which governs the contract entered into. The Lord Chancellor said: "I have always taken the rule to be, that in the case of a partnership, not existing as to its duration by contract between the parties, either party has the power of determining it when he

[1] Per Denman, C. J., Heath v. Sansom, 4 B. & Ad. 175.

the partnership will be dissolved by the bankruptcy of any of the partners. In the words of Lord Mansfield, "an act of bankruptcy by one partner is a dissolution of the partnership by virtue of the rela-

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may think proper, subject to a qualification that I shall mention. There is, it is true, inconvenience in this; but what would be more convenient? In the case of a partnership expiring by effluxion of time, the parties may by previous arrangement provide against the consequences; but where the partnership is to endure so long as both partners shall live, all the inconvenience from a sudden determination occurs in that instance as much as in the other case. I have therefore always understood the rule to be, that in the absence of express contract the partnership may be determined when either party thinks proper," and it was so decreed. See Featherstonhaugh v. Fenwick, 17 Vesey, 298.

Intention to dissolve must be communicated to other parties.—But, although the partnership may be put an end to *instanter* at the will of any partner, yet, he must communicate his intention to the other partners in such a manner as to have no doubt of his intention. Wheeler v. Van Wart, 9 Sim. 193; Van Sandau v. Moore, 1 Russ. 463. A mere notice of an intention to withdraw at some future time, or a proposal to withdraw, which is not accepted, does not amount to a dissolution. Hall v. Hall, 12 Beav. 414.

Single transactions; dissolution by decree.—Where the partnership only relates to a single transaction, it is *ipso facto* dissolved when such transaction is ended. Petrikin v. Collier, 1 Barr. (Penn.) 247; Hartman v. Walker, 13 N. J. 383. But where a general partnership is formed, either for a definite or an indefinite period, the causes that may operate its termination are various, and hardly susceptible of enumeration. But those operating to effect a dissolution *ipso facto*, and without a decree of a court of equity, are comparatively few. Prominent among them, and embracing pretty much the entire list of them, are the death or bankruptcy of one or all the partners, the effluxion of time, the sale of the entire interest of a partner in the partnership stock, or its sale upon legal process, the introduction of a stranger into the firm, or the absolute withdrawal of a member therefrom.

A partnership for a definite term can only be dissolved for cause.—It is said by the courts in some cases, that a member of a firm for a certain definite period, may withdraw therefrom at any time by proclaiming his purpose to do so, and that the only consequence is that he thereby subjects himself to a claim for damages by his copartners for a breach of contract. Skinner v. Dayton, 17 Johns. (N. Y.) 538; Slaughter v. Huling, 4 Dana (Ky.), 428; Buford v. McNeely, 2 Dev. Eq. (N. C.) 481; Bishop v. Breckles, 1 Hoff. Ch. (N. Y.) 531; Marquand v. N. Y. Mf'g Co., 17 Johns. (N. Y.) 525; Munroe v. Connor, 15 Me. 180; Cape Sable Co. Case, 3 Bland, 674. But this is hardly believed to be sound law, and the true doctrine seems to be that, when a person has entered into a contract of partnership for a certain definite period, he cannot, of his own motion, put an end thereto, and, if no intermediate legal or accidental cause, such as have previously been named, intervenes, nothing short of the effluxion of time, the consent of *all* the partners, or a decree of a court of equity predicated upon a valid cause, will relieve him from his contract. Van Tagen v. Roberts, 4 Leg. Op. 610; Peacock v. Peacock, 16 Ves. 56; Warner v. Cunningham, 3 Dow. 76; Hartman v. Waehr, 13 N. J. 383; Crawshay v. Maule, 1 Swanst. 495. In Pierpoint v. Graham, 4 Wash. C. C. (U. S.) 234, Washington, J., said: "It is perfectly clear that one partner cannot, by withdrawing himself from the association before the stipulation between the partners for its continuance, either dissolve the partnership or extricate himself from the responsibilities of a partner, either in regard to his associates or third persons; and if this be so, it would seem that he cannot produce the same consequences by any voluntary act of his own. This is not like those cases where, by the act of God, or by the operation of law, the partnership is dissolved, as by the death or bankruptcy of a partner." See, also, Story on Partnership, § 275.

Duration of partnership may be implied in certain cases.—In Gow on Partnership, 278, the author says: "In

tion in the statutes, which avoids all the acts of a bankrupt from the day of his bankruptcy; and, from the necessity of the thing, all his property being vested in the assignees, who cannot carry on a trade."[1]

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the absence of an express, there may be an implied, contract as to the time for which a partnership shall endure, Crawshay v. Maule, 1 Swanst. 508; *and where that is the case, the partnership cannot be destroyed by the act of the party until the contemplated period arrives.*" Upon the point suggested by Mr. Gow, that a term might be implied, the case of Wheeler v. Van Wert, 2 Jurist, 252, is in point. In that case, a company, the duration of which was not expressly fixed, was held to be intended to continue, at least until after a day fixed in its articles of settlement for a general meeting. In another English case, Reade v. Bentley, 4 K. & J. 656, it was held that an agreement between a publisher and an author amounted to an agreement for a joint adventure so long as might be necessary to dispose of a complete edition, and that every new edition prolonged the partnership until that edition should be sold, but that, when an edition was exhausted, either party was at liberty to discontinue it. See, also, Crawshay v. Maule, *ante.* But the circumstances and the nature of the business must be such as to leave no doubt as to the intention of the parties in that respect. Indeed it may be said that the circumstances must be such that it follows as a necessary inference both of law and fact. But where no definite term is fixed, it is a partnership at will, and may be put an end to *instanter* by either party. Skinner v. Tinker, 34 Barb. (N. Y.) 333; Marshall v. Marshall, 3 Ross' L. C. 611; Stevens v. Yeatman, 19 Md. 480; Peacock v. Peacock, 16 Ves. 50; Pine v. Ormsbee, 2 Abb. (N. S., N. Y.) 375. And the fact that goods have been bought, or debts created, which have been charged to the assets of the firm, does not warrant an inference that the firm shall continue until the goods are sold or the debts paid. King v. Accumulative Ass. Co., 3 C. B. (N. S.) 151. Nor does the fact that a lease has been taken for a definite term warrant an inference that the partnership should endure during the term fixed therein. Featherstonaugh v. Fenwick, 17 Ves. 307; Alcock v. Taylor, Tamlyn, 506; Jeffreys v. Smith, 1 Jac. & W. 301. Neither does the fact that a partnership for a definite term has previously existed between the parties, is continued by the parties after its expiration, no time for its duration being agreed upon, furnish any ground for an inference that it was to continue for the same period as the previous partnership continued. Booth v. Parks, 1 Moll. 465; Featherstonaugh v. Fenwick, 17 Ves. 307; even though a lease has been taken for a fixed term.

Rule in Featherstonaugh v. *Fenwick.*—In Featherstonaugh v. Fenwick, *ante,* this question was ably discussed by the Master of the Rolls. He said:

"The first question in this case is whether the partnership was dissolved on the 22d of November, 1804. The plaintiff contends, that the defendants had no right to put an end to the partnership at that period; and that is contended on several grounds: first, that as by the articles which formerly existed, but had expired, twelve months' notice was necessary to enable a partner to withdraw, the same notice was necessary for withdrawing from the partnership, which continued without articles. I do not agree to that proposition. The latter partnership was for an indefinite period; and therefore might be dissolved at the will of the parties; subject to the question, afterward made, by what notice that will must be declared.

Another ground, on which the plaintiff contends against the dissolution on the 22d of November, is, that the lease of the premises in London, used in carrying on the concern, was then unexpired. That does not oppose any obstacle to the dissolution; as it is not a necessary consequence that partners, taking premises for the use of their trade for a definite period, contract a partnership for the same period. If any part of the term is unexpired at the end of the partnership, that is partnership property; and is to be distributed as such; but I do not apprehend that they are bound to continue the partnership on that account.

A third ground is that there were several contracts, subsisting with their workmen, which had a considerable

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[1] Fox v. Hanbury, Cowp. 445.

An act of bankruptcy, however, does not dissolve the partnership *instanter*. It must be followed by a fiat and adjudication. "The *adjudication that he is a bankrupt,*" said Lord Loughborough, "is what

period of time to run. That argument goes considerably too far. It would go to this extent, that a partnership could not be dissolved until all their contracts were completely ended and wound up; and that can hardly be the case at any period, as persons are entering into contracts from day to day which cannot all expire at the same period. It would on that ground be hardly possible to dissolve any partnership, as there must always be contracts depending. I do not conceive, therefore, that the existence of engagements with third persons, either for goods to be worked up, or engagements with their workmen, which had not come to a conclusion, can form an objection to the dissolution. The partners cannot, it is true, by a dissolution relieve themselves from the performance of any engagements which they may have contracted with third persons, but, as among themselves, the existence of such engagements cannot prevent a dissolution either by mutual consent, or by notice.

The question then is what sort of notice ought to be given for this purpose? Until a very recent period it had been, I believe, understood, that a reasonable notice should be given; but upon the question, what is reasonable notice, much difference of opinion may prevail. On the one hand, it may be extremely disadvantageous to parties to say that a partnership shall be dissolved on a given day; on the other, it must be extremely difficult for a court of equity, by a general rule, to ascertain what is reasonable notice; and the question, whether the particular notice was reasonable or convenient, would be the subject of discussion in almost every instance of the dissolution of a partnership. Considerations of that sort, I believe, have led to a different rule; that in the case of a partnership such as this, subsisting without articles, and for an indefinite period, any partner may say, "It is my pleasure on this day to dissolve the partnership;" but, considering the principles on which the dissolution must take place, a partner can very seldom, if ever, have an interest to give notice of dissolution at a period disadvantageous to the general interests of the concern; as where the articles do not prescribe the terms the law ascertains what shall be the consequence of dissolution, viz.: that the whole of the joint property must be sold off, and the whole concern wound up. No partner, therefore, can derive a particular advantage by choosing an unseasonable moment for dissolution, as upon the principles established in Crawshay v. Collins, and the authorities there referred to, he must suffer in proportion to the extent of his interest in the trade. I hold, therefore, that the dissolution of this partnership took place on the 22d of November.

The next consideration is, whether the terms upon which the defendants proposed to adjust the partnership concern, were those to which the plaintiff was bound to accede. The proposition was, that a value should be set on the partnership stock; and that they should take his proportion of it at that valuation; or that he should take away his share of the property from the premises. My opinion is clearly that these are not terms to which he was bound to accede. They had no more right to turn him out than he had to turn them out upon those terms. Their rights were precisely equal; to have the whole concern wound up by a sale, and a division of the produce. As, therefore, they never proposed to him any terms which he was bound to accept, the consequence is that, continuing to trade with his stock, and at his risk, they come under a liability for whatever profits might be produced by that stock. In the case of Crawshay v. Collins there was no circumstance, except merely that there had been no adjustment of accounts with the assignees of the bankrupt. Here the defendants proposed adjusting the accounts on certain terms; but terms which the other party was not bound to accept. Though he, thinking they had no right to dissolve the partnership, might not have gone into any detail of the principles, on which the dissolution should take place, yet I conceive it to have been their duty in the first place to put themselves right by offering to him those terms, upon which the law gave him a right to insist; and, not having done so, but continuing to trade with his stock under the liability to answer for the profits, the same inquiry should be directed as in Crawshay v.

severs the partnership."[1] Formerly, it was necessary, in order to divest completely, that the commissioners should make an assignment of the bankrupt's effects; and such assignment related to the com-

Collins, to ascertain what that stock was at the period of the dissolution, on the 22d of November; what use was afterward made of it; and what profits were produced by the trade.

There is still remaining what I consider a separate question: whether the renewed lease formed any part of the partnership property at the time of the dissolution. That is the only view I take of this question. Sir Samuel Romilly seemed to think that, if it formed part of the partnership property, the consequence would be that the partnership was not dissolved. For the reason I have already given I think that consequence would not follow; but, supposing the lease to have been renewed on the 22d of November, and that the defendants are to be considered as trading for the plaintiff under that renewal, the consequence is that the renewed lease was partnership property from the 22d of November. It is clear that one partner cannot treat privately, and behind the backs of his copartners, for a lease of the premises where the joint trade is carried on, for his own individual benefit. If he does so treat, and obtains a lease in his own name, it is a trust for the partnership; and this renewal must be held to have been so obtained. Consider what an unreasonable advantage one partner would, upon a different principle, obtain over the rest. In this respect there can be no distinction, whether the partnership is for a definite, or indefinite, period. If one partner might so act in the latter case, he might equally in the former. Supposing the lease and the partnership to have different terms of duration, he might, having clandestinely obtained a renewal of the lease, say to the other partners, "The premises, on which we carried on our trade, have become mine exclusively; and I am entitled to demand from you whatever terms I think fit, as the condition for permitting you to carry on that trade here."

Is it possible to permit one partner to take such an advantage? When the application was made for a renewal, no notice of dissolution had been given, nor had the plaintiff notice of any intention of renewing the lease. It is not true, as has been represented, that the impediment to a renewal of the partnership arose solely from the indisposition of Mr. Wilkinson to any connection with the plaintiff; as, before any objection had been made on that, or any other ground, the defendant goes with the intention, and for the direct purpose, of obtaining a renewal for himself and his son exclusively. He makes the application to Murray, who says the proposal was for a renewal for the benefit of the defendants, expressly excluding the plaintiff, with whom it was represented that George Fenwick was determined to have no further connection in trade; and though it may be true that Wilkinson afterward said he would not have granted a lease to the defendants jointly with the plaintiff, that declaration had become quite unnecessary by the resolution, previously expressed by the defendant, not to take a lease jointly with him.

This clandestine conduct was very unfair toward the plaintiff. The defendants had not intimated to him that they would not have any further connection with him; and that they intended to apply for a lease on their own account. They ought first to have given him notice; and to have placed him on equal terms with them; and then, if Mr. Wilkinson had thought proper to give them the preference, the case might admit of a different consideration. Instead of that they clandestinely obtained an advantage, which would enable them to dissolve the partnership on terms very unfavorable to the plaintiff; and they evidently had that object in view. If they can hold this lease, and the partnership stock is not brought to sale, they are by no means on equal terms. The stock cannot be of equal value to the plaintiff, who was to carry it away and seek some place in which to put it, as to the defendants, who were to continue it in the place where the trade was already established; and if the stock was sold, the same circumstance would give them an advantage over other bidders.

[1] Ex parte Smith, 5 Ves. 295; Talcott v. Dudley, 6 Ill. 485; Stauffer v. Coleman, 1 Yeates (Penn.), 399; Barstow v. Adams, 2 Day (Conn.), 70; Cohen v. Gibbs, 1 Hill (S. C.), 206.

mission of the first act of bankruptcy;[1] but under the 1 & 2 Will. 4, c. 56, s. 25, this proceeding is no longer necessary.

Assignment by one partner or the firm.

SEC. 102. An assignment under the Insolvent Act, or a sale of the

In effect they would have secured the good will of the trade to themselves in exclusion of their partner. Then does the circumstance, that Wilkinson was unwilling to admit the plaintiff into the agreement for a renewal, make any difference? I think it does not; as it is no injury whatsoever to him, or any other of the trustees of Mr. Lambton, to declare the defendants trustees of this property for the plaintiff. There may be cases, where the interest, which a third party may have against the specific performance of an agreement, would preclude the execution of it, as between *cestui que* trust and trustee; as in a case before Lord Redesdale an insolvent tenant made over his lease to another person, who treated with the landlord for a renewal, to himself ostensibly, but under a secret agreement in trust for the original tenant. Lord Redesdale held, and very justly, that he would not execute that agreement as against the landlord, forcing upon him a tenant, whom he never would have chosen, and unable to execute the agreement, into which the ostensible tenant had entered; and therefore the principle that a trustee shall derive no benefit to himself from the trust should fail, rather than be carried into execution against a third party, not apprised of the secret engagement, and imposed upon by the default of him, who claimed as the *cestui que* trust. But Lord Redesdale said, if the farm had been occupied by the trustee, the court must have held him to be accountable for the profits, that as between them there was no reason for not carrying the trust into execution, the interest of the landlord was the only impediment. It is not necessary here to determine whether I would, or would not, have decreed Wilkinson specifically to perform the agreement for a lease, in which the plaintiff was to be one of the tenants; but I have no difficulty in declaring that under the circumstances, in which this new agreement was made, I can without injury to any third party decree that this lease must be considered as taken for the benefit of the partnership, and was therefore partnership property at the time of the dissolution. The effect will not be to consider it as partnership stock, so as to entitle the plaintiff to all the profits, that might be made during the continuance of the lease, as it is not stock employed and producing profit, in the same sense as the other stock; if he is entitled to an allowance in respect of his share of these premises, it does not follow that I should hold him entitled to a share of all the concerns carried on there. I consider him as having an interest in the premises in which the trade was carried on, to this extent only, that in taking an account of the value of the partnership stock, as it existed on the 22nd of November, this lease is to be included in the estimate of value as part of the joint property." An account was accordingly directed of the partnership property upon the 22d of November, 1804, the renewed lease to be considered as partnership property, and to be sold, with the same inquiry as in Crawshay v. Collins, viz.: whether there were any, and what, profits made since the 22d of November, 1804, by any and what use or application of, or by means of, the stock in trade and capital of the partnership business, as the master finds the same to have been constituted, the master to be at liberty to state specially at the request of any party any circumstances relative to the stock and capital existing on the 22d of November, 1804; or as to any profits made, or alleged to have been made, since such time; the master to make a separate report as to what the partnership property now consists of, with liberty to apply upon the separate report, reserving further directions.

In Crawshay v. Maule, 1 Swanst. 609, Lord Eldon said, "Without doubt, in the absence of express, there may be an implied contract as to the duration of a partnership; but I must contradict all authority, if I say that, whenever there is a partnership, the purchase of a leasehold interest of a longer or shorter duration, is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On

[1] Ex parte Birkett, 2 Rose, 70.

partnership effects under a separate execution against one partner, is *ipso facto* a dissolution of the partnership.[1] In Waters v. Taylor,[2] Lord Eldon, anxious to ascertain that a dissolution had taken place,

that argument, the court holding that a lease for seven years is proof of a partnership for seven years, and a lease of fourteen years, of a partnership for fourteen years, must hold that if the partners purchase a fee simple, there shall be a partnership forever. It has been repeatedly decided *that interests in land purchased for the purpose of carrying on trade, are no more than stock in trade.*" See, also, Daugherty v. Van Nostrand, 1 Hoffm. Ch. (N. Y.) 68.

Effect of insolvency. — Mere insolvency, of itself, does not operate a dissolution of the firm, or divest the partners of their rights in, or dominion over, the partnership property. In order to have that effect there must be a stoppage of payment, an assignment, or some judicial proceedings. Arnold v. Brown, 24 Pick. (Mass.) 89; Siegel v. Chidsey, 28 Penn. St. 279.

Assignment by the firm, or a single partner.—But a general assignment, *ipso facto*, dissolves it, McKelvy's Appeal, 72 Penn. St. 409, or an assignment by any one of the partners, Power v. Kirk, 1 Pitts. (Penn.) 510, but not, unless the partnership affairs are ended. In Pleasants v. Miny, 1 Dall. (Penn.) 390, Shippen, J., said, "Barely executing an assignment, however, of the stock in trade, *if the joint transactions are not at an end*, will not be an actual dissolution of the partnership; for where there is no express agreement to make that dissolution, the assignment can only be considered as circumstantial evidence of it which the defendant is at liberty to repel by proof." A notice served by one party upon the others of his intention to dissolve his connection with the firm before the expiration of the partnership by its own limitation, does not operate as a dissolution, nor does it preclude such partner from changing his intention before his copartners have assented to his withdrawal. Sanderson v. Milton Stage Co., 18 Vt. 107; Smith v. Mulock, 1 Robt. (N. Y.) 569.

Sale to another partner. — It has been held that taking an account of stock and transferring the amount due to one partner to another firm of which he is a member, does not of itself dissolve the firm. Russell v. Leland, 12 Allen (Mass.), 349; or the absconding of one member, Arnold v. Brown, 24 Pick. (Mass.) 89. *Contra*, however, see Whitman v. Leonard, 3 Pick. (Mass.) 177, and the latter case would seem to express the better doctrine; but when it is remembered that a partnership cannot be dissolved by one partner except by expiration of the term, without the consent of all, it will be seen that great injustice might be done to the members of the firm by placing it in the power of one member to withdraw therefrom, by any act of his own. That such an act would be a good ground for an application by the remaining members to dissolve and wind up the affairs of the firm, there can be no doubt; but that it dissolves the firm *ipso facto* is not believed. Ferrero v. Buhlmeyer, 34 How. Pr. (N. Y.) 33. The fact that one partner has mortgaged his entire interest in the property of the firm does not operate a dissolution thereof. State v. Quick, 10 Iowa, 451.

Attachment of entire interest of one partner. — An attachment of the property of one member of the firm by his copartner has been held to operate a dissolution of the firm *ipso facto*, although this is not the rule where the attachment

[1] Fox v. Hanbury, *supra;* Skip v. Harwood, 2 Swanst. 586, n.; Davis v. Grove, 2 Robt. (N. Y.) 136; Bank v. Horn, 17 How. (U. S.) 157; Cooper v. Henderson 6 Binn. (Penn.) 189; Shirley v. Long, 6 Rand. (Va.) 735; so a voluntary assignment dissolves the partnership, Cochran v. Perry, 8 W. & S. (Penn.) 262; Marquand v. N. Y. Manfg. Co., 17 Johns. (N. Y.) 525; Buford v. Neely, 2 Dev. Eq. (N. C.) 481; Merrick v. Brainard, 38 Barb. (N. Y.) 574; Rogers v. Nichols, 20 Tex. 719; Horton's Appeal, 13 Penn. St. 67; Edens v. Williams, 36 Ill. 252; Goodan v. Freeman, 11 Ill. 14; but not, if the assignment for any cause is void, Simmons v. Curtis, 41 Me. 373; or if it is agreed between the partners that it shall not have that effect, Taft v. Buffum, 14 Pick. (Mass.) 322; Buford v. Neely, *ante*.

[2] 2 Ves. & B. 300.

in order to avoid the necessity of decreeing a dissolution, after alluding to the doctrine of a court of law, that a sheriff can take in execution partnership property, and sell the interest of the debtor partner,

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is at the suit of a stranger. Foster v. Hall, 4 Humph. (Tenn.) 346; so, if one partner sells or assigns his entire interest in the property of the firm, either to a stranger or a copartner, or if his entire interest therein is taken upon legal process, or under any legal proceedings, the firm is thereby dissolved. Saloy v. Albrecht, 17 La. An. 75; Renton v. Chaplain, 9 N. J. Eq. 62; Rogers v. Nichols, 20 Tex. 719; Marquand v. N. Y. Mf'g Co., 17 Johns. (N. Y.) 525; Horton's Appeal, 13 Penn. St. 67; Edens v. Williams, 36 Ill. 252; Cochran v. Perry, 8 W. & S. (Penn.) 262.

The retirement of a partner.—The retirement of one member of the firm, by the consent of his copartners, operates a dissolution; so does the admission of a new member. Potter v. Moses, 1 R. I. 430; Mudd v. Bart, 34 Mo. 465; Bank of Mobile v. Andrews, 2 Sneed (Tenn.), 535; Spaunhorst v. Link, 46 Mo. 197.

Neglect to furnish share of capital.—If, by the terms of the partnership agreement, each partner is to furnish a certain amount of capital, a failure of any members of the firm to furnish their proportion is good ground for dissolution. Turnipseed v. Johnson, 9 Ala. 372. Partnerships formed either by parol or by written articles of agreement, may be dissolved by parol. Gardiner v. Bataille, 5 La. An. 597; Truesdell v. Baker, 2 Rich. (S. C.) 351; Wood v. Gault, 2 Md. Ch. 433.

Notice of dissolution — how must be given, when not necessary.— As to persons who have had no prior dealings with the firm, public notice of its dissolution, by publication or otherwise, is sufficient, Dickinson v. Dickinson, 25 Gratt. (Va.) 321; Martin v. Walton, 1 McCord (S. C.), 16; Lansing v. Gaines, 2 Johns. (N Y.) 300; Graves v. Merry, 6 Cow. (N. Y.) 701; Prentiss v. Sinclair, 5 Vt. 149; Lucas v. Bank of Darien, 2 Stew. (Ala.) 280; Shields v. Tilson, 2 McLean (U. S.), 458; Mauldin v. Branch Bank, 2 Ala. 502; Watkinson v. Bank of Pennsylvania, 4 Whart. (Penn.), 482, but, as to those who have had prior dealings with it, actual notice, or what is equivalent thereto, must be shown, Dickinson v. Dickinson, *ante;* Tudor v. White, 27 Tex. 484; Speer v. Bishop, 24 Ohio St. 598; Johnson v. Totten, 3 Cal. 343; Carmichael v. Greer, 55 Ga. 116; Kenney v. Atwater, 77 Penn. St. 34; Zollar v. Janvrin, 47 N. H. 324; Bank, etc., v. Mudgett, 44 N. Y. 514; Prentiss v. Sinclair, 5 Vt. 149; Bernard v. Torrence, 5 G. & J. (Md.) 383; Page v. Brant, 18 Ill. 37; Kirkman v. Snodgrass, 3 Head (Tenn.), 370; Law v. Penny, 7 La. An. 356; Hutchins v. Hudson, 8 Humph. (Tenn.) 426; Ennis v. Williams, 30 Ga. 691; White v. Murphy, 3 Rich. (S. C.) 369; Skannel v. Taylor, 12 La. An. 773; Little v. Clarke, 36 Penn. St. 114; Vernon v. Manhattan Co., 17 Wend. (N. Y.) 524; Williams v. Birch, 6 Bosw. (N. Y.) 299; Kelley v. Smith, 16 La. An. 31; Wardwell v. Haight, 2 Barb. (N. Y.) 549; Schieffelin v. Stevens, 1 Wins. (N. C.) No. 1, 106; Como v. Port Henry Iron Co., 12 Barb. (N. Y.) 27; Filbretch v. Armstrong, 5 Robt. (N. Y.) 339; Martin v. Searls, 28 Conn. 43; Simonds v. Strong, 24 Vt. 642, or the firm will be liable as to all matters within the usual course of the business. Whitman v. Leonard, 3 Pick. (Mass.) 177. But it has been held that a bank, discounting notes in the name of a firm, is not a dealer so as to be entitled to notice, to exonerate a retiring partner. City Bank of Brooklyn v. McChesney, 20 N. Y. 240. No particular form of notice is required. Any notice, informal or otherwise, which informs them of the fact, although not given by a member of the firm, if it brings the fact to the notice of a former creditor so as reasonably to put him upon inquiry, is sufficient. Young v. Tibbetts, 32 Wis. 79; Ransom v. Layless, 49 Ga. 471; Southwick v. McGovern, 28 Iowa, 533; Mauldin v. Branch Bank, 2 Ala. 502; Coddington v. Hunt, 6 Hill (N. Y.), 595. It matters not how the creditor learns of the dissolution. If he has knowledge of it, he cannot hold the outgoing partners. Davis v. Keyes, 38 N. Y. 94. The notice must be such as to indicate who withdraws from the firm. America, etc., Co. v. Wortendyke, 24 N. Y. 550. Where special or private notice of the dissolution of a firm is relied upon, the burden is upon the retiring partner to establish such notice, and if the evi-

asked, "is not that a dissolution of the partnership?" It is true, that his Lordship, notwithstanding that he asked the question, resorted to a rule of equity in order to effect the dissolution in that case. It cannot, however, be supposed that he had any real doubts on the subject, for the termination of the partnership seems to be the necessary consequence of the transfer of the property to the vendee of the sheriff, as tenant in common with the solvent partner.[1]

Death of partner.

SEC. 103. The death of one of the partners *ipso facto* dissolves the partnership.[2] So, a partnership may be dissolved by the civil death of a partner, as by his outlawry, or attainder for treason or felony. The outlaw being dead in law, incapable of entering into any contract, bringing any suit, or holding any property, it is clear that a partnership in which he was engaged is *ipso facto* dissolved, and

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dence is conflicting, and leaves a doubt as to the matter, the benefit of the doubt will be given to the creditor. Southern v. Grim, 67 Ill. 106; Carmichael v. Greer, 55 Ga. 116; Kenney v. Atwater, 77 Penn. St. 84; Nurcornet v. Bretzman, 69 id. 185. But, if the creditor has notice of the time when a partnership expires, he cannot claim to hold all the members of the firm as such for goods sold subsequently, upon the ground that he had no notice of the dissolution. He was bound to make inquiry, and neglected to do so at his peril, Schlater v. Winpenny, 75 Penn. St. 321; Irby v. Vining, 2 McCord (S. C.), 379; or if he knows that the partnership articles or contract provides for a dissolution upon a certain contingency, he is put upon inquiry whether a dissolution for such cause has transpired. Smith v. Vandenberg, 46 Ill. 34. Notice to an agent of the dissolution of a firm is not treated as notice to the principal unless facts are shown that warrant the inference that he was authorized to represent the principal in such matters. Stewart v. Sonneborn, 49 Ala. 178. Notice in some form must be shown, but it may be inferred from circumstances, as that the creditor had stated that the firm was dissolved, or had acted upon that understanding. Thus, where the plaintiffs, who were lawyers, drew a writ in favor of three persons who were partners, describing one of them as *late partner* of a certain firm, it was held that this was sufficient proof that at the time when the writ was drawn they knew that the firm was dissolved, Cahoon v. Herbert, 38 Vt. 244, so where it is shown that notice to him was published in a paper taken by the creditor, notice may be inferred. Page v. Brant, 18 Ill. 87; Treadwell v. Wells, 4 Cal. 260.

Circumstances such as leave no rational doubt that the creditor knew of the dissolution are as satisfactory as positive or direct proof of the fact; Irby v. Vining, 2 McCord (S. C.), 379; and upon the whole evidence, the question whether the creditor in fact had notice is for the jury; Treadwell v. Wells, 4 Cal. 260; Page v. Brant, 18 Ill. 87; but whether the notice was reasonable or not, the facts being admitted, is one of law for the court. Mowatt v. Howland, 3 Day (Conn.), 353.

[1] Kent's Commentaries, Vol. 3, p. 59.

[2] Vulliamy v. Noble, 3 Mer. 610; Goodburn v. Stevens, 5 Gill (Md.), 1; Gratz v. Bayard, 11 S. & R. (Penn.) 41; Remick v. Emig, 42 Ill. 343; Jacquin v. Buisson, 11 How. Pr. (N. Y.) 385; Burwell v. Manderville, 2 How. (U. S.) 576; Bank of Mobile v. Andrews, 2 Sneed (Tenn.), 585; Davis v. Christian, 15 Gratt. (Va.) 11; Potter v. Moses, 1 R. I. 430; Knapp v. McBride, 7 Ala. 19; Mudd v. Post, 34 Mo. 465; Scholfield v. Eichelberger, 7 Pet. (U. S.) 586; Williamson v. Wilson, 1 Bland (Md.), 418; Ames v. Downing, 1 Bradf. (N. Y.) 321; Powell v. North, 3 Ind. 392; Piatt v. Oliver, 3 McLean (U. S.), 27; Connor v. Allen, Harr. (Mich.) Ch. 371; Powell v. Hopson, 13 La. An. 626.

that he is incapable of the functions of a partner in trade. The effects of his delinquency are extremely severe upon his copartner, as upon the outlawry or attainder of one all the partnership effects become vested in the crown. The share of the partner outlawed or attainted is in the first place forfeited to the crown, whereby, if the king were capable of being so, he would become joint tenant or tenant in common of the partnership effects with the other partners; but as this would be inconsistent with the dignity of the monarch, he is strictly entitled to the whole. But this right of the crown is seldom enforced either against creditors or deserving partners.[1] It has been held that the marriage of a *feme sole* partner is a dissolution of the partnership at will;[2] for, otherwise, by her marriage she would introduce a stranger into the partnership, which might be adverse to the interests of the other partner.

Retirement of one partner dissolves the firm.

SEC. 104. We have spoken of the acts of a single partner as the cause of the dissolution of the whole society, and not merely of the cessation of that particular partner's interest. This seems to be the correct principle in cases where those events are not expressly provided for. The words of the Institute are, *cum aliquis renunciaverit societati, solvitur societas.* Lord Eldon likewise has assumed the existence of this principle in several of his judgments. His Lordship's reasoning in Peacock v. Peacock,[3] where the partnership was dissolved at the will of one of *two* partners, warrants the inference that a society of many similarly constituted would be dissolvable at the will of one of its members. Again, in Crawshay v. Collins, Lord Eldon, in reference to the bankruptcy or death of one of many partners, observed that the persons who had been in the partnership and remained solvent, or survived, "were not properly to be termed remaining or surviving partners; the destruction of one being, unless it was otherwise provided for, a dissolution of the whole partnership."[4] And, consistently with this opinion, Lord Eldon on another occasion decided that where *any* number of persons, exceeding two

[1] Wats. on Partn. 377; 2 Bl. Com. 409; 3 Chit. Laws of Commerce, 252.

[2] Nerot v. Burnand, 4 Russ. 260; and see Wats. on Partn. 384; Wrexham v. Huddleston, 1 Swanst. 517, n.; Brown v. Jewett, 18 N. H. 260.

[3] 16 Ves. 49. And see D. Sir J. Copley, 3 Russ. 167.

[4] 15 Ves. 228. "In Crawshay v. Collins, in Chancery, 25 July, 1808, L. C. said, 'the bankruptcy of *one* partner dissolved the partnership as to all, unless the solvent ones came to a new agreement;' but this was not the point of the cause." Cooke's MSS.

are united as partners, the death of one of them operates as a dissolution of the whole society, unless provision is expressly made to the contrary.[1]

The Roman lawyers lay great stress on the doctrine just adverted to. The Digests abound in clauses showing that the death of one partner is the dissolution of the whole society.[2] And the reason given by Pothier for this rule, arising, as it does, from the *delectus personæ* by which each partner is supposed to be actuated on entering into the contract, is applicable not only to dissolution by death, but every species of dissolution. "*La raison est que les qualités personelles de chacun des associés entrent en considération dans le contract de société ; je ne dois donc pas être obligé lorsque l'un de mes associés est mort, à demeurer en société avec les autres, par ce qu'il se peut faire que ce ne soit que par la considération des qualités personelles de celui qui est mort, que j'ai voulu contracter la société.*[3]

The principle which has just been set forth, and which in general terms is no other than this—that *the dissolution of the society as to one partner is the dissolution as to all*—is one of considerable importance. It helps to mark out clearly the basis and boundary of all accounts which are to be taken between the partners. And, although, for the purpose of winding up the concern, and fulfilling engagements which could not be fulfilled during its existence,[4] the partnership certainly subsists even after a dissolution, yet, legally and strictly speaking, it subsists for those purposes alone.

Dissolution by mutual consent.

SEC. 105. A partnership for a term may be dissolved before the expiration of the term, by the mutual consent of the parties ; by the decree of a court of equity;[5] or by the bankruptcy, outlawry, felony

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[1] Kinder v. Taylor, Gow on Partn. 240. "Where several are partners, and one dies, Lord Eldon seems to treat the death of one as a dissolution of partnership as to the survivors ; Crawshay v. Collins, 15 Ves. 228. The same in the case of the bankruptcy of one." Cooke's MSS.

[2] See them collected in Mr. Swanston's valuable note to Crawshay v. Maule, 1 Swanst. 509.

[3] Pothier, *Traité du contract de Société*, c. 8, s. 3, p. 141. And see Vinn. Comm. 634.

[4] 15 Ves. 227.

[5] It seems that upon principles, drawn from the Roman law, a partner may dissolve the partnership at any time, even though it be for a term, the only remedy being by action on the covenant for endurance. See Skinner v. Dayton, 19 Johns. (N. Y.) 538; 3 Kent's Comm. 55. But this doctrine is not now held in New York, nor is it believed to be tenable. The partner may withdraw and refuse to act with the firm, but he cannot withdraw his capital or relieve himself from liability as a partner except by decree of a competent tribunal. Bishop v. Breckles, 1 Hoff. Ch. (N. Y.) 534 ; Gansevoort v. Kennedy, 30 Barb. (N. Y.) 279 ; Sanderson v. Milton Stage Co., 18 Vt. 107 ; Potter v. Gray, 1 R. I. 430. Where articles of partnership

or death[1] of one or more of the partners. It will likewise be dissolved by the expiration of the term, or, in other words, by effluxion of time. But as the law has permitted the partners to limit the duration of the contract, so it has allowed them, except in cases of bank-

prescribe a specified period for its continuance, no partner can, by any voluntary act, work its dissolution, unless the act be such that the subject-matter of the partnership becomes extinct, or the capacity of the partner to give his personal attention is gone. But other voluntary acts may be sufficient to authorize a conrt to decree dissolution on application of the other partners; and the court may, on the application of even the party committing such acts, decree a dissolution, if other causes justify it, and it would be for the benefit of the partnership. Ferrero v. Buhlmeyer, 34 How. (N. Y.) Pr. 33; Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129; Berry v. Cross, 3 Sandf. Ch. (N. Y.). But, says Mr. Lindley, p. 176, "The contract of partnership is determinable at the will of any one of the persons who have entered into it, provided it has not been agreed that the contract shall endure for a specified time. In other words, the result of a contract of partnership is a partnership at will, unless some agreement to the contrary can be proved. See per Parke, J., in Heath v. Samson, 4 B. & Ad. 175; Frost v. Moulton, 21 Beav. 596, and the cases cited *infra*. Such an agreement may be established as well by direct evidence as by implication from the acts of the partners, and it is not possible to lay down any rule by means of which the intention of the partners on this head can be certainly ascertained, where no express agreement has been come to. One or two points, however, on the subject have been decided, and demand notice. The mere fact that a firm has incurred debts, and charged its assets for their payment, is no evidence of an agreement that the firm shall continue until its debts are paid, for those debts may be paid as well after as before a dissolution. See King v. the Accumulative Assurance Co., 3 C. B. (N. S.) 151. Again, the fact that the partners have, for partnership purposes, taken land on lease for a term of years, is no evidence of an agreement that the partnership between them shall subsist for the same period. This has been decided on several occasions; Featherstonhaugh v. Fenwick, 17 Ves. 307; Jefferys v. Smith, 1 Jac. & W. 301; Alcock v. Taylor, Taml. 506; and the reasons are thus given by Lord Eldon in Crawshay v. Maule, a leading case upon the subject. "Without doubt, in the absence of express, there may be an implied contract as to the duration of a partnership, but I must contradict all authority if I say that, whenever there is a partnership, the purchase of a leasehold interest of longer or shorter duration is a circumstance from which it is to be inferred that the partnership shall continue as long as the lease. On that argument the court, holding that a lease for seven years is proof of partnership for seven years, and a lease of fourteen, of a partnership for fourteen years, must hold that if the partners purchase a fee simple there shall be a partnership forever. It has been repeatedly decided that interests in land purchased for the purpose of carrying on trade are no more than stock in trade." Crawshay v. Maule, 1 Swanst. 509. Further, where a partnership, originally entered into for a certain number of years, is continued after their expiration, and there is no evidence as to the additional time for which the partnership was to last, it is treated as having become a partnership at will, and not as having been renewed for another definite period. Featherstonhaugh v. Fenwick, 17 Ves. 307; Booth v. Parkes, 1 Moll. 465. So, if one of several partners forms a sub-partnership with a stranger, the fact that the principal partnership has been entered into for a certain number of years is no evidence that the sub-partnership was intended to last for the same number of years, or for as many of them as were unexpired when the sub-partnership was formed. Frost v. Moulton, 21 Beav. 596. On the other hand, in Wheeler v. Van Wart, 9 Sim. 193, and better in 2 Jur. 252, a company, the duration of which was not expressly fixed, was held to be intended to last at least until after a day appointed in its deed of settlement for the holding of a general meeting. And

[1] Crawford v. Hamilton, 3 Madd. 254; Scholefield v. Eichelburger, 7 Peters (U. S.) 594.

ruptcy[1] or felony, to qualify the causes of its dissolution. For instance, in the case of the death of a partner, the partnership may, nevertheless, be continued beyond the legal period of dissolution, in the hands of his children or representatives.

The partnership *quoad* third persons, or, in other words, the liability of partners *quoad* third persons, cannot be dissolved without express notice to them, and to the world in general, that the partnership no longer exists. There is an exception to this rule in the case of a dormant partner. If the fact of his being in partnership be unknown to all the creditors of the firm, notice of his retirement is unnecessary; if it be known to a few, notice to those few is sufficient.[2] It may also be laid down, that, upon the death of a partner, notice of the dissolution to third persons is not necessary.[3] But in all other cases they who are anxious to avoid fresh liability in respect of the late copartnership must give notice of its dissolution. Even where one partner has committed an act of bankruptcy, although it will be injurious to the credit of the firm for the solvent partners to give notice of such an act, yet, if there be reason to apprehend that a *fiat* will be issued against him, it may be prudent to restrict his pow-

in the recent case of Reade v. Bentley, 4 K. & J. 656; and 3 id. 271, it was considered that an agreement between a publisher and an author (to the effect that the former should defray the expenses of publishing a work written by the latter, and should receive a percentage on the gross amount of sale, and that the net profits of each edition should be divided equally between both parties), amounted to an agreement for a joint adventure for so long as might be necessary to dispose of a complete edition; and that the publication of every new edition prolonged the partnership until that edition should be disposed of; but that when any edition was exhausted either party was free to discontinue the joint adventure."

[1] However, it seems open to argument whether an agreement "that if any of the partners shall become bankrupt the partnership shall nevertheless be continued after allowance of his certificate," would be good. An agreement of this kind, though extraordinary, has been known. Taft v. Buffum, 14 Pick. (Mass.) 272.

[2] Evans v. Drummond, 4 Esp. 89. But, in the case of Kay v. Pollock, the Court of Session held that publication of the dissolution of an anonymous partnership is necessary, if the partnership be known to any *one* creditor; See 2 Bell's Comm. 652. But it is not necessary as to those who had no knowledge of its existence. Chamberlain v. Dow, 10 Mich. 319; and a dormant partner need not give notice; Scott v. Colmensel, 7 J. J. Marsh. (Ky.) 416; Deford v. Reynolds, 36 Penn. St. 325; Magill v. Merril, 5 B. Monr. (Ky.) 168; Ellis v. Bronson, 40 Ill. 455; Kelly v. Hurlbert, 5 Cow. (N. Y.) 534; Benton v. Chamberlain, 28 Vt. 711; Warren v. Ball, 37 Ill. 76; Kennedy v. Bohannan, 11 B. Monr. (Ky.) 120; Armstrong v. Hussey, 12 S. & R. (Penn.) 315; Ayrault v. Chamberlain, 26 Barb. (N. Y.) 89.

[3] Lord Eldon, Vulliamy v. Noble, 3 Mer. 614—"I conceive that the death of a partner, of itself, works a dissolution of the partnership; and I am not prepared to say, notwithstanding all I have read on the subject, that a deceased partner's estate becomes liable to the debts of the continuing partners, for want of notice of such a dissolution." Lord Thurlow, Webster v. Webster, 3 Swanst. 490, n.—"It is impossible, that using the testator's name in the trade can subject his name to the trade debts."

ers of negotiating the partnership securities, and to give notice to the world of such arrangement.[1]

What constitutes a valid notice is a point which will be considered in discussing the liabilities of a retiring partner.

The effect of the dissolution.

SEC. 106. The effect of a dissolution of partnership as between the partners themselves is to put an end to all transactions between them as partners, except for the purpose of taking a general account, and winding up the concern. It follows that all leases held of an individual partner, during the continuance of the partnership, by the members of the firm, as partners, are determined by the dissolution of the partnership; and the lessor may enter without giving notice to quit.[2] As to third persons, the effect of a dissolution of partnership is to absolve the partners from all liability for future transactions, but not for the transaction of the partnership that is past. Therefore, a general dissolution of partnership made between A and B does not operate to discharge A from his responsibility for the subsequent conduct of B in respect of the engagements of the partnership with third persons, made prior to the dissolution.[3]

Powers of partners after dissolution.

SEC. 107. Upon the dissolution of a partnership each member of the firm has a right to have the partnership funds applied to the discharge of the partnership debts, and after all the firm liabilities are discharged, to have the residue paid over to him. Each partner then becomes a trustee for the others, as to all the partnership effects in his hands. But if all the other partners turn over the funds and effects of the firm in their hands, to the acting partner, or the one designated to settle the affairs of the firm, they are not liable for the insolvency of the latter if the payment to him was made in good faith.[4] Each partner has a lien upon the fund remaining for advances made by him to, or on account of the firm. Thus, where new partners bought the interest of a retiring partner who was indebted to the firm, agreeing to indemnify him against all partnership debts, it was held that they must be regarded as purchasers with notice, and that the lien of the remaining partner must be satisfied before a mortgage given by the new partners would be paid out of the partnership effects, but that all

[1] See and consider Lacy v. Woolcott, 2 D. & R. 458.

[2] Doe v. Miles, 1 Stark. 181; Doe v. Bluck, 8 C. & P. 464.

[3] Ault v. Goodrich, 4 Russ. 430.

[4] Allison v. Davidson, 2 Dev. Eq. (N. C.) 79; Smith v. De Silva, Cowp. 469; Campbell v. Mullett, 2 Swanst. 551; Dutton v. Morrison, 17 Ves. 193; Stevens v. Orman, 10 Fla. 9; People v. Till, 3 Neb. 261.

advances made *subsequently* to the date of the mortgage must be postponed to it.[1] And if one partner purchases all the rights and interests of another partner in the firm, he becomes subrogated to the rights of his vendor as to all liens, etc., and may enforce them.[2] Of course, *after* dissolution, partners become tenants in common of the partnership property, and the right of one partner to dispose of the interest of his copartners in the property, otherwise than according to the terms of dissolution, is lost, except so far as is necessary to pay the firm debts,[3] and his authority to bind the partnership in reference

[1] Conwell v. Sandridge, 8 Dana (Ky.), 273. See, also, Peirce v. Wilson, 2 Iowa, 20; Bullitt v. Methodist Episcopal Church, 26 Penn. St. 108. But a partner who, on a voluntary dissolution, transfers the partnership property to his copartner, thereby discharges such property from any lien in favor of partnership creditors, and if he be compelled himself to pay partnership debts after such dissolution and transfer, he can only look to the personal security of his partner for indemnity. Sage v. Chollar, 21 Barb. (N. Y.) 596.

[2] Busfield v. Wheeler, 14 Allen (Mass.), 139.

[3] Baldwin v. Johnson, 11 N. J. Eq. 441; Hogendobler v. Lyon, 12 Kan. 276; Bennett v. Buchan, 3 Barb. (N. Y.) 578. Upon dissolution, the agency of each partner for the other is revoked, except to the extent of closing up past transactions, and even in that respect his powers are limited *and he can enter into no new obligations in the name of his copartners*, even though to close up a past partnership transaction. Palmer v. Dodge, 4 Ohio St. 36; Bank v. Lyman, 5 Mas. (U. S.) 57; Long v. Story, 10 Mo. 630; Woodford v. Dorwin, 3 Vt. 88; Myatt v. Bell, 41 Ala. 233; Hall v. Lanning, 91 U. S. 160; Haddock v. Crocheron, 32 Tex. 276; Napier v. Catron, 2 Humph. (Tenn.) 530; Gale v. Miller, 1 Lans. (N. Y.) 451. Thus it has been held that after dissolution one partner cannot convert an open account *not* bearing interest into a liquidated demand drawing interest so as to charge any one but himself, Bower v. Douglass, 25 Ga. 717; or to indorse and transfer notes due the concern, even to pay the debts of the firm. Offut v. Breedlove, 4 La. 31; Humphries v. Christian, 5 Ga. 166; Bogereau v. Guesinger, 14 La. An. 479. Nor any negotiable paper indorsed in the name of the firm, even to pay a firm debt. Haven v. Goodel, 1 Dis. (Ohio) 28. The dissolution of partnership disables any one of the partners from contracting new debts in the name of the firm, or pledging goods on account of the firm. When, therefore, a surviving partner executed his notes as such, and had them discounted in bank, and executed a mortgage, as surviving partner, on partnership property to secure their payment to the bank, it was held, notwithstanding the surviving partner appropriated the money to the discharge of the partnership debts, that neither the notes nor mortgage were obligatory upon the representatives of the deceased partner, and did not bind his estate. Bank of Port Gibson v. Baugh, 9 Miss. 290. In order to charge both parties who have been partners upon a contract made by one, after dissolution, it must be shown 1. That the creditor, at the date of the contract, had knowledge of the existence of the copartnership; 2. That he did not know of the dissolution; and, 3. It must appear that the contract was entered into with the understanding he was contracting with the company, and upon their faith and credit. Pratt v. Page, 32 Vt. 15. Or the partner giving the obligation must have been specially authorized to do so, and his authority must clearly cover the act done, and must have been conferred *after* dissolution or in view of it. Crouly v. Bank of Kentucky, 18 B. Monr. (Ky.) 409. It seems that one partner cannot, *after* dissolution, put into circulation a note executed or bill drawn by the firm *before* dissolution so as to make it binding upon the other partners. Woodford v. Dorwin, 3 Vt. 88; Abel v. Sutton, 3 Esp. 109. This is upon the ground that after dissolution he has not, without special authority, power to impose new obligations upon the firm, nor to vary the form and character of those already existing. Woodworth v. Downer, 13 Vt. 524; Mutual Savings, etc., Institution v. Euslin, 37 Mo. 453; Lusk v. Smith, 8

to any new contract is revoked, and he can only act in settling of the partnership concerns.[1] Thus, he cannot bind the firm by a partnership note,[2] nor without the authority of the others, indorse a note

Barb. (N. Y.) 678; Cunningham v. Bragg, 38 Ala. 436. And it seems that even where a partner is, upon dissolution, authorized to settle up the business of the firm, he cannot bind the firm by giving a note for a firm debt, *even by way of renewal.* Parker v. Cousins, 2 Gratt. (Va.) 389; Valkenburgh v. Bradley, 14 Iowa, 112. The agreement of partners that one of their number shall wind up the business, does not enlarge his powers so as to enable him to impose any new liability upon the firm. Myatt v. Bell 41 Ala. 232. The authority to settle does not confer authority to create a new liability. National Bank v. Norton, 1 Hill (N. Y.) 573; Parker v. Macomber, 18 Pick. (Mass.) 508. But, while one partner may not *give* a firm note after dissolution, he may take a note *payable* to the firm upon a debt due the firm. Nottridge v. Prichard, 8 Bligh, 520; Combs v. Boswell, 1 Dana (Ky.) 474; or, if specially authorized to do so, may make notes in the firm name. Whitehead v. Bank of Pittsburgh, 2 W. & S. (Penn.) 175.

[1] Whitehead v. Bank of Pittsburgh, 2 W. & S. (Penn.) 172; Neal v. Hassan, 3 McCord (S. C.), 278; Bacon v. Hutchings, 5 Bush (Ky.), 598; Speake v. White, 14 Tex. 364; Chase v. Kendall, 6 Ind. 304. After dissolution, no partner can create a cause of action against the other partners, except by new authority communicated to him for that purpose. Bell v. Morrison, 1 Pet. (U. S.) 360; Sutton v. Dillaye, 3 Barb. (N. Y.) 529; Palmer v. Dodge, 4 Ohio St. 21; Castle v. Reynolds, 10 Watts (Penn.), 51; Cutter v. Cochran, 13 La. 484; Yale v. Yale, 13 Conn. 185; Montague v. Reakert, 6 Bush (Ky.), 393; Parker v. McComber, 18 Pick. (Mass.) 505; Perrin v. Keene, 20 Me. 355; Bank v. Baugh, 16 Miss. 290; Ellicott v. Nichols, 7 Gill (Md.), 85; Woodford v. Dorwin, 3 Vt. 82; Tombickbee Bank v. Dumell, 5 Mass. (U. S.) 56. In order to bind both or all the partners upon *any* contract made by one partner *after* dissolution, it must appear that the creditor at the date of the contract had knowledge of the existence of the partnership, that he did not know of the dissolution, and that the contract was entered into with the understanding that he was contracting with the company, and upon their faith and credit, or that the partner making the contract had the authority of all the other partners to do so. Pratt v. Page, 32 Vt. 15. Where, however, a contract has been entered into by the firm *before* dissolution, it is competent for any of the partners to do any thing necessary for its complete performance. Holmes v. Shands, 27 Miss. 44; Oakford v. Steamship Co., 1 Hen. & M. (Va.) 191. This is upon the principle that a partner retains his former power to bind the firm in things relating to the former business, so far as is essential to fully complete and settle it. Houser v. Irvine, 3 W. & S. (Penn.) 348. In White v. Speake, 14 Tex. 364, one partner acknowledged the indebtedness of the firm, and in writing fixed the amount signing the firm name thereto. It was held not admissible against the other partner. In Bell v. Morrison, 1 Pet. (U. S.) 351, it was sought to take a claim out of the statute of limitations against the firm, upon the acknowledgment of one partner. The court held that it was not sufficient nor admissible for that purpose. In Lane v. Tyler, 49 Me. 252, it was held that one partner, after dissolution, cannot bind the others by an express promise made to one who knew of the dissolution.

[2] Draper v. Bissell, 3 McLean (U. S.), 275; Lange v. Kennedy, 20 Wis. 279; Cunningham v. Bragg, 37 Ala. 436; Stearns v. Burnham, 4 Me. 85; Lansing v. Gaines, 2 Johns. (N. Y.) 300; Graves v. Merry, 6 Cow. (N. Y.) 701; Loomis v. Pearson, Harper (S. C.), 470; Speake v. Barrett, 13 La. An. 479; Sandford v. Mickles, 4 Johns. (N. Y.) 224; Fowler v. Richardson, 3 Sneed (Tenn.), 512; Long v. Story, 10 Mo. 636; Lusk v. Smith, 8 Barb. (N. Y.) 570; Conklin v. Ogburn, 7 Md. 553; Valkenburgh v. Bradley, 14 Iowa, 108. Thus, when a partner, after the partnership had been dissolved by the absconding of his copartner, gave a note in the name of the firm, payable on demand, in lieu of a note given by the firm which had not become payable, with a view to enable the creditor to secure his debt by an attachment of property, it was held that the other partner was not bound by the transaction, because the giving of the new note was not in the usual course of dealing, and that the attachment was void as to other creditors. Whitman v.

given after dissolution,[1] nor one given before,[2] nor renew one given before dissolution,[3] nor assign the partnership effects for the benefit of preferred creditors,[4] nor for the creditors generally.[5] It is held that he cannot draw a bill of exchange or draft[6] nor a check, except *possibly* for the payment of partnership debts.[7] Whether he can bind his co-

Leonard, 3 Pick. (Mass.) 177. So where one of two copartners, after the dissolution of the partnership, gave a note in the name of the firm for his own private debt, the creditor knowing that the partnership was dissolved; and this note being afterward sued, and the party who made it having become bankrupt, the other partner compromised the suit by giving his own note for half the debt and all the cost, part of which note he afterward voluntarily paid, it was held that the making and acceptance of the first note was a fraud upon the absent partner, and that the second note was therefore void. Stearns v. Burnham, 4 Me. 84; Burr v. Williamson, 20 Ark. 171; Chamberlain v. Bancroft, 24 Ga. 310; National Bank v. Norton, 1 Hill (N. Y.), 572; Foltz v. Powrie, 2 Dessau. (S. C.) 40; Richardson v. Moses, 31 Mo. 430; Isler v. Baker, 6 Humph (Tenn.) 85. Nor can he bind the firm by a note made before, but not delivered until *after* the dissolution. Woodford v. Dorwin, 3 Vt. 82. In Abel v. Sutton, 3 Esp. 109, it was held that a bill of exchange made before, and not put in circulation until after dissolution, must be indorsed by each member of the firm. *Contra*, however, and holding that a partner may give a partnership note, *to liquidate a partnership debt*, unless there is an agreement or order of court to the contrary, see Petriken v. Collier, 1 Penn. St. 247; as by so doing he does not create any new debt. Ward v. Tyler, 52 Penn. St. 393; McPherson v. Rathbone, 11 Wend. (N. Y.) 96. But the note must be *bona fide* for the liquidation of firm debts. Lloyd v. Thomas, 1 Penn. St. 68.

[1] Lumberman's Bank v. Pratt, 51 Me. 563; White v. Tudor, 24 Tex. 639; Foltz v. Powrie, 2 Dessau. (S. C.) 40; Bogerau v. Gurisinger, 14 La. An. 478; Poignard v. Livermore, 8 Martin (La.), 543; Jackson v. Porter, 10 id. 101; Haven v. Goodell, 1 Dis. (Ohio) 28; Nott v. Downing, 6 La. 31; even to pay a partnership debt; Humphries v. Chaslain, 5 Ga. 166. But the other partners may ratify his act, Leonard v. Wildes, 36 Me. 265, and their ratification may be implied from their acts.

[2] White v. Tudor, *ante;* Fellows v. Wyman, 33 N. H. 351; Humphries v. Christian, 5 Ga. 166; Sandford v. Mickles, 4 Johns. (N. Y.) 224.

[3] Bank of So. Carolina v. Humphreys, 1 McCord (S. C.), 388; Myatt v. Bell, 41 Ala. 233; Parker v. Cousins, 2 Gratt. (Va.) 389; Long v. Story, 10 Mo. 630.

[4] Egberts v. Wood, 3 Paige's Ch. (N. Y.) 517. In Milliken v. Loring, 37 Me. 408, it was held that one partner, after dissolution, has power to assign *to a creditor of the firm* a demand due the partnership. "The transaction," said Howard, J., "violated no rule of law, and did not create any new obligation or contract on the part of the partnership, or operate unfavorably to others." Gansett v. Cunningham, 34 Me. 56.

[5] Deckert v. Filbert, 3 W. & S. (Penn.) 454.

[6] Walker v. McMicken, 9 Martin (La.), 193; Taylor v. Hallyen, 3 Blackf. (Ind.) 423; Fisher v. Fisher, 1 McCord (S. C.), 173; Woodford v. Dorwin, 3 Vt. 82; Loomis v. Pierson, Harp. (S. C.) 470; Abel v. Sutton, 1 Esp. 109; and even though the bill is dated before, but actually made or delivered *after* the dissolution, it only binds the partner who drew it. Wrightson v. Pullan, 1 Starkie, 275. In Dana v. Conant, 30 Vt. 255, the old firm did business in the name of D. Warren & Co.; Conant, one of the firm, indorsed certain notes, payable to the company, and turned them out as collateral security for the payment of the indebtedness of the company, *after which he paid the debt and received back the notes*, and *afterward, and after the dissolution of the firm*, passed them over with the old indorsements, to pay an individual debt, and guaranteed their payment. It was held that the old firm was not liable thereon, as one partner had no right after a dissolution to transfer company notes under an old indorsement. In Woodford v. Dorwin, 3 Vt. 82, a note was made in the name of the firm *before*, but not delivered until *after*, the dissolution, and it was held that the firm were not liable thereon. See, to same effect, Glasscock v. Smith, 25 Ala. 475.

[7] Gale v. Miller, 1 Lans. (N. Y.) 454.

partners by a settlement with a creditor of the firm, and agreeing upon a balance due, is a question about which there is much conflict in the courts of this country.[1]

[1] Bower v. Douglass, 25 Ga. 717; Rootes v. Welford, 4 Munf. (Va.) 215; Woodworth v. Downer, 13 Vt. 522; Walden v. Sherburne, 15 Johns. (N. Y.) 409.

In Van Kuren v. Parmalee, 2 N. Y. 530, Bronson, J., in commenting upon the authority of a partner after the dissolution of the firm, said: "Although the rule is different in England in relation to admissions concerning partnership transactions, it has been settled by a series of adjudications in this state that the authority of partners to bind each other by any undertaking or admission, even though it relates to partnership transactions, ceases with the partnership. In Hackley v. Patrick, 3 Johns. (N. Y.) 536, although it was mentioned in the notice of dissolution that Hustie, one of the partners, would adjust the unsettled business of the partnership, it was held that his subsequent admission of a balance due from the firm to the plaintiffs on account would not bind his copartner. The court said it was a clear case. After the dissolution of a copartnership the power of one party to bind the other wholly ceases. There is no reason why his acknowledgment of an account should bind his copartners any more than his giving a promissory note in the name of the firm, or any other act." In Bell v. Morrison, 1 Pet. (U. S.) 370, the question came before the court as to the effect of a new promise made by one partner after dissolution, upon a claim against the firm barred by the statute of limitations. In that case Story, J., after a careful review of all the cases, rendered the opinion of the court denying the power of one partner to remove by any act or promise of his the statutory bar as to his former partners. He said: "By the general law of partnership, the act of each partner, during the continuance of the partnership and within the scope of its objects, binds all the others. It is considered the act of each and of all, resulting from a general and mutual delegation of authority. Each partner may, therefore, bind the partnership by his contracts in the partnership business; but he cannot bind it by any contracts beyond those limits. A dissolution however puts an end to the authority. By the force of its terms it operates as a revocation of all power to create new contracts; and the right of partners as such can extend no further than to settle the partnership concerns already existing, and to distribute the remaining funds. Even this right may be qualified, and restrained, by the express delegation of the whole authority to one of the partners. The question is not however as to the authority of a partner after the dissolution to adjust an admitted and subsisting debt; we mean, admitted by the whole partnership or unbarred by the statute; but whether he can, by his sole act, after the action is barred by lapse of time, revive it against all the partners, without any new authority communicated to him for this purpose. We think the proper resolution of this point depends upon another, that is, whether the acknowledgment or promise is to be deemed a mere continuation of the original promise, or a new contract, springing out of and supported by the original consideration. We think it is the latter, both upon principle and authority; and if so, as after the dissolution no one partner can create a new contract, binding upon the others, his acknowledgment is inoperative and void, as to them. There is some confusion in the language of the books, resulting from a want of strict attention to the distinction here indicated. It is often said that an acknowledgment revives the promise, when it is meant, that it revives the *debt* or *cause of action*. The revival of a debt supposes that it has been once extinct and gone; that there has been a period in which it had lost its legal use and validity. The act which revives it, is what essentially constitutes its new being, and is inseparable from it. It stands not by its original force, but by the new promise, which imparts vitality to it. Proof of the latter is indispensable to raise the *assumpsit*, on which an action can be maintained. It was this view of the matter, which first created the doubt, whether it was not necessary that a new consideration should be proved to support the promise, since the old consideration was gone. That doubt has been overcome, and it is now held that the original consideration is sufficient, if recognized, to uphold the new promise, although the statute cuts it off, as a support for the old. What, indeed, would

All the power of a partner, as agent for his copartners, expires when

seem to be decisive on this subject, is, that the new promise, if qualified or conditional, restrains the rights of the party to its own terms; and if he cannot recover, by those terms, he cannot recover at all. If a person promise to pay, upon condition that the other do an act, performance must be shown, before any title accrues. If the declaration lays a promise by or to an intestate, proof of the acknowledgment of the debt by or to his personal representative will not maintain the writ. Why not, since it establishes the continued existence of the debt? The plain reason is that the promise is a new one, by or to the administrator himself, upon the original consideration, and not a revival of the original promise. So, if a man promises to pay a pre-existing debt, barred by the statute, when he is able, or at a future day, his ability must be shown; or the time must be passed before the action can be maintained. Why? Because it rests on the new promise, and its terms must be complied with. We do not here speak of the form of alleging the promise in the declaration, upon which, perhaps, there has been a diversity of opinion and judgment, but of the fact itself, whether the promise ought to be laid in one way or another, as an absolute, or as a conditional promise, which may depend upon the rules of pleading. This very point came before the twelve judges in the case of Hyling v. Hastings, 1 Ld. Raym. 389, 421, in the time of Lord Holt. There, one of the points was, "whether the acknowledgment of a debt within six years would amount to a *new* promise, to bring it out of the statute, and they were all of opinion that it would not, but that it was *evidence* of a promise." Here, then, the judges manifestly contemplated the acknowledgment, not as a continuation of the old promise, but as evidence of a *new* promise; and that it is the *new promise* which takes the case out of the statute. Now what is a new promise but a new contract? a contract to pay, upon a pre-existing consideration, which does not, of itself, bind the party to pay, independently of the contract. So, in Boydell v. Drummond, 2 Camp. 157, Lord Ellenborough, with his characteristic precision, said, "if a man acknowledges the existence of a debt, barred by the statute, the law has been supposed to raise a *new* promise to pay it, and thus *remedy* is revived." And it may be affirmed that the general current of the English, as well as the American authorities, conforms to this view of the operation of an acknowledgment. In Jones v. Moore, 5 Binn. (Penn.) 573, Mr. Chief Justice Tilghman went into an elaborate examination of this very point, and came to the conclusion, from a review of all the cases, that an acknowledgment of the debt can only be considered as evidence of a *new* promise, and he added, "I cannot comprehend the meaning of *reviving* the old debt in any other manner than by a *new* promise." There is a class of cases, not yet adverted to, which materially illustrates the right and powers of partners, after the dissolution of the partnership, and bears directly on the point under consideration. In Hackley v. Patrick, 3 Johns. (N. Y.) 536, it was said by the court, that "after a dissolution of the partnership, the power of one party to bind the others wholly ceases. There is no reason why his acknowledgment of an account should bind his copartners any more than his giving a promissory note in the name of the firm, or any other act." And it was therefore held that the plaintiff must produce further evidence of the existence of an antecedent debt before he could recover, even though the acknowledgment was by a partner authorized to settle all the accounts of the firm. This doctrine was again recognized by the same court in Malden v. Sherburne, 15 Johns. 409, 424, although it was admitted that in Wood v. Braddick, 1 Taunt. 104, a different decision had been had in England. If this doctrine be well founded, as we think it is, it furnishes a strong ground to question the efficacy of an acknowledgment to bind the partnership for any purpose. If it does not establish the existence of a debt against the partnership, why should it be evidence against it at all? If evidence, *aliunde*, of facts within the reach of the statute, as the existence of a debt, be necessary before the acknowledgment binds, is not this letting in all the mischiefs against which the statute intended to guard the parties, viz.: the introduction of stale and dormant demands of long standing and of uncertain proof? If the acknowledgment, *per se*, does not bind the other partners, where is the propriety of admitting proof of an antecedent debt, extinguished by the statute as to them, to be revived without their consent? It seems

the partnership ceases, and although he can bind himself under a con-

difficult to find a satisfactory reason why an acknowledgment should raise a new promise, when the consideration upon which alone it rests, as a legal obligation, is not coupled with it in such shape as to bind the parties; that the parties are not bound by the admission of the *debt*, as a debt, but are bound by the acknowledgment of the debt, as a promise, upon extrinsic proof. The doctrine in 1 Taunt. 104, stands upon a clear, if it be a legal ground, that as to the things past the partnership continues and always must continue, notwithstanding the dissolution. That, however, is a matter which we are not prepared to admit, and constitutes the very ground now in controversy. The light in which we are disposed to consider this question is that after a dissolution of a partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for that purpose. It is wholly immaterial what is the consideration which is to raise such cause of action, whether it be a supposed pre-existing debt of the partnership, or any auxiliary consideration, which might prove beneficial to them. Unless adopted by them, they are not bound by it. When the statute of limitations has once run against a debt, the cause of action against the partnership has gone. The acknowledgment, if it is to operate at all, is to create a new cause of action; to revive a debt which is extinct, and thus to give an action which has its life from the new promise implied by law from such an acknowledgment, and operating and limited by its purport. It is then, in its essence, the creation of a new right, and not the enforcement of an old one. We think that the power to create such a right does not exist after a dissolution of the partnership in any partner." Opposed to this doctrine there is a long line of English cases, of which Wood v. Braddick, 1 Taunt. 104, is the leading case. In that case, which was an action against the defendant to recover for goods furnished to him jointly with one Cox, the plaintiff introduced a letter from Cox written *two years after the dissolution*, in which he admitted a certain sum to be due the plaintiffs. The letter was received in evidence, and upon a case reserved, the ruling of the court was sustained, Lord Mansfield, C. J., saying: "Clearly, the admissions of one partner, made after the partnership has ceased, is not evidence to charge the other *in any matter that has occurred since their separation*, but the powers of partners with respect to rights *created pending the partnership remain after the dissolution*. Since it is clear that one partner can bind the other during all the partnership, upon what principle is it that, from the moment when it is dissolved, his account of their joint contracts should cease to be evidence, and that those who are to-day as one person in interest, should to-morrow become entirely distinct in interest with regard to past transactions which occurred while they were so united?" It will be seen that this case restricts the admissions *to matters that occurred during the existence of the partnership*, and the same doctrine has been held in the English courts in numerous cases. Pritchard v. Draper, 1 R. & M. 191; Wright v. Court, 2 C. P. 332; Thwaites v. Richardson, 1 Peake, 23; Nicholls v. Danding, 1 Starkie, 81; Sangster v. Mazzaredo, 1 id. 162; Grant v. Jackson, 1 Peake, 268. See, holding a similar doctrine, Davis v. Coleman, 7 Ired. (N. C.) 424; Martin v. Kent, 17 Mass. 227; Shepley v. Waterhouse, 22 Me. 497; Zent v. Hart, 8 Penn. St. 337; Turner v. Ross, 1 R. I. 88; Shelton v. Cooke, 3 Munf. (Va.) 191; Josslyn v. Smith, 13 Vt. 353; Coit v. Tracy, 9 Conn. 1; Clark v. Sigourney, 17 Conn. 511; Fisher v. Tucker, 1 McCord (S. C.), 169.

A similar doctrine has been held in numerous American cases, not only relative to the *existence* of a debt, its amount, etc., but also as to the effect of the admissions of one partner in taking a debt against the firm out of the statute of limitations. In Bank of Vergennes v. Cameron, 7 Barb. (N. Y.) 143, the firm of Baker & Cameron procured a draft to be discounted. In order to establish notice of protest, it was shown that Baker, *after* the dissolution of the firm, admitted that the draft had been duly protested. Harris, J., in passing upon the effect of this evidence, said, "The admission of Baker in 1846, that the draft had been duly protested, though it may have been proper when the evidence was offered, to receive it, cannot be allowed to have the effect of proving notice, *as against Cameron*, as it was subsequently proved that the partnership between Baker and Cameron had been dissolved before such admission was made." Bispham v. Patterson, 2 McLean (U. S.), 87; Berryhill v. McKee, 1 Humph.

tract executed in the name of the firm, yet he cannot bind the firm.[1]

(Tenn.) 31; Lansing v. Gaine, 2 Johns. (N. Y.) 300; Berringer v. Sneed, 3 Stew. (Ala.) 201; Meyett v. Finney, 4 Strobh. (S. C.) 220; Pope v. Risley, 23 Mo. 185; Hamilton v. Summers, 12 B. Mon. (Ky.) 11; Mercer v. Sayre, Anth. N. P. (N. Y.) 119; Bell v. Morrison, 1 Pet. (U. S.) 351; Burns v. McKenzie, 23 Cal. 101; Oliphant v. Hayes, 3 Brev. (S. C.) 183; Wilson v. Torbett, 3 Stew. (Ala.) 296; Connery v. Hayes, 19 La. An. 325; Yandes v. Lefavour, 2 Blackf. (Ind.) 371; Gleason v. Clark, 9 Cow. (N. Y.) 57; White v. Union Ins. Co. 1 N. & M. (S. C.) 556; Sheton v. Cocke, 3 Munf. (Va.) 191; Ward v. Howell, 5 H. & J. (Md.) 50; Brady v. Hill, 1 Mo. 315; McMorgan v. Richardson, 16 Mo. 409; Mitchell v. Rich, 1 Ala. 228; Bennett v. Marshall, 2 Miles (Penn.), 436; and Herrick v. Conant, 4 La. An. 276. It was held that a confession of judgment was not binding upon any, except the partner making it in Van Kuren v. Parmalee, *ante;* Reppert v. Colvin, 48 Penn. St. 248; Walsh v. Kane, 4 La. An. 533; Kauffman v. Fisher, 3 Grant's Cas. (Penn.) 302; Levy v. Cadet, 17 S. & R. (Penn.) 126; Mann v. Locke, 11 N. H. 246; Exeter v. Sullivan, 6 N. H. 124; Lowther v. Chappel, 8 Ala. 353; Kelley v. Sanborn, 9 N. H. 46; Whitney v. Reese, 11 Minn. 138; Shoemaker v. Benedick, 11 N. Y. 176; Belate v. Wynne, 7 Yerg. (Tenn.) 534; Zent v. Hart, 8 Penn. St. 337; Wheelock v. Doolittle, 18 Vt. 440; Gowdy v. Gillam, 6 Rich. (S. C.) 69; Whipple v. Stevens, 22 N. H. 219; Tappan v. Kimball, 10 id. 136; Steele v. Jennings, 1 McMull. (S. C.), 297; Brewster v. Hardman Dudley (Ga.), 138; Kirk v. Hiatt, 2 Carter (Ind.), 322; Muse v. Doudson, 2 Humph. (Tenn.) 166. In Pennoyer v. David, 8 Mich. 407, it was held that, while one partner cannot create a new partnership contract, or revive one that has been barred by the statute, yet, that a partner appointed to liquidate previous accounts against the firm and to give receipts, necessarily possesses the power to adjust the accounts and agree upon the balance due. It follows as a matter of course, as a result of this doctrine that, when no particular partner is intrusted with this power, all or any of the partners may exercise it, and in Mann v. Locke, 11 N. H. 246, this doctrine was held. In that case, among other things, the plaintiff sought to recover for a lot of paper spoiled by Edwin R. Locke & Co., while partners. To prove the charge, the plaintiff offered a written statement of one of the partners, made *after* dissolution, admitting the charge. The court held that the evidence was admissible. Upham, J., remarking, "The dissolution of the firm does not discharge the partners from their liability on contracts made during the partnership; all must be sued. The partnership exists as to things past, but not as to things future. Besides, the dissolution cannot prejudice those contracting with the firm. *The admission of either partner, while the partnership exists, will bind the firm*, and it cannot be in the power of the firm by a mere dissolution which either partner may ordinarily cause at any time, to deprive those dealing with them of the benefit of any confessions, declarations or statements of a partner in reference to such contract. His contract is made with them in full faith that he is at all times entitled to the honest relation of either partner, as to the truth of the transaction, and a mere subsequent arrangement between them made without his consent, ought not, and in our opinion does not, deprive him of the benefits of such admission. * * To such persons, until their contract is entirely at an end, they are, and ever must be, in the eye of the law, regarded and held in all respects, as still a firm, *with the single exception that no partner, after dissolution*, can take a claim out of the statute of limitations." Parker v. Merrill, 6 Me. 41; Cody v. Sheperd, 11 Pick. (Mass.) 400; Martin v. Root, 17 Mass. 222; Hunt v. Brigham, 2 Pick. (Mass.) 218. In New Hampshire, a partial payment of a firm debt by one partner after dissolution, takes the claim out of the statute of limitations *as to those who had no notice of dissolution.* Tappan v. Kimball, 30 N. H. 136; Kenniston v. Avery, 16 id. 117, but not after notice of dissolution, although a different rule prevails as to joint promisors (other than partners). Kelley v. Sanborn, 9 N. H. 46; Whipple v. Stevens, 22 id. 219. In Lloyd v. Thomas, 79 Penn. St. 68, it was held that one partner could not, after dissolution, bind his former partner by an indorsement made for the purpose of raising money to pay the partnership debts. See also McCower,

[1] Bacon v. Hutchings, 5 Bush (Ky.), 596; Woodworth v. Downer, 13 Vt. 524; Dickerson v. Wheeler, 1 Humph. (Tenn.) 51.

His authority as agent for them is revoked,[8] and he cannot make a

v. Cubbison, 72 Penn. St. 358, where it was held that no partner after dissolution, except a liquidating partner, has power to pay the debts of the firm or give a note in the firm name. But, holding that a liquidating partner has, see McCower v. Cubbison, *ante;* Davis' Estate, 5 Whart. (Penn.) 530; Brown v. Clark, 14 Penn. St. 469; Whitehead v. Bank of Pittsburgh, 2 W. & S. (Penn.) 172, or to renew a note or indorsement, Dundass v. Gallagher, 4 Penn. St. 205, holding that one partner has no power to revive a debt that has been rendered invalid by want of notice. See Schoneman v. Fegley, 7 Penn. St. 433. That a liquidating partner may, by acknowledgment, stop the running of the statute of limitations upon a firm debt; see McCoon v. Galbraith, 29 Penn. St. 293, in which it was held that a letter from a member of an old firm was competent proof to take a case out of the statute against the firm, *if written before the statute had run.* But it is held that a promise to pay even, made by one partner *after* the statute has run, will not take the claim out of the statute as to the other partners. Reppert v. Colvin, 48 Penn. St. 248; Bush v. Stowell, 71 id. 208; Searight v. Craighead, 1 P. & W. (Penn.) 135; Levy v. Cadet, 17 S. & R. (Penn.) 126. The doctrine that one copartner or co-contractor can revive a debt barred by the statute, either by an admission or part payment, has been abolished in England by Stat. 9 Geo. 4, chap. 14, and 19 & 20 Vict. chap. 98, and under these statutes it is now held that a part payment by one partner will not bind the other, though he afterward assented to it. Backson v. Wooley, Ell. & Bl. 778; Watson v. Woodman, Weekly Notes (1875), p. 180. In many of the states, the distinction heretofore noted as having been made by the Pennsylvania courts, between the effect made *before* and *after* the statute has run, is adopted. See to that effect, Wheelock v. Doolittle, 18 Vt. 440; Tillinghast v. Nourse, 14 Ga. 641; Ellicott v. Nichols, 7 Gill. (Md.) 85; Reid v. McNaughton, 15 Barb. (N. Y.) 168; Fisher v. Tucker, 1 McCord's (S. C.) Ch. 169; Sigourney v. Drury, 14 Pick. (Mass.) 387. The doctrine of these cases is predicated upon the principle that, while a claim against the firm is valid and operative, a *bona fide* payment made by one partner thereon is a proper charge against his copartner, and that neither a payment nor a promise to pay it creates a new contract or liability, but merely operates to keep on foot one already existing as a valid claim, while *after* the statute has run, no liability whatever exists, and to permit one partner by a partial payment or an acknowledgment of or promise to pay it, to revive it would be extending to him the power to create a new liability.

[8] Woodworth v. Downer, *ante;* Bower v. Douglass, 25 Ga. 717. In Chase v. Kendall, 6 Ind. 304, it was held that although one partner has no authority to enter into any new contract on behalf of the firm, yet, that if after having done so his copartners ratify his acts, they are bound thereby. This is in pursuance of a well-recognized doctrine, that when one ratifies the act of another who has, without authority, assumed to act for him, it is a recognition of his agency. In Palmer v. Dodge, 4 Ohio St. 21, after the dissolution one partner renewed a note of the firm. The court held that the other partners were not liable thereon. Ranney, J., in commenting upon the powers of partners after dissolution, said: "As the dissolution finds the engagements of the company, they must remain until liquidated and paid, *unless all the partners consent to come under new engagements,* or otherwise change their character. But, while the law thus effectually revokes the implied authority of each partner, to incur new obligations for his fellows, it leaves upon each of them the duty and continues to each of them the right of doing whatever is necessary to collect the debts due to the partnership, and to adjust, settle, and pay its debts. For all these acts, if done *bona fide,* are for the advancement and consummation of the great objects and duties of the partners upon the dissolution to wind up the whole partnership concern, and divide the surplus, if any, among them, after all debts and charges are extinguished." The same doctrine is held even where one partner is designated to liquidate the affairs of the firm, and in the absence of express authority to confer upon him power to bind the firm by new contracts, he possesses no power to bind the firm by notes, drafts, etc. Palmer v. Dodge, *ante;* Hackley v. Hastie, 3 Johns. (N. Y.) 536. In Martin v. Walton, 1 McCord, 16, the firm of Walton & Co. having been dissolved, gave notice that one of the partners was authorized to liquidate. The firm at the time of its dissolution, was indebted to

new contract, nor renew any old one,[1] even though the consideration is a debt of the firm.[2]

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the plaintiff upon a note. *After* the dissolution, the partner appointed to liquidate *renewed* the note in the firm name. The court held that the firm was not liable thereon. "An authority," says Calcock, J., "to one of a copartnership to settle the affairs of the firm, receive and pay the debts, does not warrant him to draw a bill, or give a note in the copartnership name." That the other partners are bound by a settlement made with the liquidating partner, but not by a note given by him. See Lockwood v. Comstock, 4 McLean (U. S. C. C.), 383; Draper v. Bissell, 3 id. 275. Or by a bill drawn or accepted by one of the partners. Frazer v. Wolcott, 4 McLean (U. S. C. C.), 365.

[1] Long v. Story, 10 Mo. 630.

[2] Hurst v. Hill, 8 Md. 399; Draper v. Bissell, 3 McLean (U. S. C. C.), 275.

CHAPTER V.

PARTNERS' INTEREST IN THE STOCK.

SEC. 108. Of the nature of the interest.
SEC. 109. Specific lien of each partner.
SEC. 110. Rule in Ridgeley v. Carey.
SEC. 111. Share of deceased partner.
SEC. 112. Severance of joint tenancy upon death of partner.
SEC. 113. Real estate used for partnership purposes.
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SEC. 115. When there are restrictions in the deed.
Distinction between legal and equitable estate.
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General summary.
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SEC. 116. When one partner takes lease in his own name.
SEC. 117. Good will.
SEC. 118. Effect of death upon interest of deceased partner in stock.

Of the nature of the interest.

SEC. 108. Partners are joint tenants in the stock and all effects. They are seized *per my et per tout.*[1] But though they are joint tenants of all the partnership stock during their lives, yet, at least in

[1] West v. Skip, 1 Ves. 242.

Of joint estate.—"Whatever," says Mr. Lindley, pp. 547-558, "at the commencement of a partnership is thrown into the common stock, and whatever has from time to time during the continuance of the partnership been added thereto and obtained by means thereof, whether directly by purchase, or circuitously by employment in trade, belongs to the firm, unless the contrary can be shown. See Crawshay v. Collins, 2 Russ. 339, as to patents; Nerot v. Burnand, 4 Russ. 247, and 2 Bli. (N. S.) 415; Bone v. Pollard, 24 Beav. 283. The mere fact that the property in question was purchased by

such part of it as is movable, there is no survivorship either at law or in equity. Lord Coke,[1] in commenting upon a passage of Littleton, in which it is said that the right of survivorship shall hold between

one partner in his own name is immaterial; if it was paid for out of the partnership moneys, he will be deemed to hold the property in trust for the firm, unless he can show that he holds it for himself alone. See per Lord Eldon, in Smith v. Smith, 5 Ves. 193; Robley v. Brooke, 7 Bli. 90; Morris v. Barrett, 3 Y. & J. 384. Upon this principle it is held that land purchased in the name of one partner, but paid for by the firm, is the property of the firm, although there may be no declaration or memorandum in writing disclosing the trust and signed by the partner to whom the land has been conveyed. Forster v. Hale, 5 Ves. 308, and 3 id. 696. So, if shares in a company are bought with partnership money, they will be partnership property, although they may be standing in the books of the company in the name of one partner only, and it may be contrary to the company's deed of settlement for more than one person to hold shares in it. Ex parte Connell, 8 Deac. 201; Ex parte Hinds, 3 De G. & S. 613. As regards ships there was often a difficulty arising from the registration acts. For as it was clearly settled that a ship belonged, both at law and in equity, to the person or persons who were registered as her owners, and to no one else, it followed that if a ship had been bought with partnership money, had been used as partnership property, and had always been treated as such by all the partners, yet if she was registered in the name of one partner only, there was no method by which that one could be prevented from effectually asserting an exclusive right to the ship, and depriving his copartners of all their interest in her. See Slater v. Willis, 1 Beav. 354; Camden v. Anderson, 5 T. R. 709; Curtis v. Perry, 6 Ves. 739; Ex parte Yallop, 15 Ves. 60; Ex parte Houghton, 17 Ves. 251. If a ship was registered in the name of two partners, the shares in which they were interested might have been shown. See Ex parte Jones, 4 M. & S. 450. As to the right of one partner to sell or mortgage a ship belonging to the firm, see Ex parte Howden, 2 M. D. & D. 574. Strong as is the presumption that what may be bought with partnership money is partnership property, the presumption is rebutted, by showing that the money was lent by the firm to one partner, and so was not in fact partnership money when invested. As in Smith v. Smith, 5 Ves. 193. Moreover, it is to be observed that property which has been used and treated as partnership property cannot be presumed to belong to one partner only, simply because he paid for it, for the presumption in such a case is rather that the property in question was his contribution to the common stock. See Ex parte Hare, 1 Deac. 25, per Sir J. Cross. This subject will be adverted to more at length hereafter. It has been already seen that one partner will not be allowed to retain for his own exclusive benefit any property which he may have acquired in breach of that good faith which ought to regulate the conduct of partners *inter se*. Whatever property has been so acquired will be treated by a court of equity as obtained for the benefit of all the partners, and as being part of the assets of the firm; and this rule applies to property obtained by a continuing or surviving partner in breach of the good faith which he is bound to exercise toward a retired partner, and the representatives of a deceased partner, so long as their interest in the partnership assets continues. See *ante*, pp. 494–508; Featherstonhaugh v. Fenwick, 17 Ves. 298; Clegg v. Fishwick, 1 Mc. & G. 294; Clements v. Hall, 2 De G. & J. 173. At the same time, if an advantage which has been obtained by a partner is wholly unconnected with the partnership affairs, or, being connected with them, has been conferred upon him with a view to his own personal benefit, he cannot be called upon to account for it to the partnership. For example, where a ship, belonging to a Frenchman and two Americans as partners, was captured by a British cruiser, and compensation was made to the Americans, but to them only, the Frenchman being expressly excluded, it was held that the sum awarded to the Americans belonged to them alone, and that the Frenchman had no interest in it. Campbell v. Mullett, 2 Swanst. 551; see Thompson v. Ryan, id. 565, *n.*; Moffat v. Farquharson, 2 Bro. (C. C.) 338. See the note on this case in Belt's edition of

[1] Co. Litt. 182 a. See likewise 1 Roll. Abr. C.; Comm. Dig., tit. "Merchant," (D).

joint tenants, of things personal as well as of things real, observes, that "an exception is to be made of two joint merchants; for the wares, merchandises, debts, or duties that they have as joint merchants or

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Brown's Reports. So, if one partner is the lessee of property to which the firm is only entitled so long as the partnership continues, and on the dissolution of the partnership the lease is sold, its price belongs not to the firm, but to that partner in whom the lease is by hypothesis exclusively vested. See Parker v. Hills, 5 Jur. (N. S.) 809, L. J. If the lease is, as between him and the firm, partnership property, then of course any thing for which he might sell it, would be partnership property also. Further, as regards property acquired after a dissolution, but before the affairs of a dissolved partnership have been wound up, such property is not necessarily to be considered as partnership property, even though the partner acquiring it has continued to carry on the business of the dissolved firm without the consent of his late partners. This was decided in Nerot v. Burnand, 4 Russ. 247, and 2 Bli. (N. S.) 215. See, too, Payne v. Hornby, 25 Beav. 280. In that case, in effect, a hotel-keeper bequeathed his business to his son and daughter. After the death of the testator, the daughter continued to carry on the business. She afterward transferred it to a new house in Clifford street, and this house was conveyed to her in fee. She continued to carry on the business there for some time, and ultimately she married. During the greater part of the time which had elapsed since the death of the testator, his son had been abroad, and on his return he insisted that he ought to be considered as a partner with his sister, and that as such he was entitled to have the new house taken by her, and all the stock-in-trade and effects purchased by her in order to carry on the business, treated as partnership property. The vice-chancellor decided that the testator's son and daughter had become partners, but that the partnership between them had been dissolved on her marriage. He also held that the new house, and all the goods, furniture, plate, linen, china, wines, stock-in-trade, implements and other effects, being in and about the premises, formed a part of the partnership property. Upon appeal, this decision was affirmed, so far as it related to the existence and subsequent dissolution of partnership, but was varied so far as it related to what ought to be considered as partnership property. Upon this head the lord chancellor's judgment was as follows: "It appears to me satisfactorily made out from all the circumstances, that the house in Clifford street was bought with the partnership property; bought, in the first instance partly with the partnership property, partly with money borrowed by Miss Nerot and afterward repaid out of the partnership effects, and partly upon the credit of the house that belonged to the partnership, and I think that part of the vice-chancellor's decree, by which he directs the house to be sold, must be affirmed. There is a part of the decree, however, in which I cannot concur. The dissolution of the partnership took place in September, 1819. The vice-chancellor has directed all the property to be sold which was in the house in Clifford street at the time when the decree was pronounced, several years after the dissolution of the partnership, as if all the property which at the time of the decree existed in the house was, without inquiry, to be considered as partnership property Lord Eldon doubted greatly whether that part of the decree could be sustained; and in my opinion it must be varied by directing the master to take an account of the particulars of the partnership property which were in the house in Clifford street at the time of the dissolution, and of the value of the property at that time; and to inquire whether any part of that property still remains in the house." The question, What is property of a company? must, as between the company and its members, be determined upon the principles above explained. It has already been seen that what directors may acquire in breach of good faith toward the shareholders must be accounted for to the company; and it has been decided that unissued shares in a company belong to the company, and that, although they may be placed at the disposal of the directors, the directors must account to the company for whatever they may receive in respect of such shares. York and North Midland Rail. Co. v. Hudson, 16 Beav. 485.

Separate estate.— It by no means fol-

partners, shall not survive, but shall go to the executors of him that deceaseth: and this is *per legem mercatoriam*, which is part of the laws of this realm, for the advancement and continuance of com-

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lows that persons, who are partners by virtue of their participation in profits, are entitled as such to that which produces those profits. For example, coach proprietors who horse a coach and divide the profits, may each make use of horses which belong to himself alone and not to the firm of proprietors. As in Fromont v. Coupland, 2 Bing. 170; Barton v. Hanson, 2 Taunt. 49, and see Wilson v. Whitehead, 10 M. & W. 503, as to an author's interest in paper supplied for his work to the publisher So where a merchant employs a broker to buy goods for him and to sell them again on his account, although it may be agreed that the profits are to be divided, the goods themselves, and the money arising from their sale, are the property of the merchant, and not the joint property of himself and the broker; Smith v. Watson, 2 B. & C 401; Meyer v. Sharp, 5 Taunt. 74, E. C. L. R. 1.; Burnell v. Hunt, 5 Jur. 650, Q. B., and it not unfrequently happens that dormant partners have no interest in any thing except the profits accruing to the firm to which they belong. See Ex parte Hamper, 17 Ves. 404, 405; Ex parte Chuck, Mont. 373. Again, it by no means follows that property, used by all the partners for partnership purposes, is partnership property. For example, the house and land in and upon which the partnership business is carried on often belongs to one of the partners only, either subject to a lease to the firm, or without any lease at all. See Parker v. Hills, 5 Jur. (N. S.) 809, L. J.; Ex parte Murton, 1 M. D. & D. 252; Balmain v. Shore, 9 Ves. 500; Rowley v. Adams, 7 Beav. 548; Doe v. Miles, 1 Stark. 181, and 4 Camp. 373. If there is no lease and the firm is dissolved, the owner can eject his late partners without notice to quit. Doe v. Bluck, 8 C. & P. 464; Benham v. Gray, 5 C. B. 138 (an action of trespass). As to an injunction in such cases, see Elliott v. Brown, 3 Swanst. 489, *n.*; Hawkins v. Hawkins, 4 Jur. (N. S.) 1044. As to voting for members of parliament, Rogers v. Harvey, 5 C. B. (N. S.) 1. So it sometimes happens, though less frequently, that office furniture, Ex parte Owen, 4 De G. & Sm. 351; see Ex parte Hare, 1 Deac. 16; Ex parte Murton, 1 M. D. & D. 252, and even utensils in trade, Ex parte Smith, 3 Madd. 63, are the separate property of one of the partners, subject to the right of the others to use them as long as the partnership continues. Further still, it does not even necessarily follow that property bought with the money of the firm is the property of the firm. For it sometimes happens that property, although paid for by the firm, has been, in fact, bought for one partner exclusively, and that he has become debtor to the firm for the purchase-money. See Smith v. Smith, 5 Ves. 193; Ex parte Emly, 1 Rose, 64. It is obvious, therefore, that the only true method of determining as between the partners themselves what belongs to the firm, and what not, is to ascertain what agreement has been come to upon the subject. If no express agreement has been come to, attention must be paid to the source whence the property was obtained, the purpose for which it was acquired, and the mode in which it has been dealt with. The following recent case, in which there was very little evidence to show what agreement had been made, may be usefully referred to on this subject. In Ex parte Owen, 4 De G. & Sm. 351, one Bowers, who was a grocer, provision dealer and wine merchant, and who possessed stock in trade and household furniture at his place of business, took two partners, without any agreement except that they were to participate in the profits of the concern. They bought in no capital and paid no premium, and no deed or agreement was executed. Bowers bought with his own money but in the name of the firm, new stock required for the business. Upon the bankruptcy of the firm, the question arose to whom the stock in trade and furniture belonged. The court, coming to the best conclusion it could from such materials as were before it, held that there was an agreement between the three, expressed or implied, that all the stock in trade should become the property of the three, subject to an account, in which the partnership would be debited in favor of Bowers for the value of the articles which belonged to him or for which he paid. But the court thought there was not the same ground for such an inference as to the household furniture, and that therefore

merce and trade, which is *pro bono publico;* for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii, locum non habet.**

It seems clear that, at the time Lord Coke wrote, the distinction

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was held to have continued and to remain the separate estate of Bowers. The cases, however, which offer most difficulty, are undoubtedly those in which partners have brought into a common stock or at all events used for partnership purposes, land which they have not bought with the partnership moneys for the purpose of carrying on their trade. In such cases as these the real point to be determined is whether the partners are, as regards the land, anything more than co-owners, as to the distinction between co-ownership and partnership; for, as already observed, it does not follow that two persons who are partners as regards profits, are entitled as such to that which yields those profits. Suppose, for example, that two or more joint tenants, or tenants in common, of a farm or a mine, work their common property together as partners, contributing to the expenses and sharing all profits and losses equally, there would certainly be a partnership; and yet, unless there were something more in the case, it would seem that the land would not be partnership property, but would belong to the partners as co-owners, just as if they were not partners at all. See 1 Swanst. 523, Crayshaw v. Maule; and Kay, 159, Roberts v. Eberhardt. In Morris v. Barrett, 3 Y. & J. 384, lands were devised to two persons as joint tenants. They farmed those lands together for twenty years, and kept their money in one common stock to which each had access, but they never came to any account with each other. Out of their common stock they bought other lands, which were conveyed to one of them only, but were farmed by both, like the first lands. It was held that the devised farms were not partnership property, but that the purchased farms were. In Brown v. Oakshot, 24 Beav. 254, a brewer devised his real estates to trustees for a term of 500 years, upon trust, to pay certain annuities, and to divide the surplus rents between his sons, and he devised the same estates subject to this term to his sons as joint tenants. The sons carried on their father's business in partnership together, and used the real estates devised to them for the purposes of the business; but it was nevertheless held that the reversion in fee continued to be vested in them jointly, and not in common, as would have been the case had it become a partnership property. In Phillips v. Phillips, as stated in Bisset on Partnership, p. 50, the report in 1 M. & K. 649, is silent as to the property devised. Mr. Bisset considers the decision as an authority on the point of conversion. But if, as he represents, the court came to the conclusion that the devised property was not in fact partnership property, the question of conversion would not raise, public houses were devised to two persons, who carried on a brewery in partnership, and it was held that such houses did not become partnership property though used for the purposes of the partnership. In the same case some mortgage debts secured on public houses were bequeathed to the two partners, and they afterward purchased the equities of redemption, and paid for them out of the funds of the partnership, but it was held that the property thus acquired did not form part of the partnership property, the equities of redemption following the mortgage debts. But in this very case it was held that other public houses, purchased by the partners out of the partnership funds, and used for the purposes of its trade, did form partnership property to all intents and purposes. 1 M. & K. 649. On the other hand, in Jackson v. Jackson, 9 Ves. 591, and 7 id. 535, compare this with Brown v. Oakshot, 24 Beav. 254, a testator had devised to his two sons jointly his trading business and lands used by him for the purpose of carrying it on. The sons took the business and carried it on in partnership; and it was held that the lands formed part of the partnership property, and did not belong to the sons as mere joint tenants. In this case not only was there some evidence to show that the sons considered the land as part of their property as partners, but there was also this peculiarity, that a trading business was left to them, and that the land was accessory to that trade; so that it was very difficult, as observed by the Lord Chancellor, to sever the profits from the land and to hold the devisees to be partners as to the former, but not as to the latter. Upon this last

between merchants and *traders* in general had been fully established. It is probable, therefore, that in this passage he only referred to merchants properly so called, namely, those who export the native pro-

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ground it was held, in Crawshay v. Maule, 1 Swanst. 495, that mines devised to several persons for the express purpose of being worked by them in partnership, and which were worked accordingly, were partnership property. By a slight extension of the same principle, if several persons take a lease of a colliery, in order to work the colliery as partners and they do so work it, the lease will be partnership property. Faraday v. Wightwick, Taml. 250, and 1 R. & M. 45. See Bentley v. Bates, 4 Y. & C. Ex. 182. So, if co-owners of land form a partnership, and the land is merely accessory of their trade, and is treated as part of the common stock of the firm, the land will be partnership property. Essex v. Essex, 20 Beav. 442. Upon the whole, therefore, it seems that land acquired, whether gratuitously or not, for the purpose of carrying on a partnership business, and used for that purpose, is to be considered as property of the partnership; but that land which is not so acquired, but which belonging to several persons jointly or in common, is employed by them for their common profit, does not become partnership property unless there is some evidence to show that it has been treated by them as ancillary to their partnership business, and as part of the common stock of the firm.

Conversion of joint estate into separate estate and vice versa.—It is competent for partners by agreement amongst themselves to convert that which was partnership property into the separate property of an individual partner, or *vice versa*. Ex parte Ruffin, 6 Ves. 119; Ex parte Williams, 11 id. 3; Ex parte Fell, 10 id. 348; Ex parte Rowlandson, 1 Rose, 416. And the nature of the property may be thus altered by any agreement to that effect; for neither a deed nor even a writing is absolutely necessary; Ex parte Williams, 11 Ves. 3; Ex parte Clarkson, 4 D. & C. 56, per Sir G. Ross; Ex parte Owen, 4 De G. & Sm. 351. None of these cases, however, turned on the effect of an unwritten agreement relating to land. See, as to a transfer by a partner of his share in the partnership property, when it consists wholly or in part of land, *post* c. 5, s. 5. But so long as the agreement is dependent on an unperformed condition, so long will the ownership of the property remain unchanged. Ex parte Wheeler, Buck, 25; Ex parte Cooper, 1 M. D. & D. 358; Hawkins v. Hawkins, 4 Jur. (N. S.) 1044. Moreover, as the creditors of any ordinary individual have, generally speaking, no lien on his property, and cannot prevent him from disposing of it as he pleases, so the creditors of a firm have no lien on the property of the firm so as to be able to prevent it from parting with that property to whomsoever it chooses. Accordingly it has frequently been held that agreements come to between partners converting the property of the firm into the separate estate of one or more of its members, and *vice versa*, are binding not only as between the partners themselves, but also on their joint and on their respective several creditors; and that in the event of bankruptcy, the assignees must give effect to such agreements. See Ex parte Ruffin, and the other cases cited *ante*, and Campbell v. Mullett, 2 Swanst. 575; Ex parte Clarkson, 4 D. & Ch. 56; Ex parte Peake, 1 Madd. 358. A conversion of joint into separate property, or *vice versa*, most frequently takes place when a firm and one of its partners carry on distinct trades, or when a change occurs in a firm by the retirement of some or one of its members, or by the introduction of a new partner. Where a firm and one of its members carry on distinct trades, property passing in the ordinary way of business from the partner to the firm, ceases to be his and becomes the property of the partnership, and *vice versa*, just as if he were a stranger to the firm. This was settled in the great case of Bolton v. Puller, 1 Bos. & P. 539, in which there were two banking firms, one carrying on business at Liverpool and one at London. All the partners in the latter firm were partners in the former. Some bills of exchange came in the ordinary course of business into the hands of the Liverpool firm, to be placed to the general account of its customers. These bills were remitted by the Liverpool firm to the London firm to be placed to the credit of the former in the general account between the two houses. Both houses afterward becoming bankrupt, it

ducts and manufactures of the kingdom or her colonies to foreign climes, or import the commodities of different countries into this kingdom.[1] But, however this may be, Lord Keeper Harcourt observed that, in his time, the custom of merchants was extended to *all*

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was held that the bills were the property of the London firm and not of the Liverpool firm, or of its customers. Lord C. J. Eyre, in delivering judgment, adverted to the question now under consideration in the following terms:—"There can be no doubt as between themselves, a partnership may have transactions with an individual partner or with two or more of the partners having their separate estate engaged in some joint concern in which the general partnership is not interested; and that they may by their acts convert the joint property of the general partnership into the separate property of an individual partner, or into the joint property of two or more partners, or *è converso*. And their transactions in this respect will, generally speaking, bind third persons, and third persons may take advantage of them in the same manner as if the partnership were transacting business with strangers; for instance, suppose the general partnership to have sold a bale of goods to the particular partnership, a creditor of the particular partnership might take those goods in execution for the separate debt of that particular partnership." Where a change occurs in a firm by the retirement of one or more of its members, nothing is more common than for the partners to agree that those who continue the business shall take the property of the old firm and pay its debts, or that part of the property of the old firm shall become the property of those by whom its business is to be continued, whilst the rest of the property shall be otherwise dealt with. So, again, when a partnership is first formed, or a new partner is taken into an existing firm, or two firms amalgamate into one, some agreement is generally come to by which what was before the property of the one or more persons who are joined by the others, becomes the joint property of these last and of those they join. All such agreements are valid, and have the effect of altering the equitable ownership in the property affected by them. Ex parte Ruffin, 6 Ves. 119. See, too, Ex parte Sprague, 4 D. G. Mac. & G. 866; Ex parte Clarkson, 4 D. & Ch. 56; Ex parte Gurney, 2 De G. Mac. & G. 541; Ex parte Peake, 1 Madd. 346; Ex parte Fell, 10 Ves. 348, which is the leading case on this subject. Thomas Cooper, a brewer, took James Cooper into partnership. That partnership was afterward dissolved by articles, by which the buildings, premises, stock in trade, debts and effects, were assigned to James by Thomas, who retired. James afterward became bankrupt, and some of the partnership debts being unpaid, an attempt was made to have what had been the property of the partnership applied in liquidation of those debts. But it was held, that such property was no longer the joint property of the two partners, but had been converted into the separate property of James. Ex parte Williams, 11 Ves. 3. Compare Ex parte Cooper, 1 M. D. & D. 358, was a similar case, only that on the dissolution no assignment was made. There was not even any written agreement showing the terms on which the dissolution took place. But it was sworn that the partner who continued the business was to take all the stock and effects of the old firm, and it was held that they had become his separate property, and could not be considered as the joint property of the dissolved partnership. These decisions have always been regarded as settling the law upon the subject of conversion of partnership property, and have been constantly followed. They were not, it will be observed, decided with reference to the doctrine of reputed ownership, but with reference only to the real agreement come to between the partners. The case of Ex parte Owen, 4 D. G. & Sm. 351, which has been already referred to shows that similar principles must be applied in order to determine what, on the formation of a partnership, has been converted from separate into joint estate. See, too, Ex parte Barrow, 2 Rose, 252, and Belcher v. Sikes, 8 B. & C. 185, for a case where separate estate was made joint by a deed of dissolution not clearly expressed. In order, however, that an agreement may have the effect of converting joint into separate estate, or *vice versa*, the agreement must be executed and not executory merely.

[1] Beawees, 31.

traders, to exclude survivorship;[1] and the custom so extended has never since been contravened.

Specific lien of each partner.

SEC. 109. Each partner has a *specific lien* on the partnership stock, not only for the amount of his share, but for moneys advanced by him beyond that amount for the use of the copartnership, as also for moneys abstracted by his copartner beyond the amount of his share.[2]

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[1] Jeffereys v. Small, 1 Vern. 217. There must be some mistake in the report of Newell v. Townsend, 6 Sim. 420.

[2] West v. Skip, 2 Vez. 142; Ex parte Ruffin, 6 Ves. 119. Upon dissolution each partner must discharge his indebtedness to the firm and his copartners have a lien on his share for such debts. Murray v. Pinkett, 12 Cl. & F. 764. If partners having equal interests made advances unequally they are entitled to reimbursement from the others, but if the assets are insufficient, in the absence of an agreement to the contrary, the deficiency must be treated as a debt or loss, to which they must all contribute equally. Nowell v. Nowell, L. R., 7 Eq. 538; Wood v. Scoles, L. R., 1 Ch. 367. So partners have a specific lien upon the partnership property to have it applied in payment of the firm's debts. West v. Skip, *ante*. Thus in Allen v. Hawley, 6 Fla. 142, where two persons entered into an agreement for carrying the United States mail, each contributing a certain sum for the purchase of a steamboat, it was held that the steamer vested in them as partners, subject to an implied trust that they should hold it until the purposes for which it was purchased were accomplished, and subject to be applied, if necessary, to the payment of partnership debts. "Each partner," said the court, "has a specific lien on partnership stock, not only for the amount of his share, but for moneys advanced by him beyond his share to the use of the copartnership; the share of each being the proportion of the residue on the balance of the account." So, where A, resident in New Orleans, and B, resident in New York, agreed that A should buy cotton on their joint account, and ship the same to New York to be sold by B. A paid for the cotton with the proceeds of certain bills of exchange drawn by him on B, and accepted by the latter. The bills were not paid, B failed, and assigned the unsold cotton, with the rest of his property, for the benefit of his creditors. It was held on a bill by A to apply the proceeds of the cotton to the payment of his debts, that the assignees had taken the cotton subject to all the equities attached to it in B's hands, and that the proceeds of the cotton, being partnership property, should first be applied to the payment of the bills made for the purchase-money, and which constituted a partnership debt. Addison v. Burckmyer, 4 Sandf. (N. Y.) Ch. 498. Where a partner, at the request of, or by agreement with his copartner, pays such copartner's debts on account of the business, he has a lien upon the partnership property for the amount actually paid by him. Thus, where a merchant, being largely indebted, took B in as a partner, who brought in no capital, but who succeeded in establishing the credit of the firm, and the partnership business produced immense profits, it was agreed that the debts of A should be undertaken by the firm. The firm failed, and A died. One of the debts of A was $800,000 to the United States, which was compromised on the payment of $200,000. The remaining debts of A were paid and compromised by the firm. Held, that A became a creditor to the firm to the amount of A's debts paid and compromised by the firm, but only to the amount at which they were compromised, and that as the partnership property, after the payment of the partnership debts, belonged to the partners, B was to be credited with the amount of A's debts as they were compromised. Iddings v. Bruen, 4 Sandf. (N. Y.) Ch. 223. But, if it is agreed that one partner shall have the property, indemnifying the other against the firm debts, he takes it divested of this lien. *In re* Langmead, 7 D. M. & G. 353; Andrews v. Mann, 31 Miss. 322, and the same is true if it is sold and carried to the separate account of one partner; Holroyd v. Griffiths, 3 Dr. 428; unless the transfer is qualified; Holder-

In the words of Lord Hardwicke, "when an account is to be taken, each is entitled to be allowed against the other every thing he has advanced or brought in as a partnership transaction, and to charge the other in the account with what the other has not brought in, or has taken out more than he ought; and *nothing is to be considered his share, but the proportion of the residue on the balance of the account.*" If a partner take the whole, or any part of his share out of the partnership stock, the stock so taken, if identified, is applicable to the payment of what, upon an account taken, shall be found to be due from him to the partnership, before it can be applied to the payment of his separate creditors, even though they be creditors by specialty.[1] So, also, the partners' lien upon the partnership stock is not considered as appropriated to the stock brought in, but to every thing coming in lieu during the continuance or after the determination of the partnership.[2] To illustrate the latter part of this position: if the partnership between two partners be determined as to certain of their goods, by an execution levied on those goods by the separate creditors of one partner, and the creditors trade with these goods, and out of the proceeds thereof purchase other goods for the purposes of their trade, the lien of the solvent partner attaches on the newly purchased goods. In the case of Skipp v. Harwood,[3] Messrs. Harwood & Skipp

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ness v. Shakles, 8 B. & C. 612, but, if he is compelled to pay any of the firm debts, he may recover the amount of his former partners. Bruner v. Worthington, 10 Allen (Mass.), 329. The capital left in the business draws with it a share of the profits realized from its use by the remaining partners, and they will be compelled to account therefor, even though the partnership is dissolved by death, bankruptcy, insanity or other cause. Wedderbern v. Wedderbern, 22 Beav. 84; Crawshay v. Collins, 1 J. & W. 267; Simpson v. Chapman, 4 D. M. & G. 154; Parsons v. Hayward, 31 Beav. 199; Featherstonaugh, v. Fenwick, 17 Ves. Jr. 298: Turner v. Major, 3 Giff. 442; Brown, v. De Tastet, Jac. 284; Willett v. Blandford, 1 Harr. (Del.) 253; Mellerch v. Keen, 27 Beav. 236; Townsend v. Townsend, 1 Giff. 201.

[1] Croft v. Pyke, 3 P. W. 180.

[2] Per Lord Hardwicke, West v. Skip, 1 Vez. 244. See Bucknal v. Roiston, Pre. Cha. 285.

[3] 2 Swanst. 586. See the observations on this case in Corey on Mercantile Accounts, chap. 5.

A creditor of an individual partner cannot levy upon and sell his interest in the partnership property except subject to the equities of the creditors of the firm. Clagett v. Kilbourne, 1 Black (U. S.), 346; Knox v. Summers, 1 Yeates (Penn.), 477; Merrill v. Rinker, 1 Bald. (U. S. C. C.) 528; Dower v. Stauffer, 1 Penn. St. 198; White v. Dougherty, M. & Y. (Tenn.) 309; Knox v. Schepler, 2 Hill (S. C.), 595; Tappan v. Blaisdell, 5 N. H. 189; Fish v. Herrick, 6 Mass. 271; Morrison v. Blodgett, 8 N. H. 238; Dow v. Sayward, 12 id. 271; Allen v. Dunn, 16 Me. 292; Lucas v. Atwood, 2 Stew. (Ala.) 378; Waldron v. Simmons, 28 Ala. 629; Burpee v. Bunn, 22 Cal. 194; Chase v. Steel, 9 id. 64; Collins v. Butler, 14 id. 223; Witter v. Richards, 10 Conn. 37; Brewster v. Hammett, 4 id. 540; Nicoll v. Mumford, 4 Johns. Ch. (N. Y.) 522; Muir v. Leitch, 7 Barb. (N. Y.) 341; Jackson v. Cornell, 1 Sandf. Ch. (N. Y.) 348; Caldwell v. Scott, 54 N. H. 414; Conant v. Frary, 49 Mo. 530; Alexander v. Stern, 41 Tex. 195: Olson v. Morrison, 29 Mich. 395; Bass v. Estell, 50 Miss. 300; Whittemore v. Elliott, 14 N. Y. Supreme Ct. 518; Howard v. Jones, 50 Ala. 67;

were partners in the trade of a brewer ; and Harwood being justly indebted to his sisters, gave them a warrant of attorney to confess judgment, for securing the debt. The sisters enter up judgment, and, by execution sued out thereon, the sheriff takes the separate

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Geery v. Cockroft, 33 N. Y. Superior Ct. 147; Menagh v. Whitwell, 52 N. Y. 146; Day v. Witherly, 29 Wis. 363; Luce v. Hartshorn, 7 Lans. (N. Y.) 331; Flanigan v. Alexander, 50 Mo. 50; Smith v. Baker, 10 Me. 458; Wilson v. Conine, 2 Johns. (N. Y.) 280; Adams v. Paige, 7 Pick. (Mass.) 542; Fish v. Herrick, 6 Mass. 271; Rice v. Austin, 17 id. 197; Crooker v. Crooker, 46 Me. 250; Thompson v. Frist, 15 Md. 24; Glenn v. Gill, 2 id. 1; McCullough v. Dashiell, 1 Har. & G. (Md.) 96; Broadnax v. Thomason, 1 La. An. 384; O'Bannon v. Miller, 4 Bush (Ky.) 25; Black v. Bush, 7 B. Mon. (Ky.) 210; Hubbard v. Curtis, 8 Iowa, 1; Newhall v. Buckingham, 14 Ill. 405; Rainey v. Hance, 54 Ill. 29; Lime Rock Bank v. Phetteplace, 8 R. I. 56; *In re* Cook, 3 Biss. (U. S. S. C.) 122; McCauley v. Fulton, 44 Cal. 355; Switzer v. Smith, 35 Iowa, 269; Gordon v. Kennedy, 36 id. 167; Williams v. Gaige, 49 Miss. 777; Warren v. Wallis, 38 Tex. 225; Pownie v. Fletcher, 2 Bay. (S. C.) 146; Fleming v. Billings, 9 Rich. (S. C.) Eq. 43; Willis v. Freeman, 35 Vt. 44; Shedd v. Wilson, 27 Vt. 478; Converse v. McKee, 14 Tex. 20; Christian v. Ellis, 1 Gratt. (Va.) 396. At common law a partnership stock belongs to the partnership, and one partner has no interest in it, but his share of what remains *after all* the partnership debts are paid. Pierce v. Jackson, 6 Mass. 242; Eddis v. Davidson, 1 Doug. 650; Field v. Clark, 4 Ves. Jr. 296; Witter v. Richards, 10 Conn. 40. Consequently, all the debts due from the joint fund must first be discharged before any partner can appropriate any part of it to his own use, or pay any of his private debts; and a creditor of one of the partners cannot claim any interest but what belongs to his debtor, whether his claim be founded on any contract made with his debtor or on a seizure of the goods on execution. Pierce v. Jackson, 6 Mass. 242; Fisk v. Herrick, id. 271; Phillips v. Bridge, 11 id. 242; Goodwin v. Richardson, id. 469; Rice v. Austin, 17 id. 197; Adams v. Paige, 7 Pick. 542; Wilson v. Conine, 2 Johns. (N. Y.) 280; Smith v. Baker, 10 Me. 458; Garvin v. Paul, 47 N. H. 158; Broadd v. Evans, 63 N. C. 333; Thompson v. Tinnin, 25 Tex. 56. But a creditor of one of the firm has a right to attach the partnership effects against all creditors whose demands are not upon the company. Rice v. Austin, 17 Mass. 197; Phillips v. Bridge, 11 id. 242. And where more is levied on partnership property than is sufficient to pay partnership executions, the balance may be applied to pay private executions in the hands of the officer. Roop v. Rogers, 3 Watts (Penn.) 193; Schatzill v. Bolton, 2 McCord (S. C.), 478. The prior right of a partnership creditor, to be paid out of the common property, in preference to a separate creditor of either of the partners, does not exist in the case of a dormant partnership. In such case, a creditor whose debt relates to the business of the firm, and who is behind the creditors or vendees of the ostensible partner, in his attachment, shall not be permitted to defeat them and gain a priority, because he has discovered the concealed liability of a secret partner. French v. Chase, 6 Me. 166. So partnership property may be attached, for the individual debt of one of the partners, after the dissolution of the partnership, and after a receiver has been appointed, by a decree of a court of equity in a sister state, to get in and dispose of the assets. Schatzill v. Bolton, 2 McCord (S. C.), 478. The rule is that partnership property, on the dissolution of the partnership by death, goes, in the first place, to the payment of the partnership debts, and, if there be a surplus, then to the payment of the private debts of each partner afterward, in proportion to his share in the joint funds. White v. Union Ins. Co., 1 N. & M. (S. C.) 556. The right of a separate creditor depending upon the rights of his debtor, he can have no right therein that his debtor did not have; Ex parte King, 17 Ves. 119; and as neither of the partners have any thing separately in the corpus of the property, but only in what remains after the partnership account is taken (Church v. Knox, 2 Conn. 523), it follows that a creditor of one of the partners can only take the undivided share of such partner, subject to the rights of the other

effects of Harwood, and also one moiety of the partnership goods, which (at the time of the seizure) were in Harwood's custody, and delivers back a moiety thereof to the other partner; and the sisters suffer Harwood still to keep the goods taken in execution, and to

partner, to apply it in liquidation of all partnership debts. Taylor v. Fields, 4 Ves. 396; Witter v. Richards, 10 Conn. 40. The equity of partnership creditors, to have the partnership property first applied in satisfaction of their debts, is to be wrought out through the partners, and if they have *bona fide* parted with their interest therein, the equity is defeated. McNutt v. Strayhorn, 39 Penn. St. 269; Robb v. Mudge, 14 Gray (Mass.), 534; McClelland v. Remsen, 36 Barb. (N. Y.) 622; Bakus v. Murphy, 39 Penn. St. 397; Cope's Appeal, 39 id. 284; Dupuy v. Leavenworth, 17 Cal. 262; Nixon v. Nash, 12 Ohio St. 647. While any partnership property remains, either partner may compel its application to the firm debts; and, if either is backward in protecting the rights of the firm creditors, they may perhaps compel him to allow them to use his name in equitable proceedings to enforce their rights; but where neither he nor they interpose to arrest proceedings at law, the effect of which is to dissolve the partnership and extinguish the joint stock, they cannot afterward intervene in the distribution of the proceeds of the sheriff's sales, upon the execution of certain private creditors, on which the firm assets are sold. Cope's Appeal, *ante;* Backus v. Murphy, *ante.* If one partner, with the *assent of the other,* sells firm property to his creditor to satisfy his private debt, and the transaction is *bona fide,* the title passes and a partnership creditor cannot compel an application thereof on his debt, as there is nothing through which the equities of the firm creditors can work. McNutt v. Strayhorn, 39 Penn. St. 269; Flack v. Chanon, 29 Md. 311. So the firm may, by assent thereto, assume the individual debt of any partner, and when this is done, it becomes a debt against the firm, and the creditor acquires all the equities of a partnership creditor. Woodard v. Horst, 10 Iowa, 120; Casey v. Carver, 42 Ill. 225; Marine Co. v. Carver, id. 66. But not without the assent of all the partners express or implied. Downing v. Lenville, 3 Bush (Ky.), 472. The theory upon which this doctrine of equitable preference rests is well illustrated by Mr. Lindley in his work on Partnership, pp. 577–591. He says, In order to discharge himself from the liabilities to which a person may be subject as partner, every partner has a right to have the property of the partnership applied in payment of the debts and liabilities of the firm. And in order to secure a proper division of the surplus assets, he has a right to have whatever may be due to the firm from his copartners as members thereof, deducted from what would otherwise be payable to them in respect of their shares in the partnership. In other words, each partner may be said to have an equitable lien on the partnership property for the purpose of having it applied in discharge of the debts of the firm; and to have a similar lien on the surplus assets for the purpose of having them applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm. West v. Skip, 1 Ves., Sr., 239; Skip v. Harwood, 2 Swanst. 586; Doddington v. Hallet, 1 Ves., Sr., 498 and 499; Ex parte Ruffin, 6 Ves. 119; Ex parte Williams, 11 id. 3; Holderness v. Shackels, 8 B. & C. 612; Smith v. De Silva, Cowp. 469, can hardly be reconciled with the other cases, but see upon it the observations of Lord Tenterden, in 8 B. & C. 618. Each partner has an implied lien on partnership property, and upon debts due the firm, and the creditors by equitable substitution are entitled to avail themselves of it. O'Bannan v. Miller, 4 Bush (Ky.), 25; Tillinghast v. Champlin, 4 R. I. 173; Talbot v. Pierce, 14 B. Monr. (Ky.) 195; Robb v. Mudge, 14 Gray (Mass.), 534; Dunham v. Hanna, 18 Ind. 270; Carter v. Bank, 24 Ala. 37; Black v. Bush, 7 B. Monr. (Ky.) 210. This right, lien, *quasi*-lien, or whatever else it may be called, does not exist for any practical purpose until the affairs of the partnership have to be wound up, or the share of a partner has to be ascertained. As to the right of a minority of partners to insist on the payment of a partnership debt out of the partnership assets, see the observations of Turner, V. C., in Stevens v. The South Devon Rail. Co., 9 Ha. 326. Any member of an ordinary firm is at liberty to pay any debt of the firm, and to charge

trade with them; the judgment being given by him to his sisters, to protect his goods against other creditors. The solvent partner having filed his bill for an account, Lord Hardwicke, in giving judgment, said—"I shall consider the sisters as partners with Skipp, and Har-

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the firm with the amount paid. Atwood v. Meredith, 37 Miss. 477; Mayer v. Clark, 40 Ala. 259; White v. Parrish, 20 Tex. 688. Pending dissolution and settlement of partnership matters and before decree, partnership creditors may pursue their remedies at law to gain priority. Adams v Wood, 8 Cal. 152. Nor has any partner a right to insist as against a judgment creditor of the firm, that he shall have recourse to the assets of the firm before seeking to obtain payment from the partners individually. Allen v. Wills, 22 Pick. (Mass.) 450; McLain v. Carson, 4 Ark. 164; Bardwell v. Perry, 19 Vt. 292; Morris v. Morris, 4 Gratt. (Va.) 293. But in many of the states of this country the rule is otherwise, and partnership creditors must first resort to partnership property to secure payment of their claims. Van Wagner v. Chapman, 27 Ala. 172; Haskell v. Johnson, 24 Ga. 625; Moline, etc., Co. v. Webster, 26 Ill. 233; Treadwell v. Brown, 41 N. H. 12; Voorhis v. Child, 17 N. Y. 354; Ganson v. Lathrop, 25 Barb. (N. Y.) 455; Hubble v. Perrin, 3 Ohio, 287; Black's Appeal. 44 Penn. St. 503; Flemming v. Billings, 9 Rich. (S. C.) Eq. 49. But when partnership accounts have to be taken, and the shares of the partners have to be ascertained, the lien of the partners on the assets of the partnership, and on each other's shares, becomes of the greatest importance. It attaches to every thing that can be considered partnership property, and it is not therefore lost by the substitution of new stock in trade for old. See West v. Skip, 1 Ves., Sr., 239; Skipp v. Harwood, 2 Swanst. 586; Stocken v. Dawson, 9 Beav. 239, and 17 L. J. (Ch.) 282. Further, on the death or bankruptcy of a partner, his lien continues in favor of his representatives or assignees, and does not terminate until his share has been ascertained and provided for by the other partners. See Stocken v. Dawson, 9 Beav. 239, affirmed 17 L. J. (Ch.) 282, and the cases cited in note. But, after a partnership has been dissolved, the lien is confined to what was partnership property at the time of the dissolution, and does not extend to what may have been subsequently acquired by the persons who continue to carry on the business. In this respect the lien in question differs from the lien of a mortgagee on a varying stock in trade assigned to him as a security for his loan. Payne v. Hornby, 25 Beav. 280. See, too, Nerot v. Burnand, 4 Russ. 247, and 2 Bli. (N. S.) 215; but see Skipp v. Harwood, 2 Sw. 588, note, *contra*. It follows from the principle on which the lien of a partner is founded that it only extends to the property of the firm, and to the separate interest of each partner in such property. In those cases, therefore, where there is a partnership in profits only, but that which produces those profits belongs exclusively to one of the partners, the lien of the others is confined to the profits and does not extend to that which produces them. Moreover, if two persons engage in a joint adventure, each consigning goods for sale upon the terms that each is to have the produce of his own goods, neither of them will have a lien on the goods of the other, or on the produce of such goods, although each may have raised the money to pay for his own goods by a bill drawn on himself by the other, and ultimately dishonored. Ex parte Gemmel, 3 M. D. & D. 198. The lien of each partner exists not only as against the other partners, but also against all persons claiming through them or any of them, and is therefore available against their executors, execution creditors, and assignees in bankruptcy West v. Skip, and other cases cited, *ante*. To hold, however, that this lien could be enforced against persons purchasing partnership property would be in effect to prevent any sale of that property without the consent of the whole firm, and would practically stop all partnership trade. Whilst, therefore, a person who purchases a share of a partner takes that share subject to the liens of the other partners, a person who *bona fide* purchases specific chattels belonging to the firm from one partner, acquires a good title to such chattels, whatever liens the other partners might have had on them prior to their sale. See Re Landmead's Trusts, 20 Beav. 20, and 7 De G.

wood as their agent and shall make them parties to the account. It is no objection that the goods taken in execution have been since frequently changed, for the specific lien which the other partner had on those goods devolves on those which have been taken in the place

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M. & G. 253. In a recent case a partnership between A and B was dissolved. A retired, and by deed agreed to execute an assignment to B of the partnership assets (part of which consisted of a policy of which the partners were assignees), and B agreed to covenant to pay the partnership debts, and indemnify A against them. No further instrument was executed.

A died, and B afterward assigned the policy by way of mortgage to a person who had notice of the deed. A's executors were afterward compelled to pay partnership debts, which ought to have been discharged by B, and B became bankrupt. The policy being adversely claimed by the mortgagee, by A's executor, and by a purchaser from B's assignees, it was held that even if A and his executors had been entitled to pursue any portion of the partnership property in the hands of B, and to have it applied in payment of the partnership debts, yet that they had no such right as against the purchaser from B, though with notice, for he was not bound to see to the application of the purchase-money. Re Langmead's Trusts, 20 Beav. 20, and 7 De G. M. & G. 253. The lien of partners on the partnership property extends, as has been stated, to whatever is due to or from the firm, by or to the members thereof as such. It does not, however, extend to debts incurred between the firm and its members, otherwise than in their character of members. It has therefore been held that if a partner borrows money of the firm for some private purpose of his own, and then becomes bankrupt, his assignees are entitled to his share in the partnership, ascertained without taking into account the sum due from him to the firm in respect of this loan, and that the solvent partners are driven to prove against his estate in order to obtain payment of the money lent. See Ryall v. Rowles, 1 Ves., Sr., 348, and 1 Atk. 165; and Meliorucchi v. The Royal Exchange Ass. Co., 1 Eq. Abb. 8; and Croft v. Pike, 3 P. W. 180. Perhaps Smith v. De Silva, Cowp. 469, was decided on this principle, as suggested by Lord Tenterden, in 8 B. & C. 618. This qualification of the general rule is peculiarly applicable to companies, and to debts contracted between them and their members. And it has been held that if a shareholder in a company borrows money of the company for purposes of his own, and the company deals with him as if he were a stranger, it has no lien on his shares in respect of the money so borrowed. See Pinkett v. Wright, 2 Ha. 120; affirmed, 12 Cl. & Fin. 764; unless there is some special agreement creating such a lien. As there was in Hague v. Dandeson, 2 Ex. 741; Ex parte Plant, 4 Deac. & Ch. 160. Further, a partner's lien on partnership property is lost by the conversion of such property into the separate property of another partner. On the sale of one partner's share to another, the vendor has no lien on the partnership property for the unpaid purchase-money. See Stuart v. Ferguson, Hayes, Ir. Ex. 452. Therefore, if on a dissolution it is agreed between the partners that the property of the firm shall be divided in specie among them, and that the debts shall be paid in some specified manner, and if the property is accordingly divided, but the debts remain unpaid, the lien which each partner had on the property before its division is gone; and consequently no partner has a right to have the specific things allotted to any other partner, brought back into the common stock, and applied in liquidation of the partnership liabilities. Lingen v. Simpson, 1 Sim. & Stu. 600; and see Re Langmead's Trust, 7 De G. M. & G. 253, the judgment of L. J. Turner. Upon the same principle, if two partners consign goods for sale, and direct the consignee to carry the proceeds of the sale equally to their separate accounts without any reserve, and this is done, neither partner has any lien on the share of the other in those proceeds, although it would have been otherwise if they had remained part of the common property of the two. See Holroyd v. Griffiths, 3 Drew, 428. In Holderness v. Shakels, 8 B. & C. 612, E. C. L. R. 15, the transfer to each partner was subject to the lien, which was not therefore lost. If a partnership is illegal, its members have no lien upon their common property, or upon each other's shares therein.

thereof, and always continues. And so it is in the case of a mortgage of stock and goods in trade; for in such case, if the lien was to fall on the goods in trade when the mortgage was made, and not on those taken afterward, the trade must stop."

See Ewing v. Osbaldistone, 2 M. & Cr. 88, unless it be by virtue of some agreement not affected by the illegality. Mere co-owners have no such lien as is enjoyed by copartners. Kay v. Johnston, 21 Beav. 536. But a part owner of a ship has a right to have the gross freight applied in the first place in payment of the expenses incurred in earning it. See Green v. Briggs, 6 Ha. 395; Alexander v. Simms, 18 Beav. 80, and 5 De G. M. & G. 57; Lindsay v. Gibbs, 22 Beav. 522. See as to the lien of the master on freight, Bristow v. Whitmore, 1 Johns. 96; Smith v. Plummer, 1 B. & Ald. 582. The nature of a partner's share in partnership property, and the effect of the lien, are seen when a separate judgment creditor of a partner seeks to levy execution upon that partner's share in the partnership. Such a creditor has always been at liberty to execute his judgment, not only against his debtor's separate property, but also against the property of any firm in which the debtor may be a partner. This at first sight seems extremely unjust, inasmuch as it looks like taking one man's property for another man's debt, but in truth the creditor gets only what belongs to his debtor, although executions of the nature in question put the debtor's partners to no small inconvenience.

Of the duty of the sheriff.—There has been considerable doubt as to the proper mode of levying execution against the property of a firm upon a judgment recovered against one of its members only. Burton v. Green, 3 Car. & P. 306. Before the time of Lord Mansfield it seems that the sheriff was in the habit of acting upon the supposition that each partner was entitled to an undivided share of every article belonging to the firm, without reference to the state of the partnership accounts; and in executing a *fi. fa.* against a partner for his separate debt, the sheriff *seized the whole* of the partnership effects (or of so many of them as were requisite), and *sold the undivided share* of the judgment debtor therein. See Heydon v. Heydon, 1 Salk. 392; Jackey v. Butler, 2 Ld. Raymond, 871; Bachurst v. Clinkard, 1 Show (K. B.), 169; Pope v. Haman, Comb. 217; Mariott v. Shaw, Comyn, 277; Dutton v. Morrison, 17 Ves. 205; Re Wait, 1 Jac. & W. 608. The sheriff seized the whole of every chattel which he sold, because he could not otherwise seize the share of the execution debtor. But he did not sell the whole of what he seized, because his authority was limited by the writ to the goods and chattels of the debtor, and an undivided share can be sold though it cannot alone be seized. As stated by Lord Holt in Heydon v. Heydon, 1 Salk. 392 (where there were two partners, against one of whom a judgment had been obtained) "the sheriff must seize all, because the moieties are undivided; for if he seize but a moiety and sell that, the other will have a right to a moiety of that moiety, but he must seize the whole and sell a moiety thereof undivided, and the vendee will be tenant in common with the other partner." See, too, per Tindal, C. J., in Johnson v. Evans, 7 Man. & Gr. 249, 250, E. C. L. R. 49. Lord Mansfield endeavored to introduce what at first sight appears to be a more equitable practice. In his time the sheriff seems to have seized and sold the whole of a sufficient portion of the partnership goods (instead of selling only an undivided share thereof), and then an account was directed to be taken of the judgment debtor's share of the proceeds of the sale, and that share, or a sufficient part of it, was handed over to the execution creditor. See Eddie v. Davidson, Dougl. 650. This, however, will on reflection be seen to be a very imperfect mode of proceeding; for it is impossible to ascertain the share of the debtor partner in the goods seized, without taking *all* the partnership accounts, and this a court of law has no power to do. Lord Mansfield's innovation has therefore been discontinued. See Parker v. Pistor, 3 Bos. & P. 288; Chapman v. Koops, id. 289; Morley v. Strombom, 3 id. 254. Lord Eldon greatly disapproved of it. See Waters v. Taylor, 2 V. & B. 301. And it is now clearly settled, in conformity with the older cases, that the sheriff's duty is to seize the whole of the partnership effects, or of so much of them as may be requisite, and to sell the

Rule in Ridgely v. Carey.

SEC. 110. The same principles are well illustrated by the case of Ridgely v. Carey.[1] Two persons entered into partnership in all trading voyage to the West Indies; the return cargo was sold, and

undivided share of the debtor partner therein without reference to the state of the account as between him and his copartners. Holmes v. Mentze, 4 A. & E. 127; Johnson v. Evans, 7 Man. & Gr. 240. The purchaser and the copartners must settle the accounts in equity. Parker v. Pistor, 3 Bos. & P. 288. This is explicitly stated by Lord Denman in Holmes v. Mentze, 4 A. & E. 127, E. C. L. R. 31; S. C., 5 Nev. & Man. 563, and 4 Dowl. Pr. Ca. 300; in which a sheriff sought to make the judgment creditor and the partner of the judgment debtor interplead. Lord Denman said: "The sheriff in this case is called upon to seize goods of the defendant at the plaintiff's suit, but a third party alleging that the defendant is his partner, requires the sheriff not to act, because the defendant is indebted to the partnership in more than the amount of his share. That does not interfere with the sheriff's duty. He is to sell such interest as the defendant has as partner, not the degree of right which he may be found to have on a winding up of the affairs, because if the sheriff waited till that could be ascertained, the goods might remain unsold for an indefinite time. Under the law as it formerly stood, and it is the same now, the sheriff in a case of partnership must, however inconvenient it may be, sell the share of the defendant partner, and make the purchaser tenant in common with the other partners, and the purchaser must do the best he can to ascertain what interest there is. In the same case of Holmes v. Mentze, it was held that a sheriff, who for the debt of one partner executed a *fi. fa.* against the property of the firm, was not entitled to make the execution creditor and the copartner of the debtor interplead; but that the sheriff was entitled to be indemnified by the creditor if he denied the partnership. The sheriff having seized the property of the firm, proceeds to sell the interest of the judgment debtor, and to assign the same to the purchaser. The bill of sale recites that the sheriff has entered upon and taken possession of all the share and interest of A B (the judgment debtor) as partner with one C D, of and in all the book debts, materials, tools, implements, goods, chattels, effects, and stock in trade used in the same business, which has been valued at ———*l.*; and the sheriff then assigns all the share, right, and interest of him the said A B, of and in all and every the debts, chattels, and effects so seized under and by virtue of the writ of *fi. fa.*, and held by the said A B in partnership or joint tenancy with the said C D, to have and to hold, receive and take, the said share, furniture, debts, goods, chattels and effects thereby bargained and sold, or intended so to be, unto the said E F (the purchaser), his heirs, executors, administrators, and assigns, as his and their own proper debts, goods and chattels. See Habershon v. Blurton, 1 De G. & Sm. 121. It is to be observed that the sheriff seizes, sells, and assigns, but he has no business to take the goods of the firm out of the possession of the solvent partners; See per Patteson, J., in Burnell v. Hunt, 5 Jur. 650; and if the sheriff sells, not the share of the execution debtor, but the goods themselves, he is accountable at law to the solvent partners for so much of the proceeds of the sale as is proportional to their share in the partnership. Mayhew v. Herrick, 7 C. B. 229

Of the position of the purchaser from the sheriff.— If the purchaser is a stranger unconnected with the firm, he acquires for his own benefit all the judgment debtor's interest in the property comprised in the bill of sale, and becomes, as regards such property, tenant in common with the judgment debtor's copartners. The next step, therefore, is to adjust the conflicting rights of the purchaser, and these partners. Now it is clear, from the nature of the lien which each partner has on the partnership property, that a partner holds a partnership chattel with his copartner, subject to all the equities which that copartner has upon it, Barker v. Goodair, 11 Ves. 85, and subject therefore to his right to have all the creditors of the

[1] 4 Har. & M'Hen. 167.

notes were taken from the purchasers in the name of one of the partners, who afterward died. Upon a bill filed by the surviving partner, it was decreed that the executor of the deceased partner should pay to the surviving partner his proportion of the money received, or to

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firm paid out of the assets of the firm, consequently, *pro tanto*, out of the chattels seized by the sheriff. See authorities below. It is equally clear that in this respect the purchaser from the sheriff is in no better position than the partner whose undivided share has been sold; a suit in equity, therefore, becomes necessary, in order that the partnership accounts may be taken, and the partnership property duly applied. Skipp v. Harwood, 2 Swanst. 586; Taylor v. Fields, 4 Ves. 396; Young v. Keighley, 15 id. 557; Dutton v. Morrison, 17 id. 205, 206; Ex parte Hamper, id. 404, 465; Re Wait, 1 J. & W. 608. A sheriff cannot seize and sell partnership property upon an execution against one of the partners, for his private debt. The creditor can have only the right of his debtor, which is an interest in the surplus after paying the partnership debts. Gibson v. Stevens, 7 N. H. 352; Morrison v. Blodgett, 8 id. 238.

Execution against firm has preference in some states.— An execution against a firm has the preference over one against an individual partner; but where property is sold on an execution against a partner, though after the delivery of the execution against both partners, it is a valid sale if sufficient time had not elapsed for advertisement and sale under the other execution. Fenton v. Folger, 21 Wend. (N. Y.) 676.

Where an officer had attached the partnership effects, in a suit against one of the partners, and afterward, with the consent of the firm, suffered the effects to be applied to pay a partnership debt due to a stranger, it was held that he was not responsible to the first attaching creditor, in an action for not having seized the goods in execution; and although the effects were applied to pay a judgment against the firm, which included some demands not yet due and payable, yet this circumstance was held of no importance, the claim being good between the parties to the judgment, and resting, not on priority of attachment, but on the superiority of the plaintiff's title as a creditor of the partnership. Commercial Bank v. Wilkins, 9 Me. 28. In the case of a dormant partnership, an attachment of the stock in trade in the hands of the ostensible partner, in a suit against him alone, has preference to a subsequent attachment of the same goods by another person in an action against the partners. Lord v. Baldwin, 6 Pick. (Mass.) 348. The sole surviving partner is, in law, the owner of all the partnership effects; and the partnership funds in the hands of garnishees may be ordered to be paid over to separate creditors of the surviving partner, on their giving bond and security to answer any claim which may afterward be made on the funds. Knox v. Schepler, 2 Hill (S. C.), 595. Firm property is not holden by an attachment in a suit based on the joint and several notes of the partners, and not being a partnership debt. Buffum v. Seaver, 16 N. H. 160. And, generally, a creditor of one member of a partnership cannot take the interest of such partner in any article of the partnership property, unless enough is left to satisfy the creditors of the firm; and if the partnership be insolvent, the partnership creditors have the right to have the property thereof applied to the payment of their debts. But if the firm is solvent when the attachment of the individual partner's interest is made, a lien is acquired which cannot be divested in favor of the partnership debts by its subsequent insolvency, even though such insolvency be previous to the recovery of judgment against the individual partner. Willis v. Freeman, 35 Vt. 44. It is held in New York that a sheriff cannot, upon an execution issued in an attachment suit, brought against the members of a limited partnership, levy upon and sell the right, title, and interest of a special partner, in the goods, chattels, assets, and accounts of the firm, and that upon a sale of the interest of a special partner in the property of a limited partnership, the purchaser is bound to know that such sale is illegal. Hence, it is not necessary for the special partner, though present, to give any notice. More especially is such notice unnecessary, if the purchaser is himself a partner in the firm. It is also held that a levy upon the in-

be received, on the notes, notwithstanding the deceased might not have left assets sufficient to pay his own private debts.

Share of deceased partner.

SEC. 111. Upon the decease of one of several partners, his share of

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terest of a special partner in the property of the firm, upon attachments, will not deprive such partner of his interest, or the right to an account, or prevent him from collecting any surplus remaining over and above such claims as the sheriff has upon it. Harris v. Murray, 28 N. Y. 574. The division, by partners, of the partnership assets between themselves, and the transfer of such assets by the individual partners, in payment of their private debts, when the partnership is insolvent, is, in point of law, a fraud upon the partnership creditors. And if a party, to whom such transfer is made, has distinct notice that the property belongs to the copartnership, and simply gives up therefor certain overdue notes, he is not a *bona fide* purchaser, and cannot hold the property as against the firm creditors. Ransom v. Van Deventer, 41 Barb. (N. Y.) 307. A firm, to secure creditors, agreed to transfer certain coal barges, etc., to them, and executed a bill of sale, the creditors at the same time agreeing to take the real estate of one of the firm and pay the liens thereon, which were for his individual debts; deeds for the property were made, but the creditors did not pay the liens, and in an action in the name of the individual partner against the creditors on their agreement to take his property and pay the liens, the defendants claimed that it and the bill of sale were one transaction, and that they were entitled to defalk, against the amount to be recovered against them, damages for breach of the partnership contract in not turning over to them the property sold, to which they covenanted that they had good title. Held that the defense was not valid, its effect being to divert to the creditors of the partnership a fund arising from private property, specifically appropriated to private debts. Jackson v. Clymer, 43 Penn. St. 79. See, also, to the same effect, Toombs v. Hill, 28 Ga. 371; Conroy v. Woods, 13 Cal. 626; Thornton v. Bussey, 28 Ga. 302; Hill v. Beach, 12 N. J. Eq. 31. An execution creditor of one of two partners may levy upon partnership effects, as well as upon other personal property of his debtor, though the goods in specie are not bound thereby, nor do they pass by sale under the writ, *but only the interest of the debtor on final settlement of partnership accounts;* and a concealment of that interest is fraudulent. Smith v. Emerson, 43 Penn. St. 456. Where there are partnership and separate creditors, and partnership and separate property, and the firm is insolvent, *each class has priority upon its respective estate, and must first resort to it for payment; after satisfaction of the claim of either class, the other may come upon the residue, according to its several legal and equitable rights.* Black's Appeal, 44, Penn. St. 503. Wintersmith v. Pointer, 2 Metc. (Ky.) 457. Where a plaintiff in a judgment given him by a firm composed of three members, for liabilities incurred upon notes discounted for their use, continues his liability as accommodation drawer of new notes given by the firm, after he knows that one member has retired, he cannot, in a *scire facias* to revive his judgment, in which the two surviving members of the old firm and the administrator of the retiring partner, who died after suit brought, are defendants, recover for the new liabilities assumed after the dissolution, unless they are renewals of the notes of the old firm. The defendant's liability under the judgment is measured by the plaintiff's liabilities, and not by his payments for them; but the judgment will be controlled by the court, and no recovery permitted for liabilities discharged by the defendants themselves. Where, upon the *scire facias*, usury on the part of holders of certain notes is claimed as a defense, if established, and the proper deduction made in an action on the notes, the judgment will be controlled by the court to that extent, for no more can be recovered on the judgment than what the plaintiff was legally liable for in their behalf; but it is not a valid objection to the plaintiff's recovery, for his rights cannot be involved in the usury dispute. Hartley v. Kirlin, 45 Penn. St. 49. Where a partner buys real estate in his own name, and gives his individual bonds and mortgage in part payment

the movable stock and effects of the partnership, subject to the partnership debts, devolves to his personal representatives, who thereupon become, both at law and in equity, tenants in common with the surviving partners. From the change that thus takes place in the nature

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therefor, the firm is not liable to the seller for the unpaid purchase money, though it appear by the firm books that the land was bought on firm account, and a declaration of trust was afterward executed by the parchaser but not recorded, declaring that the money paid was partnership funds, and that the land was held by him in trust as partnership property. After failure of the firm, on sale of the land by their assignee, the partnership creditors were held alone entitled to share in the proceeds, and not the vendors, who could claim only against the purchasing partner. North Pennsylvania Coal Co.'s Appeal, 45 Penn. St. 181. So under assignments for benefit of creditors by a firm, and by one of the partners, the separate creditors of the latter cannot claim a *pro rata* distribution out of the firm assets, while firm debts remain unpaid, though the assigning partner was largely a creditor of the firm. Houseal's Appeal, 45 Penn. St. 484. A partnership debt is recoverable against the executors of a deceased partner, even pending a suit against the survivors. Creswell v. Blank, 3 Grant (Penn.), 320. Partnership creditors are not entitled to a mortgage on the partnership property, nor can a special mortgagee be compelled to seek payment on one rather than another part of the property mortgaged. The right attaches to all the property. Lallande v. McRae, 16 La. An. 193. The joint debts must first be paid from the partnership property, before any portion of it can be applied to the payment of the individual debts of the partnership, and the fact that a separate creditor of one of several partners has levied his attachment on the partnership property, and has subsequently made an agreement with a trustee to whom the debtor has conveyed his property, to receive from the proceeds of its sale a payment of the attachment debt, gives him no title to the partnership property or the proceeds of its sale, as against the superior equity of a subsequent attaching creditor of the partnership. Burpee v. Bunn, 22 Cal. 194; and the fact that a private creditor has obtained a judgment and levied his execution, gives him no additional rights. Convey v. Woods, 13 Cal. 626; Thompson v. Frist, 15 Md. 24. B and L, as a firm were members of two other partner, ships, and all three firms failed. The creditors of the two other firms put attachments on property belonging to B. & L. before the creditors of that firm attached it. It was held that the cred, itors of B. & L. were entitled to the proceeds of a sheriff's sale of the property. Bullock v. Hubbard, 23 Cal. 495. Where, on the dissolution of a partnership, one partner takes the partnership effects, and executes to the other a bond, with surety, conditioned for the payment of all the partnership debts, such bond is in equity a trust fund in which all the creditors have an interest, and which they (the partners being insolvent) can subject to the payment. If suit is brought on such bond for the benefit of the creditors, in the name of the obligee, and the creditors are made parties defendants with the obligors, and judgment rendered thereon, the surety cannot, without the knowledge or consent of the creditors, by an agreement with the obligee, obtain satisfaction of such judgment without payment thereof in full; and any payments made on such judgment, to the obligee in good faith, should be credited thereon. Wilson v. Stilwell, 14 Ohio St. 464. Where one partner is dormant and secret, and a suit for a partnership debt is brought, and judgment is recovered against the ostensible partner alone, the judgment is for a partnership debt, and, in the application of the property on which the partnership business is transacted, will be preferred to individual debts of the ostensible partner. If, in such case, the ostensible partner convey his separate part of the stock in trade to the dormant partner, in payment of his individual debt, the conveyance is fraudulent as to partnership creditors. Elliott v. Stevens, 38 N. H. 311.

Sheriff holds joint possession under levy. — After the levy and previous to the sale of the interest of a member of a firm in the copartnership goods, the sheriff may hold joint possession with the other members of the

of the interest of the several parties concerned, the law contemplates an entire cessation of the partnership trade. As to the surviving partner, "he only," as Sir Anthony Hart observed, "deals with the effects finally *ex necessitate*, and rather in the character of a trustee.

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firm. Where, upon such a levy, the other members of the firm, covenant with the sheriff to deliver to him the property on request, or pay the debt, it is no answer to an action for the breach of such covenant, that the property was partnership property, and had, subsequent to the covenant, been applied by them to partnership uses. Burrall v. Acker, 23 Wend. (N. Y.) 606.

Rule in Pennsylvania. — In Pennsylvania, in an action against a partnership, if process be served on one partner and judgment recovered and execution levied on the partnership property, it is the duty of such partner to give notice of it to his copartners, and a neglect to do so subjects him to an action. Devall v. Burbridge, 6 W. & S. (Penn.) 529. On a sale of partnership goods, the proceeds are first applicable to partnership debts, in a contest between creditors of the firm and creditors of the individual members. Bevan v. Allee, 3 Harr. (Del.) 80.

Rule in North Carolina. — In North Carolina, on an attachment against one partner for his separate debt, only his separate property can be seized. Jarvis v. Hyer, 4 Dev. (N. C.) 367. And the purchaser takes them subject to the claims of the partnership; but the sheriff is not affected by this equity between the purchaser and the other partners. Tredwell v. Roscoe, 3 Dev. N. C.) 50.

Execution against one partner — how may be levied.— On a judgment against a partnership, an execution may be levied upon the joint property, or upon the separate property of either partner, or of all the partners, for the whole debt. Pierce v. Jackson, 6 Mass. 242; Tappan v. Blaisdell, 5 N. H. 190; Wilson v. Conine, 2 Johns. (N. Y.) 280; Commercial Bank v. Wilkins, 4 Me. 28; Lord v. Baldwin, 9 Pick. (Mass.) 348; French v. Chase, 6 Me. 166; Allen v. Wells, 22 Pick. (Mass.) 450; Tucker v. Aukley, 6 Cranch, 34; Pierson v. Nesbit, 1 Dev. Rep. 315; Jarvis v. Hyer, 4 Dev. Rep. 367; Knox v. Schepler, 2 Hill (N. Y.), 595; 12 La. 230. On an execution for the separate debt of one partner, the share of such partner in the partnership property may be levied upon; *but the sheriff can sell only the actual interest which such partner has in the joint property, after the accounts are settled, or subject to the partnership debts.* Ex parte Smith, 16 Johns. (N. Y.) 106; Nicoll v. Mumford, 4 Johns. Ch. (N. Y.) 525; Rodriquez v. Heffeman, 5 id. 428; Johnson v. Evans, 7 Scott's N. R. 1035. A court of equity will not stop such execution or sale, by injunction, to await the liquidation of the accounts of the partnership. Moody v. Payne, 2 Johns. Ch. (N. Y.) 548. See Ex parte Smith, 16 Johns. (N. Y.) 106, in note; and Wilson v. Conine, 2 Johns. (N. Y.) 280. "It is a principle acknowledged in the equity jurisprudence of the United States, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner. If the partnership creditors cannot obtain payment out of the partnership estate, they cannot in equity resort to the private and separate estate, until private and separate creditors are satisfied; nor have the creditors of the individual partners any claim upon the partnership property until the partnership creditors are satisfied. 3 Kent's Comm. 65; Wilder v. Keeler, 3 Paige's Ch. (N. Y.) 167; Morgan v. His Creditors, 20 Martin's Louis. Rep. 599; McCulloh v. Dashiel, 1 H. & G. Md. 96; Payne v. Matthews, 6 Paige, 19; Hull v. Wood, 2 Mc Cord (S. C.), 302. Where a surviving partner died, indebted to partnership and separate creditors, and left in the hands of the administrator joint property, and also separate property, the separate creditors were allowed to receive as much out of the separate property as the joint creditors had received out of the portion of the partner in the joint property, and both classes of creditors being thus equalized, the balance of the separate property was directed to be divided equally among them. Bell v. Newman, 5 Serg. & R. (Penn.) 85; Estate of Perry, 1 Ashm. (Penn.) 347. Goods belonging to a firm cannot be held in attachment upon a writ, or by seizure upon execution, against an individual partner,

If he continues the trade, it is at his own risk, liable to the option of accounting for profits, or being charged with interest on the deceased partner's share of the surplus."[1] On the other hand it is equally evident, not only from the consideration just adverted to, but from the principles which have been elsewhere discussed,[2] that the executors of

for his separate debt, so long as any debt remains due from the company. All that can be taken is the interest of the debtor in the firm; not the partnership effects themselves, but the right of the partner to a share of the surplus that may remain after all the debts are paid. Tappan v. Blaisdell, 5 N. H. 190; Church v. Knox, 2 Conn. 514; Brewster v. Hammet, 4 id. 540; Barbour v. Harford Bank, 9 id. 407; Witter v. Richards, 10 id. 37; 2 Dall. 278; 2 Yeates, 190; 4 id. 477; 5 Serg. & R. 87; 1 Penn. 198. In Maryland, it was held that one-third of the partnership effects in that state, of those partners residing in Great Britain, who had become bankrupts, might be attached by a citizen of Maryland for a debt due to him from one of the partners; and that the attaching creditor might have a judgment without showing the state of the accounts as between the partners. Wallace v. Patterson, 2 H. & M'H. 463. In Connecticut, the interest of one partner in a debt due to the partnership cannot be taken by process of foreign attachment, to satisfy the individual debt of the partner, without showing from the state of the partnership accounts as between the partners, and with reference to the solvency of the partnership. what the right or interest claimed amounts to. Church v. Knox, 2 Conn. 514. See, also, Brewster v. Hammet, 4 id. 540; Fisk v. Herrick, 6 Mass. 271; Lyndon v. Gorham, 1 Gall. (U. S. C. C.) 367. In Pennsylvania, a debt due to a partnership may be attached at the suit of the creditor of one of the partners, and the interest of such partner in the partnership demand is bound by such attachment. M'Carty v. Emlin, 2 Yeates (Penn.), 190. A, B and C were partners. and after the death of A, B and C recovered a judgment against D, founded on a partnership transaction; E, a creditor of B and C, then brought foreign attachment to recover the debt of D, and introduced the judgment against him to show his indebtedness to B and C; it was held that the representatives of A were not precluded by such judgment from showing that B and C were debtors to the partnership, and had no interest in the debt against D, but that it belonged to A alone. Barber v. Hartford Bank, 9 Conn. 407. The doctrine that the separate debt of one partner should not be paid out of the partnership estate, until all the debts of the firm are discharged, does not apply until the partners cease to have a legal right to dispose of their property as they please. It is applicable only when the principles of equity are brought to interfere in the distribution of the partnership property among the creditors. M'Donald v. Beach, 2 Blackf. (Ind.) 55. In Georgia, a judgment creditor of a partner, in his individual capacity, may levy on the partnership effects, and sell his debtor's interest therein, without reference to the claims of the creditors of the firm. Ex parte Stebbins & Mason, R. M. Charlton's Rep. 77. In Vermont it has been held that partnership creditors have no priority over a creditor of one of the partners, even as to the partnership effects. Root v. Shepherdson, 3 Vt. 120. In Massachusetts, it was decided that at law the separate estate of one partner was liable on execution for a copartnership debt, and that the execution was not to be defeated by a subsequent attachment by a separate creditor of an individual partner. *It is in equity only that joint creditors can be restrained from proceeding against the separate estate.* Allen v. Wells, cited 3 Kent's Comm. 65 (Ed. 1840); McCullen v. Dashiell, 1 H. & G. (Md.) 96; Tucker v. Oxley, 5 Cr. (U. S. C. C.) 35. The effects of a non-resident partner may be attached, although there is one of the partners in the state. Conklin v. Harris, 5 Ala. 213. A creditor may attach the interest of one of the firm, subject to the paramount claim of partnership creditors. Douglass v. Winslow, 20 Me. 89. The proceeds of sale will at first be applied to liquidate the firm debts, and the balance, if any, may go to pay the private debts to the extent of the partner's share. Clark v. Alee, 3 Harr.

[1] See Booth v. Parks, 1 Molloy, 465.

[2] *Ante*, p. 4.

the deceased partner cannot insist upon carrying on the business in partnership with the surviving partners. These operations of law are, generally speaking, guarded against by the partnership articles; but on all points on which the articles are silent or imperfect in their pro-

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(Del.) 80. The right of the partners of the judgment debtor being of the nature described, and it being incompatible with that right that the partnership property seized by the sheriff should be removed or sold by him, the Court of Chancery will, on a bill filed by the judgment debtor's copartners against him and his creditor and the sheriff, direct the partnership accounts to be taken, and restrain the sheriff from selling, and appoint a receiver. See Bevan v. Lewis, 1 Sims. 376. As to an injunction against the sheriff, compare Newell v. Townsend, 6 Sim. 419, with Garstin v. Asplin, 1 Madd. 150, and Jackson v. Stanhope, 10 Jur. 676; and see Story on Part., § 264; and as to making the sheriff a party, see Lord Eldon's observations in Franklyn v. Thomas, 3 Mer. 235, and Hawkshaw v. Parkins, 2 Swanst. 549.

Of the position of the execution debtor. — With respect to the execution debtor, it is to be observed that, in the first place, the execution operates as a dissolution of the partnership. Aspinall v. The Lon. and North West. Rail. Co., 11 Ha. 325; Habershon v. Blurton, 1 De G. & Sm. 121; Skipp v. Harwood, 2 Swanst. 587. In the next place the assignment by the sheriff to the purchaser transfers to the purchaser whatever the sheriff had power to assign, and did assign, but no more; and as, under a *fi. fa.*, the sheriff may not have power to sell every thing which as between the partners is to be considered partnership property, it by no means follows that the assignment has transferred to the purchaser all the judgment debtor's share and interest in the partnership. In a case, therefore, where a stranger purchased from the sheriff the execution debtor's interest, and then assigned it to the other partners, it was held that the execution debtor was still entitled to an account from them, the sale by the sheriff not having divested him of all his interest in the concern. Habershon v. Blurton, 1 De G. & Sm. 121. Upon a sale by the sheriff of the interest of one partner, there is nothing to prevent a purchase of that interest by his copartners. But the copartners purchasing of the sheriff must act with perfect fairness. If they do any thing to conceal the true value of the share, so as to enable themselves to buy it for less than it would otherwise have fetched, the sale will not be allowed to stand if impeached in a court of equity. In the case of Perens v. Johnson, and Johnson v. Perens, 3 Sm. & G. 419, the share of a partner in a leasehold colliery was sold by the sheriff under a *fi. fa.* The other partners bought the share; the execution creditor was paid off, and a balance was handed over by the sheriff to the execution debtor. It appeared, however, that, before the sale took place, it was expected that a valuable seam of coal would be reached; that the solvent partners had removed the gear so as to prevent any one going down the mine; that they had also removed some iron-stone recently raised, so as to lead persons visiting the mine to believe that coal was not so nearly within reach as it was; and that a few days after the sale, and after only one day's working, a rich seam of coal was actually discovered. The execution debtor thereupon filed a bill against his late copartners, praying that the sale might be set aside, on the ground that the purchase from the sheriff was contrary to that good faith which should be observed by one partner toward another, and a decree was made in his favor, setting the sale aside upon repayment of the purchase-money, with interest at £5 per cent. The execution creditor has no title to goods seized under a *fi. fa.* issued by him, unless he purchases them from the sheriff. Consequently where, under a *fi. fa.* issued against one partner for a private debt, the sheriff seized the goods of the firm, which afterward became bankrupt, and the assignees sold the goods seized, it was held that an action by the execution creditor against the assignees for money had and received to his use, would not lie; first, because *he* had no title to the goods; and, secondly, because if he had, his interest in them could not be ascertained without taking the accounts of the partnership." Garbett v. Veale, 5 Q. B. 408.

Rule in various states.— In North

visions, it is absolutely necessary for the executors and surviving partners, unless the parties interested are all *sui juris*, to adhere in their arrangements to the general rules of law; and where it is impracticable for them to do so, they must resort to the assistance of a court of

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Carolina only the partner's separate property can be taken on execution; Jarvis v. Hyer, 4 Dev. (N. C.) 467; and a purchaser of the partner's interest takes it subject to the claims of the firm and its creditors. Tredwell v. Roscoe, 3 Dev. (N. C.) 50; Van v. Hussey, 1 Jones' L. (N. C.) 381. The same rule prevails in Virginia, Shaver v. White, 6 Munf. (Va.) 113; Missouri, Wiles v. Maddox, 26 Mo. 77; New York, Willett v. Stringer, 17 Abb. Pr. (N. Y.) 153; Alabama, Andrews v. Keith, 34 Ala. 727; and the goods may be sold under a levy unless enjoined by a court of equity. Moore v. Sample, 3 Ala. 319. A partnership creditor has no *lien* at law upon the property for the payment of his claim until after execution is issued. Mayer v. Clark, 40 Ala. 259; Reese v. Bradford, 13 id. 837. But it seems that the partners may claim exemption from the sale of partnership property to pay individual debts; Howard v. Jones, 15 Ala. 67; and it is also held that a partnership creditor is not entitled *pari passu* to share with the individual creditor of a deceased partner when it is not sufficient to pay his individual debts, and the surviving partner, though insolvent, has a joint fund in his hands. Van Wagner v. Chapman, 29 Ala. 172; Smith v. Mallory, 24 id. 628; Bridge v. McCullough, 27 id. 661. In California the sheriff may levy an execution against one partner on the firm property, but he sells subject to the rights of partnership creditors. Jones v. Thompson, 12 Cal. 191. In Connecticut the same rule prevails. Witter v. Richards, 10 Conn. 37. Partnership debts are to be paid out of partnership funds. The interest of one partner in the partnership property is his share in the surplus remaining after the payment of the claims against the partnership; and that surplus alone is liable for his individual debts. Any appropriation of the partnership property, by one partner, in payment of his individual debts, without the consent of his copartners, is a violation of his duty, and a fraud upon them. A creditor of one partner can only attach or levy his execution upon the partnership property, in such manner as to take that partner's interest therein, subject to the claims of all the partnership creditors. Filley v. Phelps, 18 Conn. 294. In Georgia, Green v. Ross, 24 Ga. 613; Toombs v. Hill, 28 id. 371. In Illinois the interest of one partner may be taken upon an execution obtained by a private creditor. White v. Jones, 38 Ill. 159; James v. Stratton, 32 id. 202. But equity will, in a proper case, restrain a sale until the partnership account can be taken and the exact interest of the debtor be ascertained. Newhall v. Buckingham, 14 id. 405. But where the money of such creditor contributed to the purchase of the partnership stock, it is held that his equities are superior to those of a partnership creditor. Reeves v. Ayres, 38 Ill. 418. In Indiana, while the doctrine that a separate creditor should not be paid until all the debts of the firm are discharged is admitted, yet it is held that this rule does not apply until the partners cease to have the legal right to dispose of their property as they please, and is only applicable when the principles of equity are brought to interfere in the distribution of the partnership effects among the creditors. McDonald v. Beach, 2 Blackf. (Ind.) 55; Dean v. Phillips, 17 id. 406; Dunham v. Hanna, 18 id. 270; Schaffer v. Fithian, 17 id. 436; Conant v. Frary, 49 Ind. 530. In Iowa, a partnership creditor, in order to avail himself of priority over a creditor of an individual partner, must resort to a court of equity, and is required to show that all the firm property is required to pay the firm debts. Scudder v. Delashmut, 7 Iowa, 39; Hubbard v. Curtis, 8 id. 1. In Kentucky it is held that an execution against one partner can only be levied on partnership property with the assent of his copartners. But when such assent is once given, it cannot be withdrawn. Howell v. Commercial Bk., etc., 5 Bush (Ky.), 99. But if a levy is made upon an individual partner's interest and sold, trover will not lie against the purchaser by the other partners. The only remedy is in equity; White v. Woodard, 8 B. Mon. (Ky.) 485; where, by equitable substitution, the partnership creditors are treated as en-

equity. Where the surviving partners are themselves the executors of the deceased partner, it is obvious that no acts performed by them in those inconsistent characters, unless expressly warranted by the partnership articles, can be binding on persons not *sui juris*.[1]

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titled to the implied lien which each partner has on the partnership property; O'Bannon v. Miller, 4 Bush (Ky.), 25; and a separate creditor only takes the interest of his debtor after the firm debts are paid. Wintersmith v. Pointer, 2 Metc. (Ky.) 457; Pearson v. Keedy, 6 B. Monr. (Ky.) 128, Black v. Bush, 7 id. 210; In Louisiana a separate creditor cannot attach the separate interest of a partner, but must take the debtor's interest in the partnership assets. Thomas v. Lusk, 13 La. An. 277; Marston v. Dewberry, 21 id. 518; and he acquires only the residuary interest of his debtor therein after the firm debts are paid. Davis v. Carroll, 11 La. An. 705. In Maine it is held that in equity partnership creditors are entitled to have their claims first paid out of the partnership assets, before the claims of a separate creditor can be enforced. Crooker v. Crooker, 46 Me. 250; Comml. Bank v. Wilkins, 9 Me. 28; but where none of the partnership creditors or other partners interpose, a separate creditor may satisfy his debt out of the debtor's interest in the property. Thompson v. Lewis, 34 Me. 167. In Maryland equity will protect the partnership creditors against a sale of partnership property to pay private debts. Thompson v. Frist, 15 Md. 24; and it is also held that partnership creditors cannot pursue the separate estate of the partners until the individual debts are paid. Glenn v. Gill, 2 Md. 1. In Massachusetts all debts due from the firm must be first paid out of the firm property before a separate creditor can apply it to the satisfaction of his debt. Pierce v. Johnson, 6 Mass. 242; Adams v Paige, 7 Pick. (Mass.) 542; but it is held that the separate estate of each partner is liable to be taken to satisfy a firm debt, and cannot be defeated by an attachment by a separate creditor. Allen v. Wells, 22 Pick. (Mass.) 450. In Michigan partnership creditors are preferred. Topliffe v. Vail, Harr. (Mich.) 346; Alson v. Morrison, 29 Mich. 395; so in Mississippi. Bass v. Estell, 50 Miss. 300. In New Hampshire the sale of partnership property to satisfy an individual debt is held void as against the partnership creditors, even though the private debt was for money loaned to be used as a part of the capital of the firm. Ferson v. Monroe, 21 N. H. 462; Gay v. Johnson, 32 id. 167. Where, in a suit against two partners, for a partnership debt, one of them is discharged upon his plea of infancy, and judgment is taken against the adult partner, the judgment is still a partnership debt, to which the partnership funds must be applied in preference to debts of the individual partners. Gay v. Johnson, 32 N. H. 167; the property of the partnership remains subject to the preference of the partnership creditors, notwithstanding the survivor may have managed and treated it as his own, with the assent of the administrator of the deceased partner, and may have contracted debts upon the credit of the property. Benson v. Ela, 35 N. H. 402. If partners, by arrangement among themselves, own each a separate part of the stock in trade on which the partnership business is transacted, the stock will nevertheless be regarded as partnership property for the payment of partnership debts, at least as to creditors who have no notice that the stock is owned in that way. Elliot v. Stevens, 38 N. H. 311. See, also, Tenney v. Johnson, 43 id. 144, where it was held that the lien of partnership creditors was preserved, although by arbitration all the property had been awarded to one member. A sheriff cannot lawfully seize the partnership property upon a process against a single member of the firm, and exclude the other partners, and if he does, replevin lies therefor. Hill v. Wiggin, 31 N. H. 292; Newman v. Bean, 21 id. 93. In New Jersey the partnership creditors have a priority over individual creditors, and the equities between the partners themselves are next to be satisfied, and it is only after these matters are adjusted that individual creditors can come in. Hill v. Beach, 12 N. J. Eq. 31; Malack v. James, 13 id. 126; Blackwell v. Rankin, 7 id. 152; Mettnight v. Smith, 17 id. 259; but partnership creditors may

[1] Wedderburn v. Wedderburn, 4 Myl. & Cr. 45.

Severance of joint tenancy upon death of partner.

SEC. 112. Where persons take *personal property* for the purposes of trade, under a will, which constitutes them joint tenants, and they enter into possession of such property, and continue for a length of

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waive the right, Linford v. Linford, 29 N. J. L. 113, and the doctrine of preference is only applicable when the principles of equity are brought to interfere in the distribution of the partnership property among the creditors. Mittnight v. Smith, *ante*. The separate creditors may levy upon the property and acquire a lien thereon, subject to the rights of the partnership creditors. Hill v. Beach, *ante*. Separate creditors are held entitled to be first paid out of their debtor's separate estate, except in cases where joint debts are secured by judgment or executi n liens. Wisham v. Lippincott, 9 N. J. Eq. 353. In New York, it is held that the debts of a partnership are to be first paid out of the partnership fund, and the separate debts of a partner out of his separate property; and the surplus only of either fund can be reached by the creditors, whose debts are primarily chargeable upon the other. Wilder v. Keeler, 3 Paige (N. Y.) 167; Nicoll v. Mumford, 4 Johns. (N. Y.) Ch. 522; Muir v. Leitch, 7 Barb. (N. Y.) 341; and it is held that a sheriff who levies upon and sells partnership property upon an execution against one partner, is liable in trover to the other partners. Walsh v Adams, 3 Den. (N. Y.) 125. Where one partner, to whom a third person has intrusted money, applies the money to the purposes of the firm, with the consent of all the partners, but without the consent of the owner of the money, such owner may elect to consider the firm his debtor, instead of the separate partner. Hutchinson v. Smith, 7 Paige (N. Y.) 26. Where real estate is conveyed to copartners, in their individual names, for the use and benefit of the firm, or in payment of debts due to the firm, the grantees become tenants in common of the land; and upon the death of either, the legal title to his undivided share descends to his heirs at law. The separate creditors of individual partners have no equitable right to any part of the partnership property, real or personal, until the debts of the firm are provided for, and the rights of the partners, as between themselves, are fully protected. Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165; Delmonico v. Guillaume, 2 Sandf. Ch. (N. Y.) 366. Representatives of the deceased partner cannot be sued at law for the partnership debts. The suit must be brought against the survivors, into whose hands the partnership effects pass, by survivorship, for the payment of those debts. The representatives of the deceased partner are only entitled to their share of the surplus; and that share alone can be reached by his separate creditors, either at law or in equity. On the other hand, the separate estate of the deceased partner in the hands of the personal representatives, and the real estate descended to the heirs at law, are legal assets, which the separate creditors can only reach by a suit at law against the administrator or the heirs. The joint creditors, however, upon an allegation of the insolvency of the surviving partners, have an equitable right to compel a satisfaction of their debt out of the estate of the deceased partner. Wilder v. Keeler, 3 Paige's Ch. (N. Y.) 167; and a creditor of a firm, one member of which is deceased, cannot sustain a bill in equity against the representatives of the deceased partner to recover the debt from his estate, without averring and proving that the surviving members are insolvent, or otherwise showing an excuse for not proceeding at law against them. Lawrence v. Trustees of Leake Orphan House, 2 Den. 577; Slattet v. Carroll, 2 Sandf. Ch. 573; Bloodgood v. Bruen, 8 N. Y. 362; Voorhis v. Baxter, 18 Barb. 592; Ricart v. Townsend, 6 How. Pr. 460; and this rule has not been abrogated by the Code of Procedure. Voorhis v. Baxter, 18 Barb. 592; Voorhis v. Childs, 17 N. Y. 354. The rule is settled that joint creditors will not be permitted to reach the individual estate of a deceased partner until all the separate creditors are satisfied. The exception maintained in England in case of no joint estate and no solvent surviving partner, does not prevail here. North River Bank v. Stewart, 4 Bradf. 254. Thus upon a settlement of partnership affairs, had after the death of S., one of the partners, the firm was found insolvent, and a large part of the joint debts remained un-

time to trade with it in copartnership, a court of equity will, upon the death of one of them, presume a severance of the joint tenancy. In

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paid. Held, 1, that the partnership creditors could not be paid out of the separate estate of the deceased until all separate debts were paid; 2, that if any surplus should remain after payment of those debts, it should be applied to the payment of the partnership creditors; in which case those that had received partial payment out of the partnership property, must bring it, their dividends and share ratably with those who had not received dividends or else be excluded until the latter class had received a sufficient amount to place them on terms of equality with the former. Id. Chancery will give relief to the creditors of a firm against the personal representatives of a deceased partner having assets, if the surviving partner is insolvent. Hamersley v. Lambert, 2 Johns. Ch. 508; Jenkins v. De Groot, 1 Cai. Cas. 122. If a partner dies and the survivor is insolvent, the estate of the deceased is liable, in equity, to the creditors of the firm, after payment of the individual debts of the decedent. Wilder v. Keeler, 3 Paige, 167. Where the surviving partner is insolvent, a creditor of the firm may enforce his demand, in equity, against the real as well as the personal estate of the deceased partner. The separate creditors of such partner are, however, entitled to a priority in payment, out of his individual property. Butts v. Genung, 5 Paige's Ch. (N. Y.) 254.

In Pennsylvania, the private creditors of one partner may sell such partner's interest upon execution, yet the sale is subject to the rights of partnership creditors, and the purchaser is entitled to an account, but not to the possession of the goods. Smith v. Emerson, 43 Penn. St. 456; Lathrop v. Wightman, 41 id. 297; Rimheimer v. Hemingway, 35 id. 432; Coover's Appeal, 29 id. 1; Roap v. Rogers, 8 Watts (Penn.) 193. In Rhode Island it is held that the creditors of the firm have the right to work out the equitable lien of the partners upon the partnership property, and can only avail themselves thereof while such lien exists on the part of the partners. Tillinghast v. Champlin, 4 R. I. 173; Bank v. Phetteplace, 8 id. 56. In South Carolina, partnership debts have a preference; Winslow v. Chipple, 1 Harp. (S. C.) Ch. 25; Hunter v. Martin, 2 Rich. (S. C.) 541; Fleming v. Billings, 9 Rich. (S. C.) Eq. 149; Crawford v. Baum, 12 Rich. (S. C.) 75; and when their debts are due, and only then, they may file a bill to enjoin separate creditors from selling the partnership property to pay their debts. Henderson v. Haddon, 12 Rich. (S. C.) 373. In Tennessee, partnership creditors are preferred. White v. Dougherty, M. & W. (Tenn.) 309. In Texas, partnership property must be first applied in payment of partnership debts; Converse v. McKee, 14 Tex. 20; but they have no lien thereon until execution is levied. White v. Parrish, 20 Tex. 688.

Rule in Vermont.—In Vermont, a preference is not given to partnership creditors in attaching partnership property; and the property itself is to be attached as in a case of tenancy in common, and not the interest of a partner in the property. And an officer is not a trespasser for so attaching for a separate creditor, though the firm afterward prove to have been insolvent. Reed v. Shephardson, 2 Vt. 120. In equity, however, the creditors of an insolvent partnership are entitled to have the partnership assets applied in satisfaction of their debts, in preference to the creditors of the individual partners, notwithstanding the separate creditors may have first attached those assets. In asserting this right, the partnership creditors prevail over the separate creditors, by virtue of a lien, which each partner is supposed to have, by implied contract, upon all the partnership effects, until all the partnership debts are paid. It is sufficient for the partnership creditors, in such case, to make out a *prima facie* case of insolvency; and, if the defendants desire to have an account taken of the partnership dealings, so as to determine the exact state of the liabilities and assets, they must file a cross bill for that purpose. The partnership creditors, having made separate successive attachments of the partnership property, and having resorted to a court of equity for relief against the attachments of the separate creditors, must share the assets *pro rata*, and not in the order of their attachments. Washburn v. Bank of Bellows Falls, 19 Vt. 278. At law, however, both separate and joint creditors of a partnership may attach either sep-

such case, therefore, not only the deceased partner's share of the profits, but such proportion of the bulk of the partnership property, as pro-

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arate or joint property, and sell it upon execution in satisfaction of their judgments, without regard to the equities of the debtors. But in equity, the partnership effects are pledged to each separate partner, until he is released from all his partnership obligations; and while the partnership continues, this equitable lien, existing for the benefit and security of the separate partners, may be reached, in a court of equity, by the creditors of the firm, for the purpose of securing to themselves a preference over the separate creditors. A partnership contract imposes precisely the same obligation upon each separate partner, that a sole and separate contract does; and there is no express or implied contract, resulting from the law of partnership, that the separate estate shall go to pay separate debts exclusively. All that the separate creditors can require, in equity, is, that the partnership creditors must first exhaust the partnership funds, before resorting to the separate effects of the individual partners; and beyond this, both sects of creditors stand precisely equal, both at law and in equity. Bardwell v. Perry, 19 Vt. 292; Willis v. Freeman, 35 id. 44; Shedd v. Wilson, 27 id. 478. The right of partnership creditors to claim a preference over the creditors of the individual members of the firm, in the distribution of the partnership property, is wholly dependent upon the right of the individual partners to enforce a lien upon the partnership funds for the payment of the partnership liabilities, before individual debts; and if the contract of copartnership be of such a nature, that the copartners can enforce no such right, as between themselves, the partnership creditors can claim no such preference. Rice v. Barnard, 20 Vt. 479.

Rule in New York.— In New York, in an action against one of two partners, the sheriff may seize the entire partnership effects or what is necessary to satisfy the execution, and sell the interest of the partner against whom the execution issued, and deliver the property sold to a purchaser, and a purchaser becomes a tenant in common with the other partner, and, if he purchases with notice, takes subject to an account between the partners and to the equitable claims of the creditors of the firm, in the name of the other partner. Phillips v. Cook, 24 Wend. (N. Y.) 389. But an execution against the firm has a preference over one against an individual partner; but where property is sold on an execution against one partner, although previous to the sale an execution is delivered against both or all the partners, it is a valid sale if a sufficient time had not elapsed to advertise and sell under the execution against the firm; Fenton v. Folger, 21 Wend. (N. Y.) 676, and after the levy, and before the sale, the sheriff may hold joint possession of the property with the other partners. Burrall v. Acker, 23 Wend. (N. Y.) 606. In Virginia, Christian v. Ellis, 1 Gratt. (Va.) 396; and in Wisconsin, Howe v. Kane, 2 Chand. (Wis.) 222, partnership creditors are treated as equitably entitled to payment out of partnership property in preference to private creditors. The private debt of one copartner cannot be set off against a copartnership demand. Powrie v. Fletcher, 2 Bay (S. C.), 146; Ladue v. Hart, 4 Wend. (N. Y.) 583; Wise v. Coply, 36 Ga. 508; Powrie v. Fletcher, 2 Bay (S. C.), 146. Nor can a partnership debtor be held as a trustee of an individual partner. Lyndon v. Gorham, 1 Gall. (U. S. C. C.) 367. Where the partnership funds of a firm have been misapplied, by a member of the firm, toward the payment of a judgment holden by a creditor of the firm against him for his individual debt, such creditor may, on the application of the other member of the firm, apply the payment to his demand against the firm, and enforce his judgment, notwithstanding a receipt given, applying the payment on account of the judgment. Campbell v. Matheus, 6 Wend. (N. Y.) 551. The joint creditors of a partnership have in equity a general lien on the funds of the partnership, and are entitled to payment out of the partnership effects, in preference to creditors of an individual member of the firm. White v. Dougherty, M. & Y. (Tenn.) 309.

Rule when joint creditor has a lien on separate property of one partner.— A joint creditor of a partnership, having a lien on the separate property of one of its members, must, in case the firm is insolvent, exhaust

duced his share of the profits, will descend to his personal representatives.[1] Although, upon the death of one partner, his interest in the

his separate lien before he comes in with other creditors for a share of the partnership effects. An action for a false return will not lie against a sheriff for returning an execution *nulla bona*, where the property of a firm is levied on under an execution against one of its members, and, previous to a sale, an execution against the firm comes to the hands of the sheriff, under which the property levied on by the first execution is exhausted. Dunham v. Murdock, 2 Wend. (N. Y.) 553; Tappan v. Blaisdell, 5 N. H. 189.

[1] In Jackson v. Jackson, 7 Ves. 535; 9 id. 591, a testator gave and devised all his residuary estate, consisting both of real and personal property, used for the purposes of trade, to trustees, upon trust to pay an annuity to his wife, and certain legacies to his daughters; and, after payment of the legacies, he directed all the residue and remainder of the said trust estates to go and to be unto and for the only use and behoof of his said two sons, and the survivor of them, their or his heirs, executors, administrators and assigns, forever, according to the several and respective natures and tenures of such estates, and to and for no other use, intent, and purpose whatsoever; to take and hold his said real estates and every part thereof in case his said two sons should both survive him, as tenants in common, and not as joint tenants; and he appointed the trustees his executors. There was nothing in the will of the testator showing any intention that the joint tenancy in the personalty should be continued. Upon his death the sons carried on the business as partners, on the premises, until the death of one of them, which happened twelve years after the death of the testator. The survivor of the sons then insisted that he was entitled to the residue of the *personal* estate of the testator, as nothing had been done to sever the joint tenancy; and Sir William Grant allowed his claim. But, upon appeal to Lord Eldon, Sir William Grant's decree, so far as it related to this point, was reversed. "Supposing," said his Lordship, "there were no special words in this residuary clause, it is clear, that, where a residue of personal estate, consisting of a great variety of particulars, and especially if none of them are property in trade, is left to two persons, their executors, administrators, and assigns, the effect is a joint tenancy. But it is to be considered, what would be the case of a bequest, acted upon; the subject simply property in trade. Now, in Hall v. Digby, 4 Bro. P. C. 224, it was agreed, that actual dealing in partnership with effects left to two jointly, with intent that it should be dealing in partnership, though they had taken under the will as joint tenants, yet, having once begun to act with the property as merchants, would sever the joint tenancy, unless the will contained something that would clothe the property, though engaged in trade, with the quality of joint tenancy. In this case, it is extremely clear that, unless there are specialties in this will, the residuary clause passed the property to these brothers as joint tenants; and, attending both to the words of the residuary clause, and all the passages in the will having relation to equal divisions or survivorship in the various events, I am not satisfied that I can hold upon the will itself, and independent of the nature of the property and the dealings of the parties, that this was a tenancy in common. The question, then, is, whether there is any purpose or scheme in the will, which should, as between themselves, not with reference to third persons, deprive them of the power of severing that which they had taken as joint tenants. Now, I am of opinion that the testator did not intend to determine, *ultra* the necessity of holding the property liable to the annuity and the legacies, in what nature and quality they should hold as between themselves, or to shut out the possibility of their dealing with that property, as other persons might, for their own benefit, taking originally as joint tenants. *Salvis* the annuitant and the legatees, there is no trust which it was not competent to these two persons, affecting only their own interests, to alter as they thought proper, with reference to the nature and quality of their own interests. Entering into partnership, dealing without the superintendence of the trustees, their various transactions afford decisive evidence, which it would be too dangerous to permit one to contradict after the death of the other, that they meant to be considered tenants in common of the interest they took in the

stock does not survive to the other, yet his right of action survives, as will appear more fully in a subsequent book.[1]

Real estate used for partnership purposes.

SEC. 113. Where partners purchase *real estate* for the purposes of the partnership, it is usually conveyed to them as tenants in common. Therefore, upon the decease of one of several partners, to whom land has been so conveyed, the legal estate in such partner's share will descend to his heir, who will be tenant in common with the surviving partners. In this case, if, under all the circumstances, it appear that the heir is to have a *beneficial* interest, the widow of the deceased partner will be entitled to dower.[2] Where lands are conveyed to certain persons, as *joint tenants*, for the purposes of a trade or an adventure, in equity there will be no survivorship in such property, notwithstanding the form of the conveyance. Where, therefore, A, B, C, D, and E had undertaken to drain certain overflowed lands, and accordingly the same were conveyed, by direction of the commissioners of sewers, to them and their heirs, it was held that in equity they were tenants in common of these lands; and further, that four out of the five having purchased additional lands for the same purposes, and the fifth having died, the son of the latter was a tenant in common in equity of those after-purchased lands, upon payment of his share of the purchase-money, with interest from the time the money ought to have been paid.[3] In the case of Morris v. Barrett,[4] in the Exchequer, the principles of this decision were fully admitted; but

trading part of their father's concern. My opinion, therefore is, that, under all the circumstances of this case, the two sons of the testator are to be considered as tenants in common of his property embarked in trade from the time they were let into possession, including as well the capital as the profits; for, though there may be cases of distinction between them, the course of dealing for so many years ought to be taken as evidence that they meant to sever the joint tenancy as to both. The decree must therefore be altered accordingly."

[1] Martin v. Crompe, 1 Ld. Raym. 340.

[2] Bell v. Phyn, 7 Ves. 453. The report omits to state, as was the fact, that Shand conveyed two-thirds of the estate to Phyn, Ellis, and Inglis, their heirs, etc. To hold to them, their heirs, etc., as *tenants in common*. Lib. Reg. 1801, A. fol. 955.

[3] Lake v. Craddock, 3 P. W. 158; Sug. V. & P. 619; S. C. *nom.* Lake v. Gibson, 1 Eq. Ca. Abr. 291; where the Master of the Rolls says, "When the proportions of the money are not equal, and this appears in the deed itself, this makes them (*i. e.* the joint purchasers) in the nature of partners; and however the legal estate may survive, yet the survivor shall be considered but as a trustee for the other, in proportion to the sums advanced by each of them."

[4] 3 Y. & J. 384. It is to be regretted that the grounds of the Lord Chief Baron's judgment do not appear in the report. It is said, *arguendo*, by the counsel for the surviving brother, that no case can be cited in which real estate *devised* has been converted from an estate in joint tenancy to a tenancy in common. This may be correct, but *quere* as to the observations which follow, relating to the case of Jeffereys v. Small.

the peculiar circumstances of the case seem to have prevented their being acted upon to the utmost extent. A testator devised the residue of his real and personal estates to his two sons, as joint tenants. The two sons, after their father's death, and during the period of twenty years, carried on the business of farmers with such estate, and kept the moneys arising therefrom in one common stock, and with part of such moneys purchased other estates in the name of one of them, but never in any manner entered into any agreement respecting the farming business, nor even accounted with each other. Alexander, C. B., held that, at the death of one of them, they were joint tenants of all the property that passed by the will of their father, but were tenants in common of the after-purchased lands.

Equity treats real estate used for partnership purposes, and bought with partnership funds, as personalty.

SEC. 114. Taking it as an established general rule that there is no survivorship in equity in lands held for the purposes of trade, the next question is whether, upon the death of a joint trader, his share shall descend for the benefit of his heir or his next of kin. It may be premised that a *lease* granted to partners for partnership purposes has long been considered in equity as accessory to the trade, and therefore, upon the death of one, is distributable between the survivor and the representatives of the deceased, in like manner as the movables of the partnership.[1] But we shall now advert to the important question, whether or not *freehold* property, held by partners for the purposes of trade, is in equity converted into personalty; whether or not, therefore, in the absence of a stipulation to the contrary, the share of a deceased partner is in equity descendible to his executor, for the benefit of his next of kin, rather than to his heir-at-law.[2]

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[1] Elliott v. Brown, 9 Ves. 597, 3 Swanst. 490, n.; Lyster v. Dolland, 1 Ves. 431. But see Jeffereys v. Small, 1 Vern. 217.

[2] It was thought by the author, when the first edition of this treatise was published, that, upon the whole, where the heir was not expressly noticed, courts of equity were in favor of the executor. But, as the law upon this point, more especially since the decision of Cookson v. Cookson, 8 Sim. 529, cannot be considered as settled, it will be necessary to take a view at some length of all the leading cases on the subject. The earliest cases which can be called decisions on this subject, are those of Thornton v. Dixon, 3 Bro. C. C. 199, and Balmain v. Shore, 7 Ves. 453. These are in favor of the heir. In Thornton v. Dixon, A, B, and C, in 1761, being seized in fee of some land called Broadmoor, entered into partnership for twenty-one years, as paper makers; and mills were erected upon the land; and they declared the uses of the land to the use of themselves in fee, as tenants in common. In 1764, they entered into another partnership for twenty-one years, by deed, taking in four new partners, in different proportions; and in the partnership deed there was a covenant from the three original partners to stand seized of the land, in trust for

Upon the authority of the decisions of Lord Eldon, referred to in the last notes, Sir John Leach, and Mr. Baron Alderson, it seems not too much to state, as a general proposition, that freehold property, used

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the copartnership, in the proportions in which they were respectively interested therein; and a proviso, that, in case any of the partners wished to dispose of his or their shares, he or they might do so, giving notice to the other partners, in order that they might have an opportunity of purchasing. That partnership term expired, and they went on afterward without any new agreement. During the second partnership they bought a freehold messuage, with a little land adjoining, called Low Meerbeck, for the better carrying on the trade, which was enjoyed by the partners as joint tenants. Upon the death of A, a question was raised as to what was the equitable quality of Broadmoor and Meerbeck. Lord Thurlow at first seemed to think that these estates were to be considered as personal; he afterward, however, changed his opinion, observing that had the agreement been that the mills should be valued and sold, it would have converted them into personalty of the partnership, but that the agreement in this case was not sufficient to vary the nature of the property; therefore, that, after the dissolution, the property would result according to its respective nature, the freehold descending to the heir, the personal to the executor, notwithstanding they were used together for the purposes of trade. In Bell v. Phyn, A, B and C, carrying on business in partnership together, purchased an estate in fee with the partnership funds, and kept the accounts of this estate in the partnership books. A died, having made his will, in which he took no notice of any real estate, but bequeathed several legacies, and concluded in these words: "As to all the rest, residue, and remainder of my personal estate and effects, of what nature or kind soever the same may consist, I give and bequeath the same equally between my three children, George, Jane and Catharine, to be equally divided between them, share and share alike." Upon the decease of A, his interest in the freehold estate having been sold, his heir insisted that as the estate formed no part of the capital of the partnership, the produce arising from the sale of it belonged to him as real estate. A's widow also claimed dower out of the estate. Sir William Grant, at the close of the argument in this case, said that, supposing that this was a partnership property, he doubted whether the consequence was a conversion, for there was no occasion to call for it, for any of the purposes of the partnership. On a subsequent day his Honor, on the authority of Thornton v. Dixon, decided in favor of the heir and the widow, against the residuary legatees, observing that even if this were partnership property, there was *nothing done by the partners to alter the nature of it.* These cases go to the full length of deciding that real estate, although held for partnership purposes, and purchased with the partnership funds, is *prima facie* to be deemed real as between the heir and executor of the deceased partner, and that in case of a sale after the partner's death, a resulting trust arises for the heir-at-law, unless there be an express agreement *a priori* that the property shall be sold, or unless a sale of the whole be necessary for the payment of the partnership debts. But the cases of Thornton v. Dixon, and Bell v. Phyn, were followed by a series of authorities of a very different complexion, and until the decision in Cookson v. Cookson, it was thought that the above-mentioned cases had been overruled. See the arguments in Bligh v. Brent, 2 You. & Col. 287; Trappes v. Harter, 2 Crom. & Mees. 174. Mr. Justice Story, in commenting on this subject, comes to the conclusion "that real estate held in fee for the partnership and as part of its funds, will upon the death of the partner belong in equity, not to the heirs-at-law, but to the personal representatives and distributees of the deceased; unless, perhaps, there be a clear and determinate expression of the deceased partner, that it shall go to his heir-at-law beneficially." Commentaries on Equity, chap. 15, s. 674. Thus, in Jackson v. Jackson, although no discussion seems to have arisen relative to the disposal of the freehold property of the partnership, it is remarkable that Lord Eldon in his judgment makes no distinction between that and the personalty; but on the contrary, leaves the reader to infer—first, that in determining whether property is to be deemed partnership property, the same rules are

for the purposes of a trading partnership, whether originally purchased with the partnership funds or not, is in equity to be considered as converted into personalty, not only for the purposes of the partner-

applicable to freehold as to leasehold and movable property, and, consequently, that for this purpose the *mode of user* may be taken into consideration; and, secondly, that the consequences of holding any species of property to be partnership property is the same as between the real and personal representatives of a deceased partner. And in other judgments of his Lordship, many dicta are interspersed, which, although perhaps of no great weight in themselves, may be considered as showing his general opinion upon the subject, and as corroborating his judgments in those cases which may fairly be considered as decisions. See Crawshay v. Maule, 1 Swanst. 521; Selkrig v. Davies, 2 Dow. 242. The leading decision of Lord Eldon on this subject is that of Ripley v. Waterworth, 7 Ves. 425, in which judgment was given on the same day as in Bell v. Phyn. The effect of Lord Eldon's decision is that if an intention to convert the real property of the partnership can be gathered from the general tenor of the partnership deed, coupled with the nature of the partnership dealings, that intention must prevail to the full extent of converting the real property as between the real and personal representatives of the deceased partner; although the property might not have been purchased with the partnership funds, and no conversion might be necessary for the payment of the partnership debts. The decision arose upon a question, whether the purchase-money, which had been given for a testator's shares in real property held for partnership purposes, should be paid to his co-heirs at law, or his personal representatives: and it was held, under the circumstances, that it should be paid to the latter. The testator was seized in fee of three undivided eighth parts of certain lands and sugar-houses. By indentures of lease and release, the same with the remaining five eighth parts were conveyed to trustees to the use of such person or persons, and for such estate or estates, as Waterworth, the testator Mears, and Woods, should together appoint; and in the meantime, as to the testator's three-eighth parts, to the use of the testator, for the purpose of carrying on the trade in partnership with Waterworth and Woods, or with such other persons as they should agree to admit as partners; and in default of such appointment, upon trust that the said trustees should, upon the decease of the shortest liver of Waterworth, Woods, and the testator, or upon the dissolution or cessation of such partnership by any one or more of the said partners, sell the whole of the said sugar-house and premises, and apply the moneys arising from such sale (after paying off the incumbrances thereon, if any), in discharging such of the joint debts of the partnership, as the joint stock of such partnership might fall short of paying, and pay the residue between the said three partners in the proportions following:—to the testator, his executors, administrators, or assigns, three-eighth parts; and the remaining five-eighth parts between the other two partners. The indenture gave a right of pre-emption to the surviving partners, in case of a sale on default of appointment as before mentioned. No appointment was ever made in pursuance of the indenture; and accordingly, upon the testator's death, Waterworth gave notice, according to the proviso, that he elected to become the purchaser of the testator's three-eighth parts of the premises; which he purchased accordingly. An inquiry having been directed in the cause, as to what interest the testator had in the freehold estate and sugar-houses, the Master stated his opinion to be, that the testator had a chattel interest therein. Exceptions were then taken to the Master's report by the co-heirs of the testator, stating that the Master ought to have certified that the testator had a fee simple estate, and that the money received by the sale belonged to his heir-at-law. In support of the exceptions it was contended, amongst other matters, that the power of sale contained in the indentures was only in aid of the other funds, to pay the partnership debts; and could only be intended to suit the exigencies of the trade. That there was no necessity for exercising it. That if it had been necessary to devote the produce to the particular purpose pointed out, namely, the payment of the partnership debts, yet, subject to that purpose it would have been considered real estate as between the representatives. That

ship, but for all other purposes; and that upon the death of the partner, the person who is seized of the legal estate in such freehold estates is a trustee for the personal representatives of the deceased

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here even the particular purpose was not required to be answered. That this case was like the cases upon wills directing the conversion of real estate into personal; where, if the purpose for which the conversion is to be made does not exist in the life of the testator, and the disposition by the will fails, so that there is no reason for the conversion to answer the purposes of the will, in the view of this court the estate remains real for the benefit of the heir. On the other hand, it was contended that the manifest intention of the parties was, that the interest of the deceased partner should be converted out and out. That the primary object of this conversion was to pay the debts, and then to pay over to the executors, not to the heir; and the purpose required the conversion, to prevent the consequence of the surviving partners being entangled by a tenancy in common with the heir, which might have interfered with the purpose of carrying on the trade. That even if there should be no debts the property was to be sold. Lord Eldon expressed his opinion to be, that this was personal estate; and that this was to be distinguished from cases of disposition, being a case of contract. "Upon the true construction of the deed," observed his lordship, "the parties contracted with each other, that, when the partnership should be determined, whether by the act of the parties or of God, the property should be converted to all intents and purposes. There is an obvious difference here from the cause which establish the general principle, that where a person dealing upon his own property only, has directed a conversion for a particular special purpose, or out and out, but the produce to be applied to a particular purpose, when the purpose fails, the intention fails. This is not a case in which an individual gives directions by will or other instrument as to his individual property, but three persons are contracting with each other as to what is to be done with property of a very peculiar nature. By the deed it is to be considered part of capital or stock in trade.* The subject, I admit, is real, but combined with a great number of fixtures, utensils, and implements, many of which are personal. My idea upon the whole deed is, that a partnership was proposed between those persons entitled to this property in eighths. It was necessary they should bring in capital, and have a place for carrying it on; to purchase utensils, etc., in which they were to have similar interests, as in the houses, for the benefit of the trade, though many of them were personal, and they agreed to carry on the business as long as it should be their pleasure. The question is, whether three persons engaging in a purchase of real property such as this, and to be applied to such purposes, might not, and did not, contract that if the partnership should be dissolved by the act of all or the death of one, it should be all sold together for the purpose of producing more benefit upon the sale. There is another purpose, very rational; a stipulation that if this concern should cease by one partner choosing to go out, the others wishing not to dissolve the partnership, but to go on, should have liberty to purchase the share of him retiring for a certain, fair, valuable consideration. So in the case of death. There is an obvious inconvenience, if two wishing to go on should not be able to compel the third to sell, but should be entangled with him as landlord of that share, provided they could prevail upon him to demise it. The question, therefore, is, whether three persons, having interests as tenants in common, and looking to these events the death or retirement of one, might not contract in this manner in order to make the most of property, though real in a strict sense, yet commercial in its nature, to sell it altogether; and upon this deed, though extremely inaccurate, I think such an intention appears, and the meaning upon the whole is, that if the surviving partners choose to buy the share of the deceased or retiring partner, to be estimated according to the proviso, they should have that option to buy out his interest in that manner." His Lordship was afterward pleased to declare that the money arising from the sale of the sugar-houses and premises, etc., was to be considered as personal estate. It seems evident from Lord Eldon's judgment in the foregoing case, that he considered the doctrine of conversion, when applied to partnership property, to be founded on principles

partner. But it must be admitted that the foregoing proposition cannot be supported in its fullest extent consistently with the doctrine laid down by the present vice-chancellor, in the case of Randall v.

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peculiar to the contract of partnership, and that the reasons which have induced courts of equity, in deciding upon the construction of wills, to uphold only a partial conversion, do not apply where freehold property becomes by contract, either express or implied, part of the trading stock of a partnership. If this view of Lord Eldon's opinion be correct, there seems no reason to doubt the correctness of the report of the case of Townsend v. Devaynes, 1 Mont. Partn. App. 96. But see 1 Roper on Husband and Wife; Ed. Jacob, p. 346, n., by which this important question seems to be settled, so far as Lord Eldon's opinion is concerned. There Devaynes, Mackintosh, and others, being in partnership as papermakers, purchased certain freehold and copyhold hereditaments, which were duly conveyed and surrendered to their use. The premises were purchased with part of the partnership capital, and consisted in part of paper-mills, and the whole were held for the purposes of the partnership. Upon the death of Mackintosh, his executors contracted to sell the whole of his share in the partnership concern to Devaynes for £4,700. A suit was then instituted by them against Devaynes, and the heir-at-law of Mackintosh, in which it was referred to the master, amongst other things, to inquire how much of the said sum of £4,700, so paid to the executors, arose out of such part of the said premises as was personal estate. The master having certified that £1,300, part of the said sum of £4,700, arose out of such part of the premises as was personal estate, an exception was taken to his report, on the ground that he ought to have certified that the whole of the said sum of £4,700 arose from personal estate, and Lord Eldon allowed the exception. These decisions of Lord Eldon, as well as the earlier decisions of Lord Thurlow and Sir W. Grant, were elaborately discussed before Sir John Leach in the case of Phillips v. Phillips, 1 Myl. & K. 649. The observations contained in the first edition of this treatise, are embodied in the speeches of counsel in that case. In that case it appeared, that a testator of the name of Phillips, who by his will had directed his real estates to be sold, and the produce considered as personal estate, had carried on the business of a brewer in partnership with a relation; that no articles of partnership had been entered into or drawn up between them, and that in the course of their business, after the date of the will, they had purchased with partnership moneys, and for the purposes of their trade, certain freehold and copyhold public houses, which were conveyed and surrendered to the two partners and their heirs. The bill was filed by the co-heiresses of the testator, who were also two of his next of kin, against the executrix and surviving residuary legatees, who were also next of kin; and one question in the cause was, whether the interest of the testator in these public houses was to be considered as a part of his general personal estate, or only personal estate, so far as it was required for the discharge of the debts and engagements of the trade. On behalf of the co-heiresses, the cases of Thornton v. Dixon, and Bell v. Phyn, were cited, and it was urged, on the authority of the judgment of Sir John Leach himself in Fereday v. Wightwick, 1 Russ. & Myl. 45, that when all the demands of the partnership were satisfied, the partnership property would become subject according to its nature, to all the incidents which belong respectively to personal or real estate. But Sir John Leach decided against the co-heiresses. His Honor said, "With respect to the second question, whether the freehold and copyhold property purchased with the partnership capital, and conveyed to the two partners and their heirs for the purposes of the partnership trade, is to be considered as personal estate only for the payment of the partnership debts, or is generally to be considered, to the extent of a moiety, as personal estate of a deceased partner, I confess I have for some years, notwithstanding older authorities, considered it to be settled that all property, whatever might be its nature, purchased with partnership capital for the purposes of the partnership trade, continued to be partnership capital, and to have to every intent the quality of personal estate; and in the case of Fereday v. Wightwick, I had no intention to confine the principal to the payment of the partnership demands. Lord Eldon has certainly upon several

Randall,[1] and his decision in the more recent case of Cookson v. Cookson.[2] Supposing the case of Cookson v. Cookson to contain the received law on this subject, the result of the authorities is that real property, used for the purposes of a partnership, unless it has been purchased with the partnership fund, or unless it be the subject of conversion by express agreement, is not to be deemed as converted into personalty, as between the heir and executor of a deceased partner, or for any purposes whatsoever, except for payment of the partnership debts. It is conceived, however, notwithstanding the ability and experience of the learned judge by whom the case of Cookson v. Cookson was decided, that the question cannot be considered as settled by that decision, but that it must, on some future occasion, be determined before a higher tribunal.

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occasions expressed such an opinion; the case of Townsend v. Devaynes is a clear decision to that effect, and general convenience requires that this principle should be adhered to." The case of Phillips v. Phillips was followed by those of Broom v. Broom, 3 My. & K. 443, and Morris v. Kearsley, 2 You. & Col. 139. In the former of these cases it appeared that real estates had been purchased by John Broom and Herbert Broom, who carried on business in copartnership, out of partnership capital, and for partnership purposes; and that upon the decease of Herbert Broom intestate, his widow and administratrix sold her interest in the estates so purchased to the surviving partner, who afterward became bankrupt without having paid the purchase-money. The bill being filed by the administratrix against the assignees of the bankrupt and the infant, to confirm the sale, and to have it declared that the share of Herbert Broom in the estates in question became, on his decease, personal estate to be administered by his administratrix, Sir John Leach, following his former decision in Phillips v. Phillips, decreed according to the prayer of the bill, and directed the infant heir, as trustee for the administratrix, to convey the estate pursuant to the provisions of the stat. 11 Geo. 4 & 1 Will. 4, c. 60. In Morris v. Kearsley, one of two partners in a brewery died intestate, and the surviving partner agreed to purchase his copartner's moiety in the business. As the partnership property consisted, to a very great extent, of freehold estate, the suit was instituted for the purpose of determining as between the real and personal representatives of the deceased partner, whether the real estates in the partnership were to be considered as realty or personalty; it being agreed between the personal representative and the surviving partner, that in the event of the court deciding in favor of the heir, who was a lunatic, a proportional abatement should be made in the purchase-money. In the course of the argument, at the hearing of the cause, the cases of Phillips v. Phillips and Broom v. Broom were cited and commented upon, and Mr. Baron Alderson, upon the authority of those cases, decreed in favor of the personal representative. The argument at the hearing was not reported, the reporter conceiving that the question of conversion was settled.

[1] 7 Sim. 221.

[2] 8 Sim. 529. In the former of these cases, his honor was of opinion, that the property, which was the subject of the suit, was not, under all the circumstances of the case, to be considered as having been used for the purposes of a trading partnership, and on that ground he appears to have decided that it was not converted into personalty. His honor's decision, therefore, in that case, was not inconsistent with any of the previous authorities; but it is clear, from the tenor of his judgment, that he was disposed to hold that, in the absence of any express agreement to the contrary, the real property of a partnership is not to be deemed converted into personalty, except so far as may be necessary for partnership purposes. In the subsequent case of Cookson v. Cookson, his Honor had an opportunity of decid-

When there are restrictions in deed.

SEC. 115. Where lands are conveyed in fee to partners, and they covenant not to convey away their respective shares during the continuance of the partnership, the fair presumption is that the partners took the property as freehold property, subject to the covenants. Thus, A, B and C being partners for a term of years, lands were conveyed to them in fee as tenants in common, with a proviso that they should continue to be used in the copartnership trade during the continuance of such copartnership; and, to that intent, each of the partners covenanted, that neither of them, nor their respective heirs, would, during the continuance of the partner-

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ing the express point. That case was as follows: Isaac Cookson, the elder, previously to the year 1803, carried on the business of a bottle manufacturer, at Newcastle-upon-Tyne, and used solely for the purposes of his trade, certain freehold messages and land, of which he was seized in fee. In 1803 he took his son, Isaac Cookson the younger, into partnership with him, and agreed to give him six-thirtysecond parts of the before-mentioned hereditaments; and it was also agreed between them that the hereditaments should continue to be used as a manufactory for carrying on the trade, and should be considered as part of the joint stock of the business. The father and son accordingly became partners together for twenty-four years, as from the 1st of January, 1803; and by indentures of lease and release, the father, in consideration of natural love and affection for his son, conveyed to his son in fee six undivided thirty-second parts of the hereditaments. The parties afterward executed articles of copartnership, by which after reciting that it was their intention that the hereditaments should be *had, taken and enjoyed as part of the joint stock in the partnership business*, they thereby covenanted with each other that they had, since the 1st of January, 1803, been, and they and their respective executors and administrators would be and continue partners in the before-mentioned business for twenty-four years from the 1st of January, 1803; the joint trade to be carried on at Newcastle, with such joint stock or capital as the partners, for the time being, should from time to time deem expedient; and that the parties should, at all times during the continuance of the copartnership, and at the ceasing, dissolving, or other eventual determination thereof, hold, enjoy, and be interested in the joint stock trade, and all moneys, goods, wares, merchandises, specialties, commodities, debts and other effects of the partnership in the shares before mentioned. The deed then contained covenants for annual accounts, and for a general and final account at the dissolution of the partnership; and that as soon as conveniently might be, after such final account should be settled and signed, payment should be made of all debts or sums of money, which should be then due from the partnership, to any person or persons whomsoever, on account of the joint trade; and that *payment, division, partition and delivery*, should be made by and between the partners at their common office, or such other place as they should agree upon, of all the stock, goods, moneys, wares, merchandises and effects which might then belong to the partnership. in proportion to their respective shares in the stock and trade; and that it should be lawful for either of the partners, before the expiration of the twenty-four years, to assign or transfer in his lifetime, or to bequeath at his decease, his shares unto a son or sons, and that such son or sons should, upon such assignment being made, or such bequest taking effect, become a partner or partners in the joint trade, in the proportion or proportions of the share or shares, or part or parts, so assigned or bequeathed, but subject to the covenants, clauses, and agreements in the articles contained; and that if, at any time before the expiration of the twenty-four years, either of the partners should be desirous to sell or dispose of his share or shares in the joint stock or trade, other than to a son or sons, or in case any partner should die before the expiration

ship, grant, bargain, sell, demise, assign, transfer, or set over, his respective share or interest in the said premises; or sue out a writ, or file a bill of partition.—Sir William Grant held that, upon the death of one of the partners during the term, his estate in the real property so purchased descended to his heir, subject to the stipulations con-

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of the term, without having bequeathed his share of the joint stock and trade to a son or sons as aforesaid, then the partner so desirous to sell and dispose of such share or shares as aforesaid, or the executors or administrators of the partner so dying, without having bequeathed his share of the joint stock and trade to a son or sons as aforesaid, should give twenty days' notice of such desire or death to the other or surviving partner, who might, if he should think fit, purchase, accept, or take such share or shares at such price as the full value of the same share or shares thereof as aforesaid should amount to; and, in case neither of such partners, after such notice as aforesaid, should be willing to become the purchaser of the shares and interests of the other of them so minded to sell, or dying, then it should be lawful for the party giving such notice to sell and dispose of his share and interest in the stock and trade to any person or persons of general fair character, etc. And the articles further witnessed, that the parties thereto, in pursuance of the agreements, and for the considerations therein mentioned, did thereby, for themselves respectively, and for their respective heirs, executors, etc., covenant with each other and their several heirs, executors, etc., that the freehold hereditaments should *at all times thereafter be held and accepted as partnership property, and be considered and treated as part of the joint stock of the partnership trade*, according to the several shares and interests of the partners therein. In 1818, Cookson, the father, conveyed to his son three other thirty-second shares of the freehold premises; but it was expressly agreed, that all the shares should be still *had, taken, and enjoyed, as part of the joint stock of the partnership.* The father and son continued to carry on the business under the articles, with such variation in their shares as before mentioned, until the 1st of January, 1837, when the term of twenty-four years expired. In the course of that term, £1,700 and upwards were expended out of the funds of the partnership, in erecting new buildings, and making other improvements on the premises. After the expiration of the term, the father and the son continued to carry on the business in partnership, without entering into any new articles, in the same manner as they had done during the term; and, from the commencement of the partnership, they held and used the freehold premises for the purposes of their trade alone; and the estimated value of those premises was entered in the books and accounts of the partnership as part of the capital or joint stock, and was treated and considered in all respects as part thereof. Isaac Cookson, the elder, died intestate on the 13th of December, 1831, leaving John Cookson, his eldest son, his heir, and six other children, who, with their elder brother, were his next of kin. John Cookson, Isaac Cookson, and one of the other children, took out administration to their father. All the debts due from the trade at the intestate's death were paid; and Isaac Cookson, the younger, remained in possession of the stock, including the land, and continued to carry on the trade on his own account. The bill was filed by the intestate's five youngest children, against their brothers, John and Isaac, praying that it might be declared, that the intestate's twenty-three 32d shares in the freehold premises formed part of the stock in trade of the partnership at the intestate's death, and that, as such, John Cookson had no beneficial interest therein, as the testator's heir; and that the whole of the trading concern might be sold, and the proceeds divided between the intestate's estate, and the defendant, Isaac Cookson, according to their respective shares and interests therein, and that it might be declared that the defendant, Isaac Cookson, had no right of pre-emption as to his father's shares in the trading concern, including the freehold premises. It was contended for the plaintiffs, and for the defendant, Isaac Cookson, that it was impossible for the parties to have expressed more clearly their intention to convert the land into personalty. That, whatever difference there might be between this case and

tained in the covenants. After referring to the case of Thornton v. Dixon, in which he observed that the land was purchased generally, applied to the uses of the partnership, and apparently was purchased for no other end, he said that here the parties had limited and defined the extent of the interest the partnership was to have in the real

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any of the decided cases, that difference was in favor of such a conversion. The land was acquired and used for the purposes of the trade; a right of pre-emption was given to the surviving or continuing partner; in the case of a partner dying, the persons who were to deal with his share, were his personal, not his real representatives; and, in order that there might not be any possibility of doubting as to the intention of the parties, an express covenant was inserted in the articles, that the land should be held as partnership property, and be considered and treated as part of the joint stock of the partnership That, in Ripley v. Waterworth, the land was not *purchased* by the partners for the purposes of trade, but was devoted, by the original owner, to those purposes; and it was held, on that ground, to have been converted into personalty. So, in this case, I. Cookson, the elder, who was the original owner of the land, devoted it to the purposes of the trade; and, on taking his son into partnership with him, he and his son bound themselves to hold it, not in its original character, but as personal estate. That it was provided by the articles, that all sums of money, charges, and disbursements whatsoever, that should, at any time thereafter, be necessary to be laid out in and about the trade, should, at all times during the continuance of the partnership, be allowed and sustained out of the stock. The land, therefore, was devoted to all the partnership liabilities. It was also provided that, in case of the death of either of the partners during the term, *his executors or administrators* should be entitled to his share of all the joint stock. What was that, but a declaration that the land should be personal property? Moreover, in this case, it became important, in the course of the trade, to make additional buildings, and other improvements upon the land, and the money expended for those purposes came out of the partnership funds. The additions and improvements were made for the benefit of the trade, not for the benefit of the heir; and the increased value of the land became part of the profits of the trade. How, then, was each party to have his share of the money so expended, except by selling the property, and each party drawing out his share of the proceeds? At the close of the argument, Sir L. Shadwell delivered judgment. His Honor commenced, by observing that those cases could hardly be said to bear upon the subject, the foundation of which was, in effect, that freehold tenements were purchased for the benefit of the partnership out of the partnership assets; because, here, Isaac Cookson, the elder, was, originally, solely seized in fee of the tenements in question, and the conveyance by him of the freeholds to his son was merely voluntary. The whole benefit, which the son took, proceeded from the father by way of bounty exclusively; and there was no application of partnership assets to the purchase of the land in question for the purposes of the partnership. His Honor then proceeded to observe that the clauses in the articles, which related to what was to be done, if, at any time before the expiration of the twenty-four years, either of the parties should be desirous to sell his share, or should die, without having bequeathed his share to a son, referred only to those specific cases; and that the only material clause to be considered was that which directed that, at the expiration of the partnership, the partners should meet and account together; and that all debts due from the partnership should be paid, and that then true payment, division, partition, and delivery, should be made by and between the partners, of the stock, moneys, goods, wares, merchandises, and effects of the partnership. His Honor then adverted to the case of Cook v. Collingride, Jac. 607, which had been cited in argument. "That case," said His Honor, "was not incumbered with the difficulty of there being any freehold tenement as part of the partnership property; but the partners had leaseholds, and a variety of chattel property, of all sorts and descriptions; and the articles of partnership there directed that the property should be divided, received, and taken by the parties, according to their respective inter-

property. Considering themselves as owners of the real estate, as tenants in common, they stipulated that the partnership should have a certain ownership, notwithstanding that interest in them as tenants in fee. The premises were to continue to be used in the trade as long as the partnership lasted. They could claim nothing as partners, except through the covenants. Subject to the covenants it went as real estate.[1] And where real estate is purchased with the partnership funds, but is conveyed to one of the partners under a specific agreement that the estate shall be his, but that he shall be debtor to the partnership for the purchase-money, the estate is his separate property, and, consequently, subject to all the incidents of real property.[2]

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ests. And Lord Eldon observed, with great reason, that it was very difficult to apply the exact language of that sentence to some of the particulars of which the partnership property consisted, so that nothing could be directed, except a sale. In this case, I do not lay stress on the word *partition*, as pointing to any peculiar mode of dealing with the real estate; there is, however, a direction that there shall be payment, division, partition, and delivery; and, if the state of the partnership assets were such as that it was not necessary to sell the whole, but it was possible to divide some things by delivery, there seems to be no reason why that mode should not be adopted, and the other things not capable of delivery might be sold, and the produce divided. But what strikes me as the law applicable to the case is that which Sir William Grant laid down in Bell v. Phyn. So it appears to me in this case, when the partnership terminated, it is not suggested that there was any necessity for a sale of a particle of the assets for the purpose of paying the partnership debts. The consequence, therefore, is, that that which, unquestionably, was originally freehold property, will remain freehold property in the two different parties; that is, that the share of I. Cookson, the elder, will descend to his heir, or go according to his will; and Isaac Cookson, the younger, will retain his nine thirty-second shares as freehold estate; and so with respect to many other articles which may belong to the partnership, but which it may not be necessary to sell; they may be divided between the father's estate, and the son's, in proportion to their shares."

[1] Balmain v. Shore, 9 Ves. 500; 2 Hov. Supp. 187.

[2] *Distinction between legal and equitable estate.*—Mr. Lindley, after reviewing the cases, announces the doctrine of the English courts as follows: Lindley on Partnership, Vol. 1, p. 565. "It is an old and well established maxim that, *jus accrescendi inter mercatores locum non habet.* Co. Litt. 182, *a.* But this maxim is not applied so universally as the generality of its terms might lead one to suppose. As regards real property and chattels real, the legal estate in them is governed by the ordinary doctrines of real property law, and, therefore, if several partners are jointly seized or possessed of land for an estate in fee, or for years, on the death of one of them, the legal estate will devolve on the surviving partners. Jeffrys v. Sprall, 1 Vern. 217; Elliott v. Brown, 3 Swanst. 489, *n.* But in equity they are, as regards the interest of the deceased partner, deemed to be trustees thereof for the persons entitled to his estate, and are compellable to account with them accordingly. Jeffrys v. Sprall, *ante;* Elliott v. Brown, *ante;* Lake v. Craddock, 3 P. Wms. 158; Lake v. Gibson, 1 Eq. Cas. Abr. 290; Lyster v. Dollard, 1 Ves., Jr., 435; Jackson v. Jackson, 9 id. 576. This, however, is the case only upon the assumption that the property in question is partnership property, and forms a part of the common stock in which the deceased had an interest as partner. Morris v. Barrett, 3 Y. & J. 384; Reilly v. Walsh, 11 Ir. Eq. 22. As regards choses in action, the right to sue for a debt owing to the firm, as well as the liability to be sued for a debt owing by it, also at law, devolve in the event of the death of one partner upon the surviving partners exclusively. Kemp v. Andrews, Carth. 172; Dixon v. Hammond, 2 B. & Ald. 310; Martin v. Crompe, 1

In the case of Smith v. Smith,[1] it appeared that Robert Smith, a brewer, took his brother, Charles Smith, into partnership with him, and in the course of that partnership, at several times, Robert Smith

Ld. Raym. 340; Slipper v. Sidstone, 5 T. R. 493; French v. Andrade, 6 id. 582. There is indeed an old case in which an action of *assumpsit* for a partnership debt was held to be properly brought by the executors of a deceased partner, and the surviving partner jointly. Hall v. Huffam, *alias* Hall v. Rougham, 2 Lev. 188 and 228, and 3 Keble, 798. But this case is in direct opposition to those last cited, and is contrary to what is now clearly settled as the law. In equity, however, the legal personal representatives of a deceased partner are entitled to have a debt due to the partnership brought into account by the surviving partners. The receipt of the survivors for a debt due to the firm is a good discharge to the debtor. Brazier v. Hudson, 9 Sim. 1; Phillips v. Phillips, 3 Ha. 281. And the surviving partner can, without making the executors of the deceased, parties, sustain a suit for an account against a debtor to the firm. Haig v. Gray, 3 De G. & Sm. 741. And are liable to be proceeded against by a creditor of the firm, for, as has been seen, all the debts due by a partnership are, in equity, deemed to be due from each partner severally, as well as from all jointly. See Sleech's case, 1 Mer. 564. As regards ordinary chattels, the doctrine at law appears to be the same as that which obtains in equity. The subject was much discussed in the case of Buckley v. Barber, 6 Eq. Cas. Ab. 164; and see per Dampier, in R. v. The Collector of Customs, 2 M. & S. 223; in which all the previous authorities were reviewed, and the court there came to the conclusion that the interest of a deceased partner in chattels belonging to the firm did not devolve upon the surviving partners, so as to enable them to give a good legal title to the chattels as against the executors of the deceased. Before quitting the present subject, it may be observed that the doctrine of non-survivorship amongst partners is not confined to merchants or even to traders, but extends to partners generally. See Buckley v. Barber, 6 Ex. 164; Aunand v. Honiwood, 2 Ch. Ca. 129; Jeffrys v. Small, 1 Vern. 217; Lake v. Gibson, 1 Eq. Ca. Ab. 290; Lake v. Caddock, 3 P. W. 158.

Of the doctrine that shares are personal estate.— If, as has been stated above, a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows that in equity a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate. And although the decisions upon this point are conflicting, the authorities which are in favor of the above conclusion certainly preponderate over the others. Thornton v. Dixon, 3 Bro. C. C. 199; Bell v. Phyn, 7 Ves. 453; Randall v. Randall, 7 Sim. 271; Cookson v. Cookson, 8 id. 529, are all cases in which partnership realty was treated as realty. On the other hand, Ripley v. Waterworth, 7 Ves. 425; Townshend v. Devaynes, 1 Mont. Partn., note 2, A. Appx. p. 96; Phillips v. Phillips, 1 M. & K. 649; Broom v. Broom, 3 id. 443; Morris v. Kearsley, 2 Y. & C. Ex. 139; Houghton v. Houghton, 11 Sim. 491; Essex v. Essex, 20 Beav. 442, and Darby v. Darby, 3 Drew, 495; Holroyd v. Holroyd, 7 W. R. 426, all support the statement.

Rule in Thornton v. *Dixon.*—In Thornton v. Dixon, 3 Bro. C. C. 199; the court recognized the rule that partnership property must be considered as personal estate, but held that the lands which were there in question could not be so considered, as they had been conveyed to all the partners in common, and there was no agreement for a sale.

Rule in Bell v. *Phyn.*—In Bell v. Phyn, 8 Sim. 529, partners in trade purchased with the funds of the firm a share in a plantation, and kept the accounts relating to the estate in the partnership books, and it was held upon the authority of the last case that, assuming the land to have become partnership property, it ought not to be regarded as personal estate.

Rule in Randall v. *Randall.*— In Randall v. Randall, 1 Mont. Part., note 2, A. Appx. p. 96; see, too, 11 Sim. 498, note,

[1] 5 Ves. 189; 1 Hov. Supp. 502.

purchased freehold and copyhold estates at Croydon, Merton and Wooden, in Surrey, and was seized of the legal estate of the freehold premises in fee, except one, which was conveyed to him and a trustee,

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the partners were farmers, maltsters and biscuit makers. They bought land for the farming business, and it was held that as it was not acquired for the purpose of any partnership in trade, the land could not be treated as personalty.

Rule in Cookson v. *Cookson.*—In Cookson v. Cookson, 1 M. & K. 649, a father, who was seized in fee of land on which he carried on business as a bottle manufacturer, took his son into partnership, and conveyed a share in the land to him. The land was declared by the articles of partnership to be partnership property, But on the death of the father, it was held that his share in the land was to be treated as real estate, no sale being required for the payment of the partnership debts or for any other purpose. These are the cases which militate against the rule under discussion. The following are those which support it:

Rule in Ripley v. *Waterworth.*—In Ripley v. Waterworth, 7 Ves. 458, partnership land was conveyed to trustees upon trust, upon a dissolution of the partnership, to sell and pay the partnership debts and divide the residue of the money arising from the sale amongst the partners: and it was held, upon the death of one of them, that his share in the land was personal estate, although the land was not in fact sold, and the deceased's share in it was purchased by the surviving partners under a clause enabling them so to do, and contained in the conveyance to the trustees.

Rule in Townshend v. *Devaynes.*—In Townshend v. Devaynes, 7 Ves. 425, two persons in partnership as paper makers purchased paper mills for the use of the firm, and paid for them out of its funds. It was agreed that on the death of either, the survivor should have the option of purchasing his share. One of the partners died, and his share was purchased by the survivor. It was held that the whole of the purchase-money formed part of the personal estate of the deceased, although most of the money was paid in respect of the interest of the deceased in the mills.

Rule in Phillips v. *Phillips.*—In Phillips v. Phillips, 7 Sim. 271, two persons in partnership as brewers purchased public houses for the purposes of their trade, and had them conveyed to both in fee. On the death of one of them, it was held that his share in the houses was to be treated as personal estate. Broom v. Broom, 3 M. & K. 443, is a decision to the same effect as the last, and decided on its authority. In Morris v. Kearsley, 2 Y. & C. Ex. 139, the report does not state how, when, or for what purpose, the property was originally acquired. A partnership of brewers was possessed of real estate conveyed partly to the partners as tenants in common, and partly to one or more of the partners in trust for the firm; and it was deceided that the several lands, hereditament, and premises belonging to the partnership, ought to be considered as personal estate.

Rule in Houghton v. *Houghton and Darby* v. *Darby.*—In Houghton v. Houghton, 11 Sim. 491, two brothers, A and B, were partners as soap boilers. They purchased land for the purposes of their trade, took a conveyance to themselves as tenants in common, and mortgaged the land for the purchase money. They then built on the land, insured the buildings, and paid the expenses and the interest of the mortgage debt out of the partnership funds. A died intestate, and B took another brother, C, into partnership. B and C paid off the mortgage and took a reconveyance to themselves as joint tenants in fee, and expended money in building and insurance, defraying the expense, as well as providing the mortgage money out of the funds of the partnership. On B's death it was held that the land and buildings had clearly become partnership property, and that it ought, therefore, to be treated as personal estate. In Darby v. Darby, see the judgment of V. C. Kindersley, in Darby v. Darby, 3 Drew 499, etc., two brothers embarked in joint speculations in land. Their scheme was to buy land, convert it into building sites, and then sell it at a profit. This was done on several occasions, the land being generally conveyed to one of them only. On the death of that one it was held that his interest in all the land bought by both, and still unsold, was personal, and not real, estate. In Essex v. Essex, 3 Drew, 506,

to bar dower, and of the copyhold premises according to the custom of the manor. He was also seized of other freehold estates by inheritance, or by purchases previous to the partnership. The estates pur-

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two brothers were, under the will of their father, seized of freehold lands. They agreed to become partners as curriers and tanners for fourteen years, and to carry on their business on those lands. It was stipulated that if either died during the copartnership term, the other should take his share in the freeholds, and that the entirety thereof, including the plant and tan-pits, should be valued at 5,000*l*. The fourteen years expired, but the partnership was continued as before. On the death of one of the partners it was held that his share in the freeholds was to be regarded as personal estate. There are also various *dicta* of Lord Eldon in favor of the broad principle that partnership property is to be regarded as personal and not as real estate. 3 Drew, 495. Upon the whole, therefore, it is submitted, that nothwithstanding Thornton v. Dixon, Bell v. Phyn, and Randall v. Randall, the true rule is, as stated by the vice-chancellor, Kindersley, in Darbey v. Darbey, 20 Beav. 442, "that whenever a partnership purchases real estate for the partnership purposes, and with the partnership funds, it is, as between the real and personal representatives of the partner's personal estate." See in addition to the cases referred to above, Holroyd v. Holroyd, 7 W. R. 426; 2, that notwithstanding Cookson v. Cookson, no satisfactory distinction, with reference to the question of conversion, can be drawn between land purchased with partnership moneys, and land acquired in any other way; see per Lord Eldon in Jackson v. Jackson, 9 Ves. 593. "It is very difficult to make a distinction between a joint tenancy by will, by a gratuitous deed, or a purchase. The law of merchants, if it applies to one, must apply to all." And that the question of conversion, like the question of survivorship, turns only on whether the land is or is not to be deemed property of the firm in the true sense of that expression. If, indeed, the property is not partnership property in the true sense of the phrase (*i. e.*, the property of the firm, or in other words, of all the partners as such), the rule has no application. Therefore, in a case where two out of three partners were owners of land occupied by the firm, and for which the firm paid a rent, and the land was in fact kept distinct from the joint property of the three partners, it was properly held, on the death of one of the two partners to whom the rent was paid, that his interest in the land was not to be considered as personal, but as real estate. Rowley v. Adams, 7 Beav. 548; Balmain v. Shore, 9 Ves. 500; see, too, Phillips v. Phillips. So, if land belongs to all the partners as tenants in common, but not as partners, and that land is used by them for partnership purposes, but is nevertheless intended to remain vested in them as tenants in common, and not to form part of the assets of the firm, the share of each partner will be real, and not personal estate. In the case now supposed, co-owners of land are partners, but the co-ownership continues unaffected by the partnership. But it is not possible on this ground to uphold Thornton v. Dixon, Bell v. Phyn, Randall v. Randall, and Cookson v. Cookson. In each of these four cases the land had become part of the assets of the firm, or it had not; if it had, these four cases are in direct conflict with those which have just been alluded to; whilst, if it had not, they are in no less direct conflict with other cases which are authorities on the question what is and what is not property of the firm. The doctrine of conversion which has just been considered, merely amounts to this, that on the death of a partner, his share in the partnership is, as between his real and personal representatives, to be treated in equity as money and not as land. The crown cannot avail itself of the doctrine, and require probate duty to be paid upon the assumption that the share of the deceased actually consisted of money. Custance v. Bradshaw, 4 Ha. 315. And if the shares of the partners in partnership realty are of sufficient value, they are not precluded by the doctrine in question from voting in respect of those shares at elections for members of Parliament." Baxter v. Brown, 7 Man. & Gr. 199, E. C. L. R. 49. See, too, Rogers v. Harvey, 5 C. B. (N. S.)

American doctrine. — In this country real estate purchased with partnership funds for the use of a firm, and employed in the partnership busi-

chased consisted of a brewhouse and premises, and some public-houses, for the purposes of the trade. When the partnership was formed, it was agreed, that the freehold and copyhold estates of which

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ness, is, in equity, regarded as assets of the partnership, and will be applied to the liquidation of partnership debts, in preference to the debts of individual members of the firm. Uhler v. Semple, 20 N. J. 288; Bryant v. Hunter, 6 Bush (Ky.), 75; National Bank of Metropolis v. Sprague, 20 N. J. Eq. 13; Cornwall v. Cornwall, 6 Bush (Ky.), 369; Tillinghast v. Champlin, 4 R. I. 173; Lacy v. Waring, 25 Ala. 625; Fall River Whaling Co. v. Borden, 10 Cush. (Mass.) 458; Duhring v. Duhring, 20 Mo. 174; Sigourney v. Munn, 7 Conn. 11; Davis v. Christian, 15 Gratt. (Va.) 11; King v. Weeks, 70 N. C. 372; Price v. Hicks, 14 Fla. 565; Savage v. Carter, 9 Dana (Ky.), 408; Matlock v. Matlock, 5 Ind. 403; Bopp v. Fox, 63 Ill. 540; Russell v. Miller, 26 Mich. 1; Willis v. Freeman, 35 Vt. 44; Dupuy v. Leavenworth, 17 Cal. 262; Hunt v. Benson, 2 Humph. (Tenn.) 459; Jervis v. Brooks, 27 N. H. 37; Blake v. Nutew, 19 Me. 16; Bank of Louisville v. Hale, 8 Bush (Ky.), 672, Swaggs v. Blair, 44 Miss. 406; Mauck v. Mauck, 54 Ill. 281; Hewitt v. Rankin, 41 Iowa, 35; York v. Clemens, 41 id. 95; Little v. Snedecor, 52 Ala. 167; Kendall v. Rider, 35 Barb. (N. Y.) 100; Drewry v. Montgomery, 28 Ark. 256; Buckley v. Buckley, 11 Barb. (N. Y.) 43; Fowler v. Bailey, 14 Wis. 125; Lime Rock Bank v. Phetteplace, 8 R. I. 56; Fairchild v. Fairchild, 64 N. Y. 471; Galbraith v. Gedge, 16 B. Mon. (Ky.) 631; Coles v. Coles, 15 Johns. (N. Y.) 159; Divine v. Mitchum, 4 B. Mon. (Ky.) 488; Ensign v. Briggs, 7 Gray (Mass.), 329. In Ross v. Henderson, 77 N. C. 170, it was held that land purchased with partnership funds is to be treated as partnership property, and is to be first applied in payment of joint debts, and if a creditor of one partner levies upon and sells under execution, the interest of one partner in partnership property, either the sale is void, or the purchaser takes only a moiety subject to the equities of the other partners and the creditors of the firm; or before distribution thereof among the heirs of a deceased partner can be made; Cornwall v. Cornwall, *ante;* and the fact that the deed is executed to the partners in their *individual* rather than in their partnership name, does not change the rule. Uhler v. Semple, *ante;* Bopp v. Fox, 63 Ill. 540; Price v. Hicks, 14 Fla. 565. It is not necessary that the deed should describe the grantees as copartners. If it is purchased with partnership funds, or by its credits, for the use of the firm, it will be presumed that it was intended to be held and treated as partnership property; Tillinghurst v. Champlin, 4 R. I. 173; but after the partnership debts are paid, and all its affairs are closed up, it will be regarded as real property, and will descend to their heirs, according to the respective interests of each partner. Id. In Patterson v. Silliman, 28 Penn. St. 304, two persons took a lease of a coal mine as tenants in common. They afterward associated themselves in the business of coal mining, shipping and selling coal as partners. It was held that the leasehold became partnership property. Roberts v. McCarty, 9 Ind. 16. But, in order that it may be regarded as *assets* of the firm, and treated as personal property, it is said that it must, by agreement or otherwise, have been impressed as partnership property. That is, in the absence of any direct expression of their intention in this respect, the facts and circumstances must be such as to indicate such intention; Ware v. Owens, 42 Ala. 212; and in the absence of any such intention as establishes an agreement, express or implied, it will be treated as real estate, although purchased with partnership funds and used for partnership purposes. Smith v. Jackson, 2 Edw. Ch. (N. Y.) 28; Hiscock v. Phelps, 49 N. Y. 97; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 165; Columb v. Reed, 24 N. Y. 505. But if it is purchased with partnership funds, and used for partnership purposes, it is treated as partnership property, but, although purchased with partnership funds, if not needed or used for partnership purposes, it is not partnership property, although the firm has the rents; Ramondsburg v. Mitchell, 29 Ohio St. 22; and parol evidence is admissible to establish the fact that it is partnership property. Fairchild v. Fairchild, *ante;* Sherwood v. St. Paul R. R. Co. 21 Minn. 127; Ford v. Clemens, 41 Iowa, 95. The fact that it is purchased with partnership funds is necessary for partnership purposes, Bryant v. Hunter, 6 Bush (Ky.), 75; Cornwall v. Corn-

he was then seized should continue his separate property; but the rents of those estates, and also of the estates purchased in his name, and to be considered as his separate property, were carried to the

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wall, 6 id. 367; Uhler v. Semple, 20 N. J. Eq. 288; Hoxie v. Carr, 1 Sum. (U. S.) 173; and is in fact used for such purposes, will afford a strong presumption that it was intended to be held as partnership property, and in the absence of circumstances, or facts overcoming this presumption, it will be sufficient. Hoxie v. Carr, *ante;* Pugh v. Corse, 5 Ala. 446; Boyce v. Coster, 4 Strobh. Eq. (S. C.) 30; and this is so, although it is conveyed to them in such a manner as, if they stood in a different relation, it would make them tenants in common. Somerset Works v. Minot, 10 Cush. (Mass.) 593; Burnside v. Merrick, 4 Met. (Mass.) 537; Dyer v. Clark, 5 Met. (Mass.) 562; Fall River Whaling Co. v. Borden, 10 id. 467; but see Ensign v. Briggs, where it was held that if the deed is so drawn as to create a tenancy in common, the title, *at law*, rests in the partners individually. But in Mississippi it is held that something more than a mere use, or agreement to use the property for partnership purposes, must be shown. Alexander v. Kimbro, 49 Miss. 520. And in Pennsylvania, it has been held that the intention must be evidenced by deed or other writing, Ridgway's Appeal, 15 Penn. St. 177; Hale v. Hinnie, 2 Watts (Penn.) 143, and such is now the rule in the latter State, it being held that as to strangers an agreement to make real estate partnership stock, ought to be in writing and upon record, Ebert's Appeal, 69 Penn. St. 79; Lefevre's Appeal, 69 id. 122. The instances in which the fact that real estate belonging to partners is used for partnership purposes does not raise a presumption that it is partnership property, does not arise, are when a factory, mill, mine or farm not bought out of partnership funds are used for the prosecution of the business. In such cases, unless the intent of the owners, to throw it into the partnership stock, is distinctly manifested, it is held in some of the States that it will retain its character as realty. Wheatley v. Calhoun, 12 Leigh (Va.), 264; Pecot v. Armelin, 21 La. An. 667. Real estate taken by a firm upon a debt due the partnership would be treated as personal assets; so would lands bought by a firm at joint expense to be sold upon joint account, at least, if such was the evident intention of the partners. Ludlow v. Cooper, 4 Ohio St. 1. Where real estate is brought into a firm, it is treated as personalty, and a lease thereof made by one partner will inure to the benefit of all. Moderwell v. Mollison, 21 Penn. St. 257. In Clark's Appeal, 72 Penn. St. 142, two persons entered into partnership, one contributing real estate at an estimated value, which was carried into the stock account of the firm to his credit, he reserving the right, on dissolution, not to be bound by the estimated value, and to withdraw the property. During the partnership the buildings were burned and rebuilt with partnership funds. It was held that the real estate was, in equity, partnership property, with the legal title in him; that his reservation was a provision to correct the valuation, and that if he withdrew it upon dissolution he must take it at its then value, as the property, with all its accretions, belonged to the firm to be accounted for as assets. The fact that the title is taken in the name of one partner, King v. Weeks, 70 N. C. 372; Holmes v. Moon, 7 Heisk. (Tenn.) 506; Clark's Appeal, 72 Penn. St. 142, or even in the name of the *wife* of a partner, does not change the rule. In either case, the person holding the legal title, if it was purchased and paid for with partnership funds, will be treated as holding it in trust for the partnership. Price v. Hicks, 14 Fla. 565; and the fact that the real estate was really partnership property may be proved by parol. Thus, in a New York case, certain lands were devised to the plaintiff by a former partner of the defendant. The plaintiff brought an action against the defendant to dispossess him. The legal title to the premises was in the testator, but the defendant set up a defense that the real estate was partnership property, and it was held that parol evidence of the facts was admissible. Thompson v. Egbert, 3 T. & C. (N. Y.) 474; Ford v. Clemens, 41 Iowa, 95; Sherwood v. St. Paul R. R. Co., 21 Minn. 127. Real estate purchased with partnership funds, for partnership purposes, will, in equity, be treated as partnership property, without reference to the manner of its purchase, or the person in whose name the title stands. The person in whom

partnership account; and the partnership allowed him interest upon the estimated value of the estates of which he was seized before the partnership, and upon the purchase-money of those which were pur-

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the title stands, or in case of his decease, his heirs, will be treated as trustees for the partners, although no such trust is expressed in the conveyance. If such a trust exists, and is clearly proved, it will be enforced. Thus, in a recent case in New York, Fairchild v. Fairchild, 64 N. Y. 471, this question was considered by the Court of Appeals, and as the opinion of Church, C. J., is ably considered, and may be regarded as expressing the modern American doctrine upon the question, I give it entire. He said: "This is an action for partition among the heirs of Egbert N. Fairchild, of forty-eight vacant lots in the city of New York. Egbert N. Fairchild, Stephen C. Walker, Isaac D. Coleman and Henry J. Brown, were copartners, and constructed the new reservoir in Central Park, and also other public works. The copartnership was formed in 1858, and the lots in question were purchased in 1860, and a conveyance taken in the name of Fairchild only. The other copartners, including the widow and heirs of one of them who has since died, claim an interest in the property equal to their respective interests in the copartnership. The rights of creditors are not involved. The judge who tried the case at Special Term found that the property was purchased by and for the benefit of the copartnership, and paid for with its funds; that taxes and incumbrances were also paid from such funds, and that it was intended and understood by all the members of the firm that said property belonged to the firm assets, and all payments, expenses, etc., were kept upon the firm books. He further found that the other members of the firm consented that Fairchild should take title for the firm, but that they did not consent that he should take the title absolute in his own name, without recognition of their interests, and they did not know that the deed was so taken. If these findings are sustained by sufficient legal evidence, the legal conclusion arrived at by the learned judge is inevitable, viz.: That the other members of the firm are entitled to an interest in said property, according to their interest in the partnership. I do not understand that this general proposition is seriously disputed by the counsel for the plaintiffs, but he predicates his answer to the claim, first, upon the incompetency of the evidence admitted, and, second, upon its insufficiency. The fifty-first section of the statute of uses and trusts provides that when a grant for a valuable consideration shall be made to one person, and the consideration paid by another, no use or trust shall result in favor of the person making the payment, but the title shall vest in the alienee, subject to the rights of creditors, as provided in section 52. The fifty-third section contains an exception in favor of the person paying the consideration, when an absolute conveyance is taken in the name of another without his consent or knowledge. The Special Term decided in favor of the defendants upon two grounds: First, that a trust resulted to the defendants by the payment of the consideration, and that they could invoke the benefit of the exception contained in section 53; and, second, that the property was copartnership property, and should be treated as such, although the title was held by one member of the firm. It is insisted on behalf of the plaintiffs that the admissions in the answer prevent the defendants from availing themselves of the exception contained in the fifty-third section. These admissions are: 'That the conveyance was taken to and in the name of Egbert N. Fairchild, for the purpose and convenience of the partnership, to the end that it might be more easily handled and pledged and disposed of for said copartnership purposes than if it stood in the individual names of all the members of said firm.' It cannot be disputed that this allegation is a distinct admission that the defendants knew that Fairchild was to take the title not only, but so take it as to be able to pledge and dispose of it in his own name, but it is not absolutely inconsistent with his taking it in a way to recognize their rights. It would probably have been sufficient for this purpose to have inserted a declaration that he took the title for the benefit of the firm, and that the property was partnership property in pursuance of an agreement between the members of the firm. Assuming the necessity of some such recognition in order to secure the interest of the other members of the

chased. As these purchases were made, Robert Smith drew the money from the partnership; and his account was debited with the amount and interest. A joint commission of bankrupts

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firm, it may be presumed that they contemplated it, and hence that the failure to thus take it was a fraud upon them. Upon the findings in the case, the authorities go far toward sustaining the decision upon this ground. Day v. Roth, 18 N. Y. 448; Lounsbury v. Purdy, id. 515; Seimon v. Schurck, 29 id. 598; Foote v. Bryant, 47 id. 544. Parties are bound by the allegations in their pleadings, and by every reasonable intendment to be inferred therefrom, and it is, to say the least, a liberal construction in favor of the defendants, to hold that the statement in the answer, that the lots were conveyed to Fairchild for the purpose of pledging and disposition, is not an admission that they were conveyed precisely as the parties intended, especially in the absence of any intimation they were not. The tendency of the decisions is to sustain the equitable interests of parties in such transactions, whenever it can be done without a palpable violation of the statute, and following this tendency it may perhaps be held that the defendants are not concluded by their answer. But looking at the real nature of the transaction as found by the judge, it seems to me more reasonable to hold that this property should be regarded as assets of the copartnership. The findings are explicit that it was purchased and paid for by the firm as partnership property, and always treated as its property in the payment of taxes and incumbrances, making improvements, etc. Real estate purchased for partnership purposes and appropriated to those purposes, and paid for by partnership funds, becomes partnership property, and it is not material in what manner or by what agency the land is purchased, or in what name it stands. If it be established that it belongs to the partnership, equity will hold the one in whom is the legal title as trustee for the partnership. When the land is conveyed to the several partners it is not indispensable that it should be actually used for partnership purposes, nor that a positive agreement should be proved making it partnership property. If it has been paid for with partnership effects it is then a question of intention, whether the conveyance is to have its legal effect, and the parties are to be treated as tenants in common, or whether the land is to be treated as partnership property. The manner in which the accounts are kept, whether the purchase-money was severally charged to the members of the firm, or whether the accounts treat it the same as other firm property, as to purchase-money, income, expenses, etc., are controlling circumstances in determining such intention, and from these circumstances an agreement may be inferred. 24 N. Y. 511 The rule, I apprehend, is the same in this respect when the deed is made in the individual name of one of the partners, as where it is made in the names of all the members of the firm. But a distinction is claimed to exist between creditors and the members of the firm, and between the members themselves in respect to the proof necessary to establish the fact that the real estate is partnership property. I do not think such a distinction is recognized by the authorities. In this country, real estate belonging to a partnership, for the purpose of paying the debts and adjusting the equities between the members of the firm, is treated as personal property; and what remains is considered and treated as real estate, which would go to the heirs of the partners according to their interests. This conclusion was reached by the chancellor in an elaborate opinion in Buchan v. Sumner, 2 Barb. Ch. 165-200, reviewing all the American authorities; and was approved and adopted by this court in Collumb v. Read, 24 N. Y. 505. The English rule gives to the real estate of a partnership the character and qualities of personal property as to all persons; and the remainder, after paying debts and adjusting the equities of the partners, goes to the personal representatives, and not to the heir, probably on account of the great injustice which would result by the laws of inheritance in England. 24 N. Y. 505. But the American rule, that the remainder descends to the heir, does not affect the character of the property as partnership effects, except that the incidents and qualities of real estate are revived. It is divided as so much money capital would be, but it resumes its original qualities. The same evidence, however, which would make it partnership property for the purpose of paying debts

having issued against the Smiths, under which they were declared bankrupts, the real property before mentioned was sold by the assignees, they at the same time entering into an agreement to allow

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and adjusting the equities between the copartners would establish it for the purpose of final division. It would be incongruous to say that evidence which would be sufficient to establish that it was partnership property for the former purposes would fail for the latter purpose, and I can find no authority for such a distinction. Such a rule, while compelling one member of a firm holding the legal title as trustee for the partnership, to account and disgorge to the extent of making the accounts equal between the members of the firm, when that was accomplished, would enable him to rob his associates by pocketing the remainder. A different question has been very much controverted both in this country and in England, and that is, whether a partnership or agreement between two or more persons to purchase lands can be proved, by parol, within the statute of frauds. The counsel for the plaintiffs contends that this question is involved in this case, and cited the case of Smith v. Burnham, 3 Sum. 435, as an authority against the competency of such evidence. It does so hold in an elaborate opinion by Story, J. The correctness of this decision has been disputed by the Commission of Appeals, in Chester v. Dickerson, 54 N. Y. 1, which, if necessary, we should probably feel bound to follow. But I do not think that question is involved here. Proof of a partnership, for the purpose of buying and selling lands, presents a different question from that which arises when an existing partnership purchases land for its use or benefit; and Story, J., in delivering the opinion in Smith v. Burnham (*supra*), recognizes the distinction; he says: 'It is not the case of a purchase confessedly paid out of the funds of an existing partnership for partnership purposes, and the deed taken in the name of one partner.' In the latter case he concedes that a resulting trust would arise, while in the former he held that it would not; the difference being that in the former the trust results from the payment of the consideration, while in the latter it arises entirely from the contract. Real estate purchased as partnership property is not within the prohibition of the statute. In the first place, it is not the case where the consideration is paid by one person and a conveyance taken in the name of another. The consideration is paid by all. It is not, therefore, within the letter of the statute. But a more substantial reason is that property thus held is regarded as personal property, for the purpose of paying debts and adjusting the equities between the partners; and the individual member holding the legal title is a trustee for the partnership in respect to the property as personalty; and when the debts are paid and the claims of the several members as between themselves paid, the trust for partnership is discharged and a trust results to the others members of the firm, and the heirs of such as have died, in the remainder, by operation of law, which is saved by section 50 of the statute, and the holder of the legal title then becomes a trustee of such remainder, as real estate for the benefit of persons interested. Such a trust is not prohibited, nor is it necessary for parties claiming the benefit of it to bring themselves within the exception in section 53. Lloyd v. Spillet, 2 Atk. 150; 44 N. Y. 544, and cases before cited. It remains to consider the exceptions to the admission of evidence, and to the sufficiency of the evidence, to establish the facts found. Some of these objections are necessarily disposed of by the views before expressed. The point was taken that the entries in the firm books were incompetent, because made by the book-keeper, without affirmative proof that Fairchild saw them. It was proved that Fairchild had access to the books, and sometimes examined them, and had personal supervision of the office where the books were kept, and, I infer, had the financial management of the firm. From these circumstances it is properly inferable that he knew how the entries were made, and it is sufficient if they were competent. As a general rule, where members of a firm have access to the books, and opportunity to know how their accounts are kept, the presumption is that they do know. It was proved that mortgages upon the lands were paid by the funds of the firm—by checks of the firm—and it was objected that the mortgages and checks should have been produced. As to the checks,

compensation to the wife of Robert Smith, in respect of her dower in the estates, on condition of her joining in a fine. Robert Smith and his wife having filed a bill for the specific performance of this

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there was evidence tending to show that they had been burned, and I do not think it was strictly necessary to produce the mortgages. The material fact was the payment of money out of partnership funds upon claims against the real estate. The mortgages appeared in the accounts of the firm, and the payment of them, while it strengthened the evidence that the land was paid for by the firm, was not absolutely necessary for that purpose. The mortgages may be regarded as collateral to the principal fact, and not necessary to be produced. * * * * * The ground evidently taken by the learned counsel for the plaintiffs was, that it was incompetent to alter or vary the legal effect of the conveyance to Fairchild by parol evidence. As this general ground is not tenable, and as the principal and controlling facts were proved by competent evidence, an appellate court will not be critical to discover technical errors where no rule of law has been clearly violated, and it is evident that no injustice has been done. The evidence produced, assuming its competency, to sustain the finding that this was partnership property, is ample for that purpose." See, also, upon this question, Drewry v. Montgomery, 28 Ark. 256; Sherwood v. St. Paul Railway, 21 Minn. 127; Little v. Snedecor, 52 Ala. 167; Hewitt v. Rankin, 41 Iowa, 35; Yook v. Clemens, id. 95. Holding that a partnership for dealing in real estate may exist, but that it must be evidenced by written agreements, see Benton v. Roberts, 4 La. An. 216; Patterson v. Ware, 10 Ala. 447; Smith v. Burnham, 3 Sum. (U. S.) 463; Pecot v. Armelin, 21 La. An. 667; Gant v. Gant, 6 id. 678; Henderson v. Henderson, Manuf. (Va.) 615; Rowland v. Boozer, 10 Ala. 694; Bird v. Morrison, 12 Wis. 152; Chaddick v. Skidmore, 2 De G. & J. 55. When land held as partnership stock is sold by the firm, *the land becomes land again in the hands of the purchaser, and the proceeds personalty in the hands of the firm.* But this is the case only to the extent of accomplishing the purposes of the conversion, that is to the extent of paying the partnership debts and re-imbursing advances made by the partners before any portion of it goes to the other partners or their private creditors. When this is accomplished, and the affairs of the partnership are wound up, by decree of court or otherwise, re-conversion transpires, and the money becomes realty for all the purposes of distribution. Foster's Appeal, 74 Penn. St. 391. In view of the doctrines held by the courts of this country in reference to realty held as partnership property, it follows that a creditor of an individual member of the firm can acquire no interest therein, either by attachment or levy thereon, except in such interest as may remain in such partner after all the partnership debts are paid and its affairs are finally wound up. Lang v. Waring, 17 Ala. 145. The proposition that, when a partnership ceases, the partners become tenants in common of the partnership property undisposed of, is generally true. Rice v. McMartin, 39 Conn. 573; Buckley v. Buckley, 11 Barb. (N. Y.) 43. When the affairs of the partnership are settled and all its debts are paid and an equal distribution of the assets can be made without a sale of the real estate, a sale will not be ordered in proceedings for a dissolution unless it clearly appears that the interests of all the partners require it. Pierce v. Covert, 37 Wis. 252. But this is not the case unless all the partnership debts have been paid. So long as any debts remain unpaid partnership property continues such for the purpose of being applied in liquidation thereof. Rice v. Martin, *ante.* Real estate held as partnership stock may be mortgaged or sold by them, without the joinder of their wives in the deed, and if the title passes under the foreclosure of the mortgage, the widow of a deceased partner cannot claim a dower in the land upon the ground that she did not join in the conveyance, Hudson v. Neil, 41 Ind. 505; nor in the land conveyed in fee. Her dower interest is contingent upon the fact whether any portion of the proceeds of the realty remains to the share of her deceased husband after the payment of all the partnership debts, and advances made by the other partners. If a balance remains, a dower interest may remain in such balance, which then becomes realty. Howard v. Priest, 5 Met. (Mass.) 592; Hudson v. Neil, *ante.* The surviving partner has the control of all the

agreement, it was contended for the defendants, that these estates were partnership stock, and not liable to dower; but Lord Loughborough held that they were the separate property of Robert Smith, and

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real estate held by the firm until the firm debts are paid and all its affairs are settled, and until then the widow of the deceased partner has no separate share therein. Cobble v. Tomlinson, 50 Ind. 550. When land is held as partnership stock no lien can be acquired thereon by an individual creditor of a member of the firm, which will prevent the firm from passing a clear title thereto. A creditor of an individual member of a firm could not, under a levy of an execution upon such partner's share, sell an interest in the realty, but simply the balance due his debtor with a right in equity to compel a settlement. Chilley v. Wood, 71 Penn. St. 488; see, also, Hiscock v. Phelps, 49 N. Y. 97; Deveney v. Mahoney, 23 N. J. Eq. 247; Menagh v. Whitwell, 52 N. Y. 146. Where a partner purchases land in his own name, and for his own purposes, although it is paid for out of partnership funds, it remains his separate property, Goodwin v. Richardson, 11 Mass. 469; Pitts v. Waugh, 4 id. 424; and even as to realty owned by the partnership, it is competent for the partners to agree that each partner's share of the rent shall be paid to him, and a party renting with knowledge of this agreement and contracting to pay in this mode, may be sued by each partner for his proportion of the rent. McDougald v. Banks, 13 Ga. 451. In Dyer v. Clark, 5 Met. (Mass.) 562, the court held that the legal title under such circumstances is held in trust for partnership purposes, and must be applied to the liquidation of all the joint debts. Each partner has an equitable interest in that portion of the legal estate held by the other, until the debts obligatory on the firm are paid, including the amount due to each partner from the firm for advances, etc., and that the rights of the widow of the deceased partner and his heirs and separate creditors are postponed until these equities are satisfied. See, also, to the same effect, Loubat v. Nourse, 5 Fla. 350. In Shearer v. Paine, 12 Allen (Mass.), 289, it was held that the administrator of a deceased partner could not apply for leave to sell such real estate, but that leave could alone be granted upon application of the surviving partner while any partnership obligations remain unsatisfied. In Peck v. Fisher, 7 Cush. (Mass.) 389, two persons were partners and owned real estate which was purchased with partnership funds, and used for partnership purposes. They were also members of another firm doing business under another name. A creditor of the last-named firm levied upon the real estate of the first-named firm. The court held that the creditors of the first-named firm must first be paid out of the real estate before the creditors of the last-named firm could come in. See, also, Fall River Whaling Co. v. Borden, 10 Cush. (Mass.) 467; Catskill Bank v. Hooper, 5 Gray (Mass.), 583; Somerset, etc., Works v. Minot, 12 Cush. (Mass.) 593; Lyman v. Lyman, 0 Paine (U. S. C. C.), 22. If a partner is whose name the legal title stands sell- the land, taking notes for the same pay able to himself, with the purpose of applying the proceeds to his own use, the transaction is fraudulent, and he, or any person knowing the facts who may hold the notes, will be enjoined from using or collecting them. Stockdale v. Ullery, 37 Penn. St. 486. But the rule would be otherwise as to one who purchased either the land or notes without notice of the facts. Houston v. Stanton, 11 Ala. 420; Mallack v. Jaines, 13 N. J. 128. In equity, lands purchased and used in that way are treated as partnership property, in whatever name the title may stand, and the person in whom the legal title is vested is a trustee for the partners, and he will not be permitted to deal with the property as his own. Indiana Pottery Co. v. Bates, 14 Ind. 9; Dewey v. Dewey, 35 Vt. 559; Sigourney v. Munn, 7 Conn. 17; Galbraith v. Gedge, 16 B. Mon. (Ky.) 633; Matlock v. Jaines, 13 N. J. 128; Lacy v. Hall, 37 Penn. St. 361; Houston v. Stanton, 11 Ala. 420; Hoxie v. Carr, 1 Sum. (U. S.) 173; In re Thomas Ryan, 3 Irish Eq. 232; Yook v. Clemens, 41 Iowa, 95; Hewitt v. Rankin, id. 35; Little v. Snedecor, 52 Ala. 167; Sherwood v. R. R. Co., 21 Minn. 127; Drewry v. Montgomery, 28 Ark. 256. If one partner takes a new lease of real estate used for partnership purposes, in his own name, previous to the expiration of the partnership, it inures to the benefit of the firm, and if he employs it for his own purposes, he must account to his copartners for the profits. Leach v.

that he was debtor to the partnership for so much money; consequently, that his wife was entitled to dower.

When one partner takes lease in his own name.

SEC. 116. If a partner take a lease of lands in his own name for

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Leach, 18 Pick. (Mass.) 69. So, where one partner purchases lands in his own name, with partnership funds in part, and in part with his own, and the lands are used for partnership purposes, the firm will be entitled to the benefit of the purchase. Lacy v. Hall, 37 Penn. St. 361; Claggett v. Kilbourne, 1 Blackf. (Ind.) 346. In Richardson v. Parkwood, 6 Martin (La.), 510, an agent for a firm purchased real estate and paid for it by a debt due the firm, but took a deed in his own name, and after the death of one of the partners transferred it to the survivor. It was held that the heirs of the deceased partner were entitled to recover a share of the estate. Houston v. Stanton, 11 Ala. 420. In Washburn v. Washburn, 23 Vt. 580, the members of a firm purchased the pine timber on certain lands, which they were to cut within a certain time. They did not cut the timber within the time agreed upon, but the owner of the land did not avail himself of their *laches*, but sold the land to one of the partners, subject to the contract. It was held that the partners were entitled to an equal interest in the timber. In Delaney v. Hutcheson, 2 Rand. (Va.) 186, it was held that where one partner invests partnership funds in the purchase of real estate, without the assent of his copartners, although with the declared intention of appropriating it to his own use, yet his partners might follow him and claim the lands, even though they were in another State from that in which the partnership business was transacted. If lands are conveyed to a firm, by name, as to J. L. Saffrons & Co., in those States where a firm, *as such*, cannot hold the title to real estate, it will be treated as a valid deed to the person whose name appears in the deed, as in this instance, J. L. Saffrans, and he will be treated as holding the title in trust for his copartners. Moreau v. Saffrans, 3 Sneed (Tenn.), 599; Beaver v. Snodgrass, 1 Cold. (Tenn.) 445. And a court of equity in such a case will compel a conveyance to the other partners of such a moiety thereof as they are entitled. Edgar v. Donally, 2 Mumf. (Va.) 392. Even after a dissolution of the firm, if one member takes a conveyance of real estate in his own name, in satisfaction, in whole or in part, for a debt due the firm, the conveyance will inure to the benefit of the firm, and all the members may join in an action of trespass for an invasion of the land. Garrett v. Cunningham, 34 Me. 62. Where real estate was conveyed by partners to a trustee, to be sold, and the proceeds applied in a certain way, it was held that the surplus belonged to the surviving partner, to be administered in behalf of the partnership, and not to the administrator of a deceased partner. Carlisle v. Mulhern, 19 Mo. 56. Holding that a partner is entitled to the benefit of the purchase of real estate by a copartner, with partnership funds, even though the title is taken in his own name's. See Pierce v. Triggs, 10 Leigh (Va.), 407. See, also, a very strong case, Hunt v. Benson, 2 Humph. (Tenn.) 460, where it was held that partners were entitled to the benefit of such a purchase, although the partner charged the funds so used to himself upon the books of the company, but without the knowledge or consent of his copartners. See, also, Smith v. Ramsey, 6 Ill. 373. But where such land is *improved* by the partner in whom the title stands, a court of equity will, in a proper case, charge the land with the cost of such improvements. Lyman v. Lyman, 2 Paine (U. S. C. C.), 51. After the firm debts are paid, and all its obligations are discharged, the land belongs to the partners individually, and descends to their heirs. Yeatman v. Woods, 6 Yerg. (Tenn.) 20; Wilcox v. Wilcox, 13 Allen (Mass.), 254; Buckley v. Buckley, 11 Barb. (N. Y.) 44; Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 206; Mumford v. McKay, 8 Wend. (N. Y.) 444; Smith v. Wood, 1 N. J. Eq. 82; Patterson v. Blake, 12 Ind. 438; Whitman v. Boston, etc., R. R. Co., 3 Allen (Mass.), 134.

Property not recognized as partnership property.—Of course the mere fact that certain real estate is used as partnership property, and is owned in common, that is, not recognized or treated as partnership property, remains the property of each as tenants in common, and is not to be treated as personalty. Batman v. Shore, 9 Ves. 506; Cowden

the purposes of the partnership, he will be considered in equity as a trustee of such lease for himself and his copartners, the lease being deemed to be an incident of the partnership. In 1790,[1] Forster, Rankin, Kent, and Burdon, carried on the business of bankers, under the title of the Commercial Bank, at Newcastle. In June, 1791, a lease

v. Cairns, 28 Mo. 471; Slemmer's Appeal, 58 Penn. St. 177; Coles v. Coles, 15 Johns. (N. Y.) 160; Gaines v. Catron, 1 Humph. (Tenn.) 523; Bernard v. Defour, 10 La. 596; Skillman v. Purnell, 3 id. 497; McDermot v. Lawrence, 7 S. & R. (Penn.) 438; Farmer v. Samuel, 4 Litt. (Ky.) 189. The same is true of real estate held in the joint names of the members of the firm, *but which was not purchased with partnership funds, or for partnership purposes.* Blake v. Nutter, 19 Me. 16; Thompson v. Bowman, 6 Wall. (U. S.) 336; Woolridge v. Wilkins, 4 Miss. 360; Dilworth v. Mayfield, 36 id. 40; Ware v. Owens, 42 Ala. 215; Bernard v. Dufour, 17 La. An. 599.

Right of surviving partner to sell.—Real estate that is strictly partnership property, being treated as personalty, may be sold by the surviving partner for partnership purposes, and while such conveyance does not convey the legal, yet it carries the equitable title to the purchaser, and a court of equity will compel the heirs to convey the legal title. Andrews v. Brown, 21 Ala. 437; Bird v. Morrison, 12 Wis. 153; Ludlaw v. Cooper, 4 Ohio St. 9; Dupuy v. Leavenworth, 17 Cal. 267; Murphy v. Abrams, 50 Ala. 293. But the better course to pursue is to apply to the court for leave to sell the deceased partner's interest in the lands. Buffum v. Buffum, 49 Me. 108; Shearer v. Paine, 12 Allen (Mass.); 289.

[1] Forster v. Hale, 5 Ves. 308; 1 Hov. Supp. 418.

Each partner is the general agent of the firm, and is bound to exercise the utmost good faith in reference to all transactions relating to the joint business or the property employed. He will not be permitted to undermine his copartners, or turn to his own individual profit that which should inure to the benefit of all. This rule was well illustrated in a case recently decided in New York. Mitchell v. Reed, 61 N. Y. 123. In that case the plaintiff and defendant were copartners in running the Hoffman House in New York city. The copartnership by its terms expired May 1st, 1871, and they had leases of various premises used in the prosecution of their business. The firm had spent a large amount of money in improving and fitting up the leasehold premises for the business, also in fixtures and in furnishing the same, and by their joint efforts had built up a profitable business and largely enhanced the rental value of the premises. In 1869 the defendant, without the knowledge of the plaintiff, and without any notice of his intention, procured renewal leases of the premises in his own name and for his own benefit, commencing at the termination of the partnership and of the partnership leases. Upon discovery of these facts the defendant, insisting that the leases were his, and for his sole benefit, the plaintiff brought an action to have the leases declared to be for the benefit, of the partnership, and to have it adjudged that the defendant held them as trustee for the firm. The Commission of Appeals held, reversing the judgment below, that the plaintiff was entitled to the relief demanded. "It has been frequently held," said Earle, C., "that when one partner obtains the renewal of a partnership *secretly* in his own name, *he will be held as trustee for the partnership as to the renewed lease.* It is conceded that this is the rule where the partnership is for a limited term, and either partner takes a lease commencing within the term; but the contention is that the rule does not apply where the lease thus taken is for a term to commence *after* the expiration of the partnership by its own limitation. It is not necessary, in maintaining the right of the plaintiff in this case to hold that in all cases a lease thus taken shall inure to the benefit of the firm, but whether, upon the facts of this case, these leases ought to inure to the benefit of this firm. I will briefly allude to some of the prominent features of this case. These parties had been partners for some years; they were equal in dignity, although their interests differed. The plaintiff was not a mere subordinate in the firm, but, so far as appears, just as important and efficient in its affairs as the defendant. They procured the exclusive control of the leases

of a colliery, called Hebburn, was granted by Ellison to Burdon and three other persons, of the names of Peareth, Wade, and Wren, for a term of thirty-one years, as tenants in common, in equal fourth parts. Mr. Burdon died in December, 1792. The bill was filed by Forster and Rankin against the executors of Burdon, praying that it

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of the property, to terminate May 1, 1871, and their partnership was to terminate on the same day. They expended many thousand dollars in fitting up the premises, a portion thereof after the new leases were obtained, and they expended a very large sum in furnishing them. By their joint skill and influence they built up a very large and profitable business, which largely enhanced the rental value of the premises. More than two years before the expiration of their lease and of their partnership, the defendant secretly procured, at an increased rent, in his own name, the new leases which are of great value. Although the plaintiff was in daily intercourse with the defendant, he knew nothing of these leases for about a year after they had been obtained. There is no proof that the lessors would not have leased to the firm as readily as to the defendant alone. The permanent fixtures, by the terms of the leases at their expiration, belonged to the lessors. But the movable fixtures and furniture were worth vastly more to be kept and used in the hotel than to be removed elsewhere. Upon these facts I can entertain no doubt, both upon principle and authority, that these leases should be held to inure to the benefit of the firm. If the defendant can hold these leases, he could have held them if he had secretly obtained them immediately after the partnership commenced, and had concealed the fact from the plaintiff during the whole term. There would thus have been, during the whole term, in making permanent improvements and in furnishing the hotel, a conflict between his duty to the firm, and his self-interest. Large investments and extensive furnishing would add to the value of his lease, and defendant would be under constant temptation to make them. While he might not yield to the temptation, and while proof might show that he had not yielded, the law will not allow a trustee thus situated to be thus tempted, and therefore disables him from making a contract for his own benefit. Terwilliger v. Brown, 44 N. Y. 237, and cases cited. It matters not that the court at special term found upon the evidence that the improvements were judicious and prudent for the purposes of the old term. The plaintiff was entitled to the unbiased judgment of the defendant as to such improvements, uninfluenced by his private and separate interest. But, further, the parties owned together a large amount of hotel property in the form of furniture and supplies, considerably exceeding, as I infer, $100,000 in value. Assuming that the partnership was not to be continued after the 1st day of May, 1871, this property was to be sold, or in some way disposed of for the benefit of the firm, and each party owed a duty to the firm to dispose of it to the best advantage. Neither could, without the violation of his duty to the firm, place the property in such a situation that it would be sacrificed, or that he could purchase it for his separate benefit, at a great profit. Much of this property, such as mirrors, carpets, etc., was fitted for use in this hotel, and it is quite manifest that all of it would sell better with a lease of the hotel, than it would to be removed therefrom. It is clear that one or both of these parties could obtain advantageous leases of the hotel for a term of years, and hence, if the parties had determined to dissolve their partnership, it would have been a measure of ordinary prudence to have obtained the leases and transferred the property with the leases as the only mode of realizing its value. This was defeated by the act of the defendant, if he is allowed to hold these leases, and thus place himself in a position where the property must be largely sacrificed or purchased by himself at a great advantage. This the law will not tolerate. The language of Lord Eldon in Featherstonhaugh v. Fenwick, 17 Ves. 311, a case in many respects resembling this, is quite in point. He says: "If they (the defendants) can hold this lease, and the partnership stock is not brought to sale, they are by no means on equal terms. The stock cannot be of equal value to the plaintiff, who was to carry it away and seek some place in which to put it, as to the defendants who were to con-

might be declared that Burdon took and held the said fourth part of the colliery on account of himself and the plaintiffs, and the defendant Kent, respectively, in equal shares; and that the defendants might be decreed to assign the same accordingly. In order to raise a declaration of trust for the partnership, in writing, as required by the

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tinue it in the place where the trade was already established, and if the stock was sold the same construction would give them an advantage over the bidders. In effect they would have secured the good-will of the trade to themselves in exclusion of their partner." For these reasons, independently of the consideration that the leases themselves had a value to which the firm was entitled upon other grounds and upon authorities to be hereafter cited, the plaintiff, who commenced his suit about one year before the term of the partnership expired, was, upon undisputed principles and authorities, applicable to all trustees and persons holding a fiduciary relation to others, entitled to the relief he prayed for. It has long been settled by adjudications, that generally, when one partner obtains the renewal of a partnership lease secretly, in his own name, he will be held a trustee for the firm, in the renewed lease, and when the rule is otherwise applicable, it matters not that the new lease is upon different terms from the old one, or for a larger rent, or that the lessor would not have leased to the firm. The law recognizes the renewal of a lease as a reasonable expectancy of the tenants in possession, and in many cases protects this expectancy as a thing of value. I will briefly notice a few of the cases upon this subject. In Holridge v. Gillespie, 2 Johns. Ch. 30, Chancellor Kent says: "It is a general principle pervading the cases, that if a mortgagee, executor, trustee, tenant for life, etc., who has a limited interest, gets an advantage by being in possession, 'or behind the back' of the party interested in the subject, or by some contrivance or fraud, he shall not retain the same for his own benefit, but hold it in trust." That was a case where a lease was assigned as security, and the assignee surrendered it to the lessor and took a new lease for an extended term of years. In Phyfe v. Wardell, 5 Paige, 268, Chancellor Walworth lays down the general rule, "that if a person, who has a particular or special interest in a lease, obtains a renewal thereof from the circumstance of his being in possession as tenant, or from having such particular interest, the renewed lease is in equity considered as a mere continuance of the original lease, subject to the additional charges upon the renewal, for the purpose of protecting the equitable rights of all parties who had any interest, either legal or equitable, in the old lease." That case was followed in Gibbs v. Jenkins, 3 Sandf. Ch. 131, where it was held that one purchasing a leasehold which was subject to a mortgage and contained no covenant of renewal, could not escape the lien of the mortgage by suffering the lease to expire and afterward obtaining a new lease of the premises; that the new lease in such case, though not a renewal, was a continuance of the original lease for the purpose of protecting the rights of the parties interested in the original lease, both legal and equitable. In these two cases church leases were involved, and some stress was laid upon that fact, as the continuance of such leases was expected as a matter of course, without any covenant of renewal. But the fact that they were church leases could make no real difference in the principle upon which the decisions were based. The fact that a renewal or continuance of a lease is more or less certain, can make no difference with the principle; that springs from the fact that the party obtained the new lease from the position he occupied, being in possession and having the good-will which accompanies that, or being connected with the old lease in some way, and thus enabled to take an inequitable advantage of other parties also interested, to whom he owed some duty. In Struthers v. Pearce, 51 N. Y. 357, it was held that when, during the existence of a continuing copartnership of undetermined duration, three of four copartners, without the knowledge of the other, obtained a new lease in their own names, of premises leased and used by the firm, the same became partnership property, and upon dissolution the other partner was entitled to his proportion of the value. In that case the defendants intended to dissolve the copartnership as early as August, and gave written notice on the

17th section of the Statute of Frauds, the plaintiffs produced various letters written by Burdon, in which he treated them as persons interested with himself in the colliery. It was also proved that Burdon had ordered a draft to be prepared, which should declare that the lease was taken (subject to certain previous trusts in favor of Bur-

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18th day of September, 1865, for the dissolution on the thirty-first day of December, following. On the eleventh day of September, the defendants secretly obtained a new lease, in their own names, of the same premises, for a term of five years, to commence May 1, 1866. I think that case is fairly decisive of this. It is true that a period for a dissolution of the partnership had not been fixed when the new lease was taken, but negotiations were pending for its dissolution, and a few days after the new lease was taken, a time for its dissolution was fixed by a written notice. But it can make no difference that the partnership might have been continued by the parties until after the new term commenced. So it might here, if the parties had so willed. There they had the right to dissolve it at any time. The principle which lies at the foundation of the decision of that and all similar cases must be the one above stated, that the defendants in possession took advantage of their position to procure the new lease, and thus deprived the plaintiff of a benefit to which he, with them, was equally entitled. In a note to Moody v. Matthews, 17 Ves. 185, the learned editor says, as a deduction from adjudged cases, that "with a possible exception in favor of a *bona fide* purchaser, it seems to be a universal rule that no one who is in possession of a lease or a particular interest in a lease, which lease is affected with any sort of equity in behalf of third persons, can renew the same for his own use only; but such renewal must be construed as a graft upon the old stock." In Clements v. Hall, 2 De G. & J. 173, where one partner in a mining partnership died in 1847, and the surviving partner thereafter worked the mine without a new lease thereof, claiming to do so for his own benefit, until 1850, when the lessor gave him notice to quit in March, 1851, when he entered into new negotiations with the lessor for a new lease, and obtained one of the greater part of the mine, on terms much more burdensome than those of the old tenancy, it was held that those who claimed under the will of the deceased partner were entitled to a share of the benefit of the new lease. In Clegg v. Fishwick, 1 McN. & G., 294, one of several partners working a mine under a lease died, and the firm business was thereafter carried on for several years between the surviving partners and the plaintiff, widow of the deceased partner. Finally, the old lease expired, and some of the partners took a new lease of the mine without the privity of the plaintiff. It was held that the estate of the deceased partner was interested in the new lease. The lord chancellor says: "The old lease was the foundation of the new lease, the tenant's right of renewal arising out of the old lease giving the partners the benefit of this new lease; at least the law assumes it to be so. Without saying at all what circumstances there may be to interfere with that ordinary right, we know that the rule of equity is that parties interested jointly with others in a lease cannot take to themselves the benefit of a renewal to the exclusion of the other parties interested with them." In Clegg v. Edmondson, 8 De G., Mc N. & G. 787, the managing partners of a mining partnership at will gave notice of dissolution to the rest, and intimated their intention, after the dissolution, to apply for a new lease for their own exclusive benefit, and did so and obtained a lease, and it was held to inure to the benefit of the partnership. See, also, the leading cases of Featherstonhaugh v. Fenwick, 17 Ves. 298, and Keech v. Sandford, 2 Eq. Cas. Abr. 741, and notes to the latter case in 1 Leading Cases in Equity, 32, where the whole doctrine is discussed, and conclusion reached in harmony with the views above expressed. I therefore conclude that it makes no difference that these leases were obtained for a term to commence after the partnership, by its own limitation, was to terminate. I can find no authority holding that it does, and there is no principle sustaining the distinction claimed. The defendant was in possession, as a member of the firm, and the firm owned the good-will for a renewal, which ordinarily attaches to the possession. By his occupancy and the payment of the rent he was brought

don), in trust for Burdon, the plaintiffs, and Kent, in equal shares. To prove the consideration given by the plaintiffs and Kent for their share of the lease, certain entries were read from the partnership books. Upon this evidence, Lord Alvanley held that the trust was legally raised within the meaning of the Statute of Frauds, and he

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into intimate relations with the lessors; he became well acquainted with the value of the premises, and he took advantage of his position during the partnership, secretly to obtain the new leases. He must hold them for the firm." Dwight, C., said upon the questions involved: "The question at issue in this case is whether a member of a commercial partnership, during its continuance, and without the consent or knowledge of his associate, can take a renewal of a lease of property used in the business, in his own name and for his own benefit, the partnership having a definite termination, and the renewal lease commencing at its expiration. The general power of a partner to take a lease of such property for his own benefit must be considered as settled in this court by the decision in Struthers v. Pearce, 51 N. Y. 357. In that case the lease was taken during the existence of the partnership, which was of indefinite duration. No notice had been given of its termination when this lease was taken. The facts presented the case of a lease taken during the existence of the partnership, and to begin in enjoyment during that time. The court expressly distinguished it from the present case, which had then been decided in the Supreme Court. The only point now open for discussion is, whether the fact that, when Read took the renewal of the lease, the partnership had a precise limit, and was to terminate before the lease commenced, is material. Before considering that point it may fairly be claimed that this case comes within the precise decision in Struthers v. Pearce, on a ground not mentioned in the argument. Read, though his lease was not to commence in possession until after the expiration of the original lease, acquired an immediate interest by way of an *interesse termini*. This precise point was decided in Smith v. Day, 2 M. & W. 684, 699; 2 Platt on Leases, 60. This, it is true, is not an estate, but a right. Still it is the subject of grant before entry. 1 Steph. Com. 268; Burton's Real Prop. 18 pl. 61; 2 Crabb's Real prop. 227. If the partnership had acquired this *interesse termini*, it might, as the facts of the case show, have been disposed of for a large sum of money. If the doctrine of Struthers v. Pearce establishes that the partner cannot acquire a lease in his own behalf, to commence while the partnership lasts, by parity of reasoning he cannot obtain an *interesse termini* under the same circumstances. If, however, this view is not correct, the main question must be disposed of. *Can a partner take a lease for himself, to commence in possession after the partnership has expired?* In order to settle this point it is essential to give the subject a more full examination than was requisite in Struthers v. Pearce, and to consider more at large the principles on which this branch of the law rests. It grows out of the relation of trust and confidence between partners, and is a branch of the rule that a trustee cannot profit from the estate for which he acts. It largely has its roots in a principle of public policy, as shown in one of the early decisions. Keech v. Sandford, Sel. Cas. in Chan. 61; Griffin v. Griffin, 1 S. & L. 352, per Lord Redesdale. The general rule is so well settled that it would be a waste of time to refer to authorities. The text-writers on the law of partnership, without exception, assert the applicability of this rule of law to partnership transactions. Lindley on Part. 495; Story on Part., §§ 174, 175; Parsons on Part., §§ 224–226; Collyer on Part., §§ 281, 282. The special rule that a trustee cannot take, for his own benefit, a renewal of a lease which he holds in trust, is enforced in a great number of cases. The principle on which it rests is nowhere more fully or clearly stated than in the argument of Sir Francis Hargrave in Lee v. Vernon, 5 Brown's Parl. Cases, 10th Eng. ed., 1803. Although the passage is somewhat long, it is quoted as shedding much light on a subject, the principle of which has, in course of time, become somewhat obscure. He said: "It has long been an established practice to consider those who are in possession of lands under leases for lives or years as having an interest beyond the subsisting term, and this in

declared that Burdon was a trustee as to one-fourth part of the Hebburn colliery, for himself and the other partners in the bank. Upon appeal, Lord Alvanley's decree was affirmed by Lord Loughborough. But he proceeded on different grounds. He considered that the same evidence which had been adduced to raise a trust in Burdon for him-

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terest is usually termed the tenant right of renewal, which, though according to language and ideas strictly legal, is not any certain, or even contingent estate, but only a *chance*, there being no means of compelling a renewal, yet is so adverted to in all transactions relative to leasehold property, that it influences the price in sales, and is often an inducement to accept of it in mortgages and settlements. This observation is more especially applicable to leases from the crown, the church, colleges, or other corporations, and, indeed, from private persons, where the tenure is of ancient date. * * * This 'tenant right' of renewal, as it is termed, however imperfect or contingent in its nature, being still a thing of value, ought to be protected by the courts of justice, and when those who are entitled to its incidental advantages, whether by purchase or other derivation, are disappointed of them by fraud, imposition, misrepresentation, or unfair practice of any kind, it is fit and reasonable that this injury should have redress. Accordingly, courts of equity have so far recognized the tenant right of renewal as frequently to interpose in its favor by decreeing that new or *reversionary* leases gained by *means* or *supposition* of the tenant right of renewal, should be for the benefit of the same persons as were interested in the ancient lease, and those who procured such new leases, and were legally possessed of them, should be trustees for that purpose. There is a great variety of authorities on this head, but the cases which have hitherto occurred have been principally of two kinds, some being cases of persons not having any beneficial interest in the old lease, as guardians and executors, and others being cases of persons having only partial and limited interests, as tenants for life, mortgagees and mortgagors, and in cases of both descriptions, those who have procured a new lease in such situations have been uniformly declared trustees for the persons beneficially interested in the ancient lease, either wholly or in part, according to the particular circumstances, the court ever presuming that the new lease was obtained by means of a *connection with* and a *reference to* the interest in the ancient one, without in the least regarding whether the persons renewing intended to act as trustees, or for their own emolument." From this exposition, so luminous and judicial in its tone, which is fully sustained by the authorities, it is clear that the rule under consideration is not confined to crown, church or college leases, but embraces those of every kind. The same principle appertains to all. The *cestui que trust* has a right to the *chance* of renewal. Though this is termed a "tenant right" as between the lessee and the landlord, that is a mere phrase. It is a hope, an expectation, rather than a right. Such as it is, the trustee shall not take it to himself, but if it results in any substantial benefit he shall hold it for his beneficiary. Phyfe v. Wardell, 5 Paige, 268; Bennett v. Van Syckel, 4 Duer, 162; Gibbes v. Jenkins, 3 Sandf. Ch. 130; Davoue v. Fanning, 2 Johns. Ch. 252; Armour v. Alexander, 10 Paige, 573; Dickinson v. Codwise, 1 Sandf. Ch. 226. Some of these were instances of church or other corporation-leases, and others were not. In no case has it been held that the rule is confined to these, as it certainly cannot be on principle. The whole doctrine is extended to the case of partners in Featherstonhaugh v. Fenwick, 17 Ves. 298; Clegg v. Edmonson, 8 De G. M. & G. 787; Clements v. Hall, 2 De G. & J. 173; Clegg v. Fishwick, 1 Mc N. & G. 294; Struthers v. Pierce, *supra*. The principle cannot depend on the fact whether the lease is made to begin during the continuance of the partnership or at its close. Once admit the general principle, and it must result in this, *while the relation lasts*, one partner cannot clandestinely and exclusively profit by the trust relation. There may, perhaps, be cases where the act is openly done by the trustee and acquiesced in by the beneficiary that would admit of different considerations. It is not now necessary to decide that in no case can a partner take a lease for his own benefit. What is now to be decided is, whether he can

self, the plaintiffs, and Kent, was conclusive of a partnership existing between the same parties in the colliery. That partnership being established, he held, as a necessary consequence, that Burdon, having

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do so behind the back of his associate and without his consent. The bad consequences of making any such distinction as the defendant seeks to maintain in the present case is easily shown by a reference to the relation of a guardian and his ward. A guardian, we may suppose, holds a lease in his official character which is to expire at his ward's majority. While the *relation* of guardian and ward exists, he takes a lease to himself to commence at the termination of the existing lease. Could that be sustained? Has he not profited by the trust relation? When he takes a lease to himself, can a tenable distinction be taken between one commencing immediately, and one beginning at a future day, even though that day be postponed until the trust relation expires? The sound rule is, that he cannot make any profit to himself from a secret transaction *initiated* while the relation of trustee and *cestui que trust* exists, no matter when it springs into active operation. It must never be forgotten that, on general principles of the law of contracts, his *right* to the lease, as between him and his landlord, commences as soon as he has made his agreement for it. This is an immediate subject of sale, and if the trustee can hold it, he will be allowed to profit by the trust relation which, as has been shown, he cannot do. The *cestui que trust* may accordingly say: "All the value of this lease you hold in trust for me. Grant that it is not yet an estate but only a right — make it over to me in the condition in which you hold it." While no case has been found presenting the precise facts in the case at bar, the principles which should govern it may be derived from the result in Featherstonhaugh v. Fenwick, *supra*; Clegg v. Edmondson and Clegg v. Fishwick, *supra*. In the first of these cases, the partnership was for an indefinite period, and might be dissolved at the pleasure of either party, on notice. It was dissolved November 22d, 1804, the day on which the lease expired. Two of the partners, without communication with the plaintiff, had applied for a renewal of the lease, and obtained it before giving notice of the dissolution of the partnership. The new lease was to run for eight years from the expiration of the old one. On October nineteenth, they gave notice to dissolve the partnership. The court held that the new lease belonged to the partnership, and was assets of the firm. Much stress was laid on the fact that the transaction was a clandestine one, and the court thought if notice had been given the case might have admitted of different consideration. The case is not in all respects parallel in its facts with the case at bar, for, at the time the lease was taken, the period for the termination of the partnership had not been fixed, and only became subsequently ascertained by notice. In the case of Clegg v. Edmondson, which was also an instance of a partnership to be dissolved at the pleasure of the parties, the effect of a notice to dissolve, preceding the execution of the renewal lease, came before the court. In that case, five managing partners had determined to dissolve their partnership, and had communicated their intent in June, 1846, and their determination to take a renewal to themselves. To this two other partners objected, claiming that the renewal should be for the benefit of all. Formal notice of dissolution was given in July, to take effect on September thirtieth. On the succeeding eleventh of December, a new lease was executed for twenty-one years to the managing partners, to take effect from September 29, 1846. The defendants endeavored to distinguish this case from that of Featherstonhaugh v. Fenwick, on the ground of the openness and fairness of the transaction. The court, however, held that the mere communication of an intent on the part of the managing partners to apply for a lease for their own benefit was not sufficient to give them an exclusive right to it. This case, on the point of time, is stronger than the case at bar, for the new lease was taken after the partnership was dissolved, though some stress was laid upon a point which does not appear here, that the act was that of managing partners. On principle, in many cases, it is of but little consequence whether the partnership is dissolved or not before the renewal, since, if the former partners become tenants in common the result is the same. Clements v. Hall, 2 De G. & J. 173; Horne v. Fonda.

taken the lease of the one-fourth part for the purposes of the colliery, took it as trustee for himself and his copartners in that colliery, by operation of law, uncontrolled in any manner by the statute.

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5 Johns. Ch. 388; Baker v. Whiting, 3 Sumn. 475, 495. The case of Clegg v. Fishwick is still nearer to the one under consideration. In this instance the renewal lease was obtained during the existence of the partnership, and the lease commenced at its expiration. This lease was declared to be held in trust for the firm. Without further collation of authorities the fair deductions from the principles on which they rest may be summed up as follows: 1. A trustee holding a lease, whether corporate or individual, holds the renewal as a trustee, and as he held the original lease. 2. This does not depend upon any right which the *cestui que trust* has to the renewal, but upon the theory that the new lease is, in technical terms, a "graft" upon the old one; and that the trustee "had a facility," by means of his relation to the estate, for obtaining the renewal, from which he shall not personally profit. 3. This doctrine extends to commercial partnerships, and one of several partners cannot, while a partnership continues, take a renewal lease clandestinely, or "behind the backs" of his associates, for his own benefit. It is not material that the landlord would not have granted the new lease to the other partners, or to the firm. 4. It is of no consequence whether the partnership is for a definite or an indefinite period. The disability to take the lease for individual profit grows out of the partnership relation. While that lasts the renewal cannot be taken for individual purposes, even though the lease does not commence until after the expiration of the partnership. 5. It cannot necessarily be assumed that the renewal can be taken by an individual member of the firm, even after dissolution. The former partners may still be tenants in common; or there may be other reasons of a fiduciary nature, why the transaction cannot be entered into. The authorities cited on behalf of the defendant do not disprove these conclusions. In Lee v. Vernon, *supra*, there was no trust. The question arose between a stranger to the lease and the claimant. The point made by the plaintiff was, that the "tenant right" of renewal had become strictly a right, so that even a stranger could not take a renewal and hold it for his own benefit. It was an extraordinary claim, having no foundation in principle, and was rejected. In Van Dyke v. Jackson, 1 E. D. Smith, 419, the party had made a special contract with his partner to abandon the *place* where the business was carried on. The case turned on the special contract to leave the business in the hands of the other party. Musselman's Appeal, 62 Penn. St. 81, does not raise the question. It was not sought there to charge a partner with the value of a renewal lease which he had taken to himself during the existence of the partnership, but rather with that of the good-will as it existed after the partnership was dissolved. In fact, the place where the business was carried on was sold for the benefit of the firm, and it was held in substance, that the good-will had been realized in the enhanced value of the property sold. It is said, in the present case, that Read was not authorized by the articles of partnership, to contract for Mitchell after the expiration of the firm; and that, therefore, Mitchell cannot take advantage from the renewal lease. The answer is, that he made the contract while the firm was in existence, and Mitchell may adopt and ratify it. The objection also proves too much, as it applies to all the cases in which the partner, acting clandestinely, has been declared a trustee. In Phillips v. Reeder, 18 N. J. Eq. 95, one of the partners, R, prior to the partnership, owned the lease, exclusively, of certain stone quarries. He entered into a partnership with P for three years, and so much longer as R should continue lessee of the quarries. In the lease there was a covenant of renewal at the option of R. He having declined to renew, it was held that the partnership expired; or, in other words, that R was under no obligation to renew, and thus to continue the partnership. There could be no pretense in this case that the doctrine under review applied, since the original lease did not itself belong to the firm. It was the private property of one of the partners, which he was under no obligation to preserve

Good-will.

SEC. 117. It will be useful, in this case, to make a few remarks on the interest of partners in the *good-will.* The term "good-will" is used in two distinct senses. It is applied either to an advantage arising from the fact of sole ownership simply, without reference to other

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for the firm's benefit. In Achenson v. Fair, 3 Dr. & War. 512, the point decided was, that the doctrine was not to be extended to *additional* lands purchased by trustee; in other words, the rule was fully recognized, but nothing was to be governed by it except that which could be fairly regarded as a graft on the former lease. In Nesbitt v. Tredennick, 1 Ball & B. 29, 48, a mortgagee, not in possession, obtained a renewal, the original lease having been forfeited, both in law and equity, for non-payment of rent. Here there was no violation of trust. The rule under discussion was fully recognized, but its application to the existing case denied. The court said: "In all the cases upon this subject, either the party by being in possession obtained the renewal, or it was done behind the back, or by some contrivance in fraud of those who were interested in the old lease; and there was either a remnant of the old lease, or a tenant right of renewal on which a new lease could be engrafted." There could be no plainer recognition of the general principle maintained by the plaintiff In Maunsell v. O'Brien, 1 Jones' Exch. 184, the facts were that there was an under tenant who took a new lease from the original landlord without advising his own immediate landlord. The court held that there was no fiduciary relation between these parties. The principle was fully admitted, but the facts did not raise a case for its application. Joy, C. B., said: "It is admitted that there is no authority which can be produced where such a lease as the present has been declared to be a trust; and that we are now called upon *to go further than any decision has ever gone before,* and to make an authority for future decisions. We are called upon to do this on what are called the principles of a court of equity; namely, that where a person is clothed with a fiduciary character, and in that character becomes possessed of an interest in land, held under a determinable lease, any acquisition by him of a new interest in those lands is a continuation of the old lease, and a 'graft' upon it. This, however, is the first time that I have heard it asserted that if an under tenant obtains a lease of his lands from the head landlord without consulting his own immediate landlord, that lease is a trust for his immediate landlord. because that person had a tenant right of renewal. *But there is no fiduciary character imposed on an under tenant,* in reference to his landlord, by the creation of the relation of landlord and tenant, which would entitle the plaintiff to the relief he seeks, on the ground of his having a tenant right of renewal. A *cestui que trust* is entitled to the benefit of a new lease, obtained by a trustee by means of a tenant right of renewal, which the latter became entitled to as trustee, but there is no such person in the present case." This language plainly shows that the court was but following in the wake of Lee v. Vernon, and holding that the doctrine of tenant right of renewal, and that the new lease is a graft on the old stock, are not to be extended to strangers, but confined to persons acting in a fiduciary character. The only other case that will be noticed is Anderson v. Lemon, 8 N. Y. 236, which holds that one partner may in good faith purchase and hold, for his own use, the *reversion* of real estate occupied by the copartnership, under a lease for years, with the qualification that if he secretly makes such purchase in his own name while the other partner with his concurrence is negotiating with the owner to obtain the property for the use of the firm, the purchaser will be declared a trustee. This decision carefully admits the general doctrine, but considers it not applicable to the case where one of the partners purchases in good faith the landlord's interest, as distinguished from taking a new lease. It is simply a case of an exception to a general rule. It can scarcely be considered as a decision in favor of a partner's right to purchase, since he was under the circumstances a trustee. Should the question be distinctly presented, it will deserve consideration whether the view in Anderson v. Lemon, that one partner may even in good faith buy the reversion for himself, is correct. There is great cogency in the remarks of Sir

persons; or as an advantage arising from the fact of sole ownership to the *exclusion* of other persons. The latter species of good-will is founded on special contract, and is a commodity upon which a valuation may be fixed. Therefore, the interest of an outgoing partner in such good-will may be valued and assigned with the rest of the effects

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William Grant, that the partner may in this way intercept and cut off the chance of future renewals and consequently make use of his situation to prejudice the interests of his associates. Randall v. Russell, 3 Meriv. 190, 197. There appears to be no direct decision allowing the partner thus to purchase, and the right to do so is treated as doubtful by approved text writers. 1 Lead. Cas. Eq., 3d Am. ed., 43, 44, marg. paging. The application of the principles discussed in this opinion to the case at bar is obvious. The plaintiff and defendant were owners, as partners, of a lease of premises in the city of New York, on which a hotel business was carried on, yielding a large profit. These consisted of Nos. 1111, 1113, 1115 Broadway, and Nos. 1 and 3 West Twenty-fourth street. The leases of the Twenty-fourth street property were made directly to them, November 17th, 1866. The Broadway property, through a series of transactions not necessary to be detailed, became vested, according to the fair construction of the various agreements respecting it, in the partnership. The leases expired on the same day, May 1st, 1871, when the partnership terminated. While the partnership continued, both parties thought it necessary to provide a place for a bar room, and with this view the premises No. 3 West Twenty-fourth street were connected with the rear of the premises fronting on Broadway, known as the 'Hoffman House,' and the first story fitted up and used for that purpose. A considerable expenditure was made with this view, and large profits were realized, as the course taken was judicious. While all the leases owned by the firm were still in existence, viz., April 20th, 1869, and on January 21st, 1869, the owners of the hotel property made leases to the defendant, to commence from May 1st, 1871, and to continue as to part of the property for five years, and as to another portion for ten years from that date, at specified rents. The leases were obtained by Read without notice to the plaintiff, and he now claims that they are his exclusive property. They are of great value, and the hotel at the commencement of the action, March, 1870, was still in operation. The furniture, fixtures, stock, etc., were valuable, and the business carried on was profitable. The case has in it every element of the equity which has been already considered. The partnership is undisputed; the leases were in existence when the renewal was made. The act of renewal was clandestine, or occurred 'behind the back' of the plaintiff. It took place while the partnership was in force. The right to renewal was immediate and vested in Read during the partnership's continuance. The property belonging to the firm, and which will be prejudiced by the prospect of disposing of it at a sacrifice at the close of the existing lease, is large and valuable. Common justice and a due regard to rules of public policy demand that the renewal lease should be declared to belong to the firm, and that the defendant should be required to account to the plaintiff for his portion of its value. The clauses in the leases to Read that there shall be no assignment without the consent of the landlord do not stand in the way of the plaintiff's relief. This does not consist in an assignment in the ordinary sense of that term. On the contrary, the ground of relief is that the defendant acted inequitably when he entered into the contract; that he must therefore be considered as a trustee, while the assignment to the firm simply follows as an incident to the giving complete effect to the trust relation declared by the court to exist between the parties. Featherstonhaugh v. Fenwick, *supra*." See, also, upon the same question, Menlove v. Ball, 2 Vern. 84; Rakestraw v. Brewer, 2 P. Wms. 511; 1 Dow, 269; 1 Bro. Ch. Cas. 198; 1 B. & B. 46, 47; 2 id. 290, 298; Horne v. Fonda, 2 Johns. Ch., 388, 407; Baker v. Whiting, 3 Sumn. 475, 495; Dickinson v. Codwise, 1 Sandf. Ch. 214, 225; Wood v. Perry, 1 Barb. Ch. 115, 134; Bennett v. Van Syckel, 4 Duer, 462; Armour v. Alexander, 10 Paige, 572; Greenlaw v. King, 5 Lond. Jur. 18, 1841; Hudson v. Wallace, 1 Rich. Eq. 2, 4, 7; Clements v. Hall, 2 De G. & J. 173; Leach v. Leach, 18 Pick.

to the remaining partner.[1] A good-will of this kind, being a valuable addition to a trade, and arising, as it does, in contract, must be created by some appropriate words. It cannot be implied from the general words, stock, effects, etc. Therefore, where one partner had agreed to sell to his copartner "his inheritance in their nursery for

68; 3 Meriv. 190, 347; Raw v. Chichester, 2 Arm. 715; Anderson v. Leman, 4 Sandf. 552; 8 N. Y. 236; Moody v. Matthews, 7 Ves. 185; Cook v. Collingridge, Jacobs, 607, 619; Brown v. De Tastet, id. 284; Alden v. Fournacie, 3 Swanst. 489; Lafleur v. Naglee, 9 Cal. 662; Lacy v. Hall, 37 Penn. St. 360; Pickering v. Vowles, 1 Bro. Ch. 197; Colegrave v. Manby, 6 Madd. 72; Luckin v. Rushworth, L. R., 2 Ch. 116; Darrell v. Whitchot, 2 id. 59. The right of the party in whose favor the trust is declared to have the benefit of the renewal, does not depend upon the fact whether by custom, courtesy, or contract there was a right of a renewal. Holbridge v. Gillespie, 2 Johns. Ch. 30; Clegg v. Edmonston, 8 De G., M. & G. 787: Luckin v. Rushworth, 2 Ch. 113; Darrell v. Whitchot, id. 59; Huson v. Wallace, 1 Rich. Eq. (S. C.) 2-7; Clements v. Hall, 2 De G. & J. 173; Clegg v. Fishwick, 1 McN. & G. 294; Phyfe v. Wardell, 6 Paige (N. Y.), 268; Bennett v. Van Syckel, 4 Duer (N. Y.), 462; Leach v. Leach, 18 Pick. (Mass.) 68.

[1] *Good-will.*—Kennedy v. Lee, 3 Mer. 441. The good-will of a trade established in a particular place, *means the sum which a person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on.* Churton v. Douglass, Johns. (English) 174; Austin v. Bays, 2 De G. & J. 626; and the benefits and advantages that have been acquired by the old firm in carrying on its business, *whether connected with the premises or with the name of the firm,* but not the right to use the firm name. Bond v. Weborne, 6 W. N. 248. A business or profession may also acquire a special value from particular or individual skill, as in the case of professional men. This is treated as an asset, and so far as it is salable must be sold if any partner requires it. Bradbury v. Dickens, 27 Beav. 53. There is no survivorship of good-will on the death of a partner. Wedderbern v. Wedderbern, 22 Beav. 104; Davies v. Hodgson, 25 id. 177; Smith v. Everett, 27 id. 446; or upon dissolution, but it must be treated like any other asset, Mellerish v. Keen, 28 Beav. 453; but where the good-will has no separate value apart from the premises where the business is carried on, and they have become the property of the surviving partners, a legatee of the mere good-will of the deceased partner cannot maintain a bill against the surviving partners to obtain the benefits of his legacy. Robertson v. Quiddington, 28 Beav. 36; nor if a partner agrees to leave at the expiration of the partnership can he claim an accounting from his copartners who continue the business at the same place for the good-will. Van Dyke v. Jackson, 1 E. D. S. (N. Y.) 119. If it is of no value, the court will not regard it either by ordering its sale or the payment of a compensation for it. Davis v. Hodgson, *ante,* whether it belongs to the survivor or not. Lord Eldon doubted in Crawshay v. Collins, 15 Ves. 226, but it is now regarded as assets, and is to be sold as such upon the winding up of the partnership; Banks v. Gibson, 34 Beav. 568; Johnson v. Hellsley, 34 id. 65; and is taken into account in valuing the stock in trade; Case v. Abeel, 1 Paige's Ch. (N. Y.) 401; and a surviving partner, or one carrying on the business after dissolution, with the capital of the other partner, must not only account for the profits made upon the capital, but also for the good will. Mellerish v. Keen, 27 Beav. 241; Macdonald v. Richardson, 1 Giff. Ch. 90. In Dayton v. Wilkins, 17 How. Pr. (N. Y.) 511, the plaintiff and defendant were formerly partners in the publication of *Porter's Spirit of The Times.* The property belonged to the plaintiff. Upon dissolution it was claimed that the good-will belonged to the firm, and the court held that it was as much partnership property as the furniture or debts due the firm, and must be sold for the benefit of the firm, and ordered a sale by the receiver, but refused to enjoin the defendant from publishing another paper under the same title. One partner may sell his interest in the good-will to another partner, and after such sale he will be enjoined from carrying on the same business upon the same premises; Turner v. Major, 3 Giff. 449; or from carrying on the same identical

10,000*l.*," and the other partner in answer to the proposal wrote as follows: "I agree to give you 10,000*l.*, as you mention, for your moiety of all your partnership premises, stock, business, and concern," Lord Eldon held that the purchaser had no right, according to his contract, to claim any good-will in the trade, in addition to the part-

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business *in the same name* on adjoining premises; Charlow v. Douglass, 1 Johns. Ch. (N. Y.) 188; but not unless he claims to be carrying it on as successor to the firm. White v. Jones, 1 Robt. (N. Y. Sup. Ct.) 331. If the firm owns a lease, the good-will passes upon its sale to the person purchasing; Dougherty v. Van Nostrom, 1 Hoff. Ch. (N. Y.) 701; and a sale by a receiver carries the good-will to the purchaser; Martin v. Van Schaick, 4 Paige's Ch. (N. Y.) 480; but the mere sale of the good-will of a business does carry with it the right to use the vendor's name in carrying on the business. Howe v. Searing, 10 Abb. Pr. (N. Y.) 264. It seems that there is no good-will applicable to any business of trust and confidence, as of attorneys, physicians, or that class of business, the value of which depends on the *delictus personæ* of the partners. Austin v. Bags, 2 De Gex & J. 636. See Cruess v. Fessler, 39 Cal. 337. The good-will ceases upon the termination of the partnership by limitation. Mussleman's Appeal, 62 Penn. St. 83. Mr. Lindley in commenting upon this subject, p. 710, says; "The term 'good-will' can hardly be said to have any precise signification. It is generally used to denote the benefit arising from connection and reputation, and its value is what can be got for being able to keep that connection and improve it. Upon the sale of an established business its good-will has a marketable value, whether the business is that of a professional man or any other person. Potter v. Commrs., 11 Ex. 147; Cooper v. Hood, 26 Beav. 293; but it is plain that the nature of the good-will of any business to a purchaser depends, in some cases entirely, and in all very much, on the absence of competition on the part of those by whom the business has been previously carried on. When a partnership is dissolved, the question arises what is to be done with the good-will? Now it has been seen that there is no obligation on the part of any of the partners to retire from business merely because the partnership has been dissolved. On the other hand, in the case of death, the surviving partner is not under any obligation to carry on the old business, so as to preserve its good-will until the final winding up of the partnership affairs, Lewis v. Langdon, 7 Sim. 425; and yet, unless the good-will is preserved, and unless a person purchasing it can be secured against rivalry on the part of the old partners, it is obvious that the good-will can have little, if any, marketable value. See Davies v. Hodgson, 25 Beav. 177, where the good-will was treated as valueless on this very ground. Whatever value, however, it has must be considered as belonging to the firm, unless there is some agreement to the contrary; and it follows from this that if a firm is dissolved, and no agreement has been come to respecting its good-will, such good-will must be sold for the benefit of all the partners. Wedderburn v. Wedderburn, 22 Beav. 104. In the event of dissolution by death, it has been said that the good-will survives. But this is not correct, if it is meant that the value of the good-will, as such, belongs to the survivor. It undoubtedly may happen that the survivor may obtain the benefit of the good-will without paying for it; for he is at liberty (unless restrained by agreement) to carry on business on his own account, Farr v. Pearce, 3 Madd. 74; Davies v. Hodgson, 25 Beav. 177, and, it is said, in the name of the late firm. See Webster v. Webster, 3 Swanst. 490; and Hammond v. Douglass, 5 Ves. 539. But, see *contra*, Smith v. Everett, 5 Jur. (N. S.) 1332. The executor of the deceased partner has no right to do this, Lewis v. Langdon, 7 Sim. 421. Under these circumstances, if, on the death of a partner, the good-will is put up for sale, it will produce nothing if it is known that the surviving partner will exercise his rights. He will therefore require all the benefit of the good-will; but he does not acquire it by survivorship, as something belonging to him exclusively, and with which the executors of the deceased partner have no concern; for if he did, he might sell the good-will for his own benefit, and this he cannot do. See Smith v. Everett, 5 Jur. (N. S.) 1332; Wedderburn v. Wedderburn, 22 Beav. 104. Hammond

nership property which was the subject of it, except what was the necessary effect of his acquiring the sole ownership in the property; certainly not such as to preclude the seller from carrying on the same trade, where and when, and with whom he pleased.[1] The former species of good will is clearly not founded in special contract, but in a combination of accidental circumstances, as the existence and celebrity of the house, the skill and affluence of the trader, or the prejudices or necessities of the customer. This, therefore, is not a tangible interest. It is not a commodity on which a specific value can be placed, or for which a definite allowance can be made.[2] Therefore,

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v. Douglas, 5 Ves. 539, is not consistent with the statement in the text, but this case has been much doubted, and is against all principle. When, therefore, it is said that on the death of one partner the good-will of the firm survives to the other, what is meant is, that the survivor is entitled to all the advantages incidental to his former connection with the firm, and that he is under no obligation, in order to render those advantages salable, to retire from business himself. See Farr v. Pearce, 3 Madd. 74; Davies v. Hodgson, 25 Beav. 177. Again, when a partner retires not only from the firm, but from the business carried on by it, the continuing partners will acquire the benefit arising out of the good-will for nothing, unless it has been agreed that they shall pay for it; for they retain possession of the old place of business, and they continue to carry on that business under the old name. This, in fact, secures the good-will to them, and they cannot be compelled to pay separately for it, unless some agreement to that effect has been entered into; and an agreement that the continuing partners shall take the share of the retiring partner in the property of the partnership at a valuation, does not entitle the retiring partner to have the good-will taken into account. See Hall v. Hall, 20 Beav. 139; Kennedy v. Lee, 3 Mer. 452. When an agreement is entered into, to the effect that a retiring partner shall be entitled to be paid for his interest in the good-will of the firm, it is material to determine whether the firm is to be regarded as of definite or of indefinite duration. For upon this will depend the amount to be paid to the retiring partner. In the recent case of Austen v. Boys, 24 Beav. 598, affirmed 2 De G. & J. 626, a partnership was entered into for seven years, with power for any partner to retire. In case of retirement the retiring partner was to be paid by the continuing partners the fair market value of his interest and share in the partnership business, and in the good-will thereof. Two days before the expiration of the seven years one of the partners retired, and the question arose whether, in ascertaining the value of his interest in the good-will of the business, the partnership business was to be considered as continuing, or as ending at the expiration of the seven years. It was held that the good-will to be valued was the good-will of a business ending with the seven years, and that therefore the retiring partner's interest in it was nominal merely. Good-will is generally valued at so many years' purchase on the amount of profits."

Trade-mark. — A partnership trade-mark is property and salable as such. Leather Cloth Co. v. Am. Leather Cloth Co., 11 H. L. Cas. 523; Hall v. Barrows, 33 L. J. Ch. 204; and where one partner brings a trade-mark into the business, in the absence of any special agreement, it thereby becomes partnership property. Bury v. Bedford, 10 Jur. (N. S.) 503.

[1] Kennedy v. Lee, 3 Mer. 441; and see Farr v. Pearce, 3 Madd. 47.

[2] In Crutwell v. Lye, 1 Rose, 123, it was held, that the circumstance of the assignees having sold the good-will and interest of the bankrupt's trade of a carrier did not preclude him from setting up the trade again, provided he did not hold himself out as carrying on the *same* trade as had been purchased. The same doctrine was held in Charton v. Douglass, 1 Johns. Ch. (N. Y.) 188. In that case it was held that in order to warrant an injunction, the business must be *identical*. But in White v. Jones, 1 Robt. (N. Y. S. C.) 331, the plaintiff and

upon the death of one partner, it is not stock of which the executor of a deceased partner can compel a division, unless he can also compel a sale of the whole premises and stock, as in the case of a partnership at will. Under these latter circumstances, however, the good-will would accompany the rest of the stock, and might create some additional speculative value in the mind of a purchaser.[1] Accordingly a court of equity, in this and similar cases, would so treat it that its value should be felt and appreciated by all parties interested in the concern; and, therefore, in decreeing a sale of the entire partnership, would order the sale to be so adjusted as to give full effect to the value of the good-will. This will be shown more minutely in a future chapter. The remarks which have just been made are solely applicable to the good-will of a mercantile business. In a business of a professional nature, as that of an attorney or apothecary, the good-will attaches to the person, rather than to any other subject. Such part of it as is not personal is so small, that equity will not regard it as matter of sale, even where the partnership is without articles. It seems clear, therefore, that, upon the death of one partner, the good-will in these cases will survive to the survivor. Sir John Leach was of this opinion in the case of Farr v. Pearce.[2] There it was unnecessary to determine the general question, whether the good will of a professional partnership, without articles, survives. But his Honor said that if the general question had arisen, he thought it would have been difficult to maintain that, where a partnership is formed between professional persons, as surgeons, and one dies, the other is obliged to give up his business, and sell the connection for the joint benefit of himself and the estate of his deceased partner. That when such partnerships determine, unless there be stipulations to the contrary, each must be at liberty to continue his own exertions; and where the determination is by the death of one, the right of the survivor cannot be affected. "Such partnerships," he said, "were very different from commercial partnerships." Upon the same principles,

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defendant were formerly partners. The plaintiff purchased the defendant's interest in the business, including the good-will of the entire business. He established himself in a similar business in the vicinity, and upon a bill to enjoin him from so doing, the court held that the sale did not divest him of either his legal or equitable right to carry on a similar business *in the vicinity provided he did not claim to be carrying on the business as the successor of the firm.*

[1] In Hammond v. Douglass, 5 Ves. 539, Lord Loughborough is reported to have said that, upon a partnership without articles, the good-will survives, and a sale of it cannot be compelled by the representative of a deceased partner. But this *dictum* is contrary to general principles. See 15 Ves. 224.

[2] 3 Madd. 78.

Sir John Leach held, in a recent case, that the good will in a business of a personal nature is not assets in the hands of an administrator. A, a country attorney, having died intestate, B, a London attorney, and a friend of the family, with the consent of A's widow, took out letters of administration to A's estate. It was then agreed between B and the widow, that B should carry on A's business of attorney, until A's son should come of age, at which period the latter was to take it upon himself. B accordingly conducted the business for the time agreed upon at his own expense, paying the widow half the profits. Upon A's son coming of age, B left the concern. A's son afterward becoming insolvent, one of his creditors filed a bill against B for an account of the profits of the concern during the time it was in his hands, insisting that a sum of money was due from B to A's estate, in respect of the good will of A's business, and charging maladministration on the part of B. But Sir J. Leach, M. R., dismissed the bill, on the ground that the good-will of a trade of a personal nature, as that of attorney, was not a subject of administration.[1]

Effect of death upon interest of deceased partner in stock.

SEC. 118. We have seen that, upon the death of one of several partners, his share devolves on his personal representatives as tenants in common with the surviving partners. So, in other cases, where the partnership becomes dissolved by the extermination of any one of the partners, his assignees or representatives will become tenants in common with the remaining partners, liable however to all the equities of the partner in whose place they stand. When, therefore, under an execution against one partner, the sheriff seizes and sells that partner's undivided moiety of the partnership goods, the vendee will be tenant in common with the solvent partner, but will, in equity, receive no fruit from the execution, except what shall be found due to him on the balance of the partnership accounts.[2] In the same manner, if one partner buy goods for the partnership, and become a bankrupt, and his vendor stop the goods *in transitu*, the vendor becomes tenant in common of the goods with the solvent partner, subject to the partnership accounts.[3] So, also, where one partner becomes bankrupt, his assignees are tenants in common with the solvent partner, of an undivided moiety of the partnership effects, sub-

[1] Spicer v. James, Rolls, M. T. 1830.
[2] Heydon v. Heydon, 1 Salk. 392; Chapman v. Koops, 3 B. & P. 289; West v. Skip, 1 Ves. 242.
[3] Salomons v. Nissen, 2 T. R. 674.

ject to the partnership accounts; and they can retain nothing but what shall be found due on the balance of those accounts.[1]

The interest of each partner is his share of the partnership assets after all the obligations of the firm are discharged.[2] Therefore an executor, heir or private creditor of one partner can claim nothing except such partner's share in the surplus remaining after all the firm liabilities are paid.[3] And if an executor appropriates any part of the partnership assets, he may be compelled to restore them or their value to the survivors. Thus, in Kelley v. Greenleaf, 3 Story (U. S. C. C.), a bill was brought by one partner against the representatives of his deceased partner, who, without his knowledge and consent, had appropriated certain partnership funds to the purchase of real estate, upon which there was a certain mortgage. Held that a decree should be rendered in favor of the plaintiff, to dispose of the real estate under a master's sale, and apply the proceeds, first to the discharge of the mortgage, and the residue to the discharge of the debt due from the deceased partner to the partnership.

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[1] West v. Skip, *supra*.

[2] Harrison v. Sterry, 5 Cr. (U. S.) 289; U. S. v. Hack, 8 Pet. (U. S.) 271; Lyndon v. Gorham, 1 Gall. (U. S.) 367.

[3] U. S. v. Williams, 4 McL. (U.S.C. C.) 236; Gilmore v. N. A. Land Co., Pet. (U. S. C. C.) 460.

CHAPTER VI.

PARTNERS' INTEREST IN THE STOCK.—(*Continued.*)

SEC. 119. Of the distribution of interest.
SEC. 120. Rule in Peacock v. Peacock.
SEC. 121. When one furnishes capital and another services.
SEC. 122. Broker participating in profits.
SEC. 123. Summary.
SEC. 124. Intention of parties controls.
SEC. 125. Power of partners over stock.
SEC. 126. Effect of seizure in foreign country.
SEC. 127. Rights of assignee of partner.

Of the distribution of interest.

SEC. 119. When the respective shares of the partners in the stock and capital are to be ascertained, a necessity usually arising on a dissolution, it will be essential in the first place, to know in what manner the respective *interests* of the partners are distributed, either by virtue of their own agreement, or by operation of law. This will not be difficult where one partner has brought to the joint concern real property, the other, personal property; or where both have provided stock of the same nature in certain shares; or where one has provided stock *in specie*, the other, capital. And in all these cases where it does not appear what is the precise amount of the respective shares of the partners, the presumption is that they are entitled equally.[1] But suppose one partner to have contributed labor only, sharing the profits, would he, in default of partnership articles, be adjudged a partner in the original capital? In all doubtful cases this question must be answered by a jury, and their verdict must depend upon whether they think with the civilians, *operam pro pecuniâ valere.*

Rule in Peacock v. Peacock.

SEC. 120. In Peacock v. Peacock,[2] which was an issue out of chancery, a son was admitted into partnership with his father, contribut-

[1] Farrar v. Beswick, 1 M. & Rob. 527. It appears that such a presumption is not admitted in Scotland. Thompson v. Williamson, 7 Bligh (N. S.), 432.

[2] 2 Camp. 45; 16 Ves. 56.

ing his labor but no capital; and the jury held that he was entitled to a share of the profits only, and of these only to a fourth part, calculating them from the period at which the partnership commenced. It did not appear, in this case, that the father was otherwise than a working partner. The verdict, therefore, seems fair, supposing the profits to be made up of the interest of capital and the value of labor, and then estimating the value of the son's labor at half that of the father's, and equal to the interest of the father's capital; or supposing it to be equal to one-third of the value of the father's labor and the interest of his capital put together. Lord Eldon, however, disapproved of this verdict. He says: "It appeared to me, that as no distinct share was ascertained by force of any express contract between the partners, they must of necessity be equal partners, if partners in any thing. In that view, the result of the issue that was directed appears to be extraordinary. The proposition being that the son was interested in some share, not exceeding a moiety, the jury in some way, upon the footing of *quantum meruit*, held him entitled to a quarter. I have no conception how that principle can be applied to a partnership."[1] In this case nothing, from the nature of the circumstances, was said about the capital; and of course where persons are admitted into a firm as partners, bringing in nothing but their skill and labor, stipulations are usually made so as to prevent any question arising as to their participation of the capital. Such a question, however, might reasonably be agitated, where a partnership has been carried on without articles for many years; and such a case does not unfrequently occur. Puffendorf observes that "It sometimes happens in partnership concerns that labor and money are so interwoven together as to give to him who contributed only his labor, a share in the principal; the labor of the one and the money of the other being, in a manner, united into one mass. As when one lays out his money upon unwrought commodities, and another spends his labor in working them up and managing them. Thus, if I give a weaver £100 to buy wool, and he makes cloth of it, computing his labor at £100, it is manifest that here both of us have an equal interest in the cloth, and when it is sold the money must be equally divided; nor in fairness could I deduct the £100 contributed at first, and then divide the remainder with him.[2]

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[1] But see Paley's Moral Philosophy, book 3, part 1, chap. 13; and see 7 Bligh (N. S.), 432 *et seq.*

[2] Puffendorf, lib. 5, c. 8. And see Pothier, *Contr. de Soc.*, c. 1, s. 4; In Snyder v. Lumsford, 9 W. Va. 223, by

When one furnishes capital and another services.

SEC. 121. But the question whether a person contributing labor only, but sharing in the profits, has likewise an interest in the capital, most usually occurs in relation to *particular adventures*. Now, although it may not unfrequently be otherwise in general partnerships, yet in adventures, conducted as they generally are, upon a large scale, the labor on the one hand can seldom be commensurate with the risk of capital on the other. Therefore, if a person agree to be interested in the profit and loss of an adventure, this agreement alone will not constitute him a partner in the goods which are the subject-matter of the adventure.[1]

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articles of partnership it was agreed that one of the partners should furnish all the capital, and the other was to have no interest in the capital stock, but was to put his services against the capital and share equally the profits and losses. It was held that the goods, stock, materials and tools of the carriage factory, manufactured by the firm or purchased by it, in its business, became the property of both partners, and that a sale of real estate belonging to the partnership, by the partner furnishing capital, was null and void as against the creditor of the firm.

[1] In Meyer v. Sharp, 5 Taunt. 74, the plaintiffs, assignees of Grant, a bankrupt, brought an action of trover against the defendants, Sharpe & Co., under the following circumstances: Grant was a merchant in London, trading extensively to and from Russia. The defendants were brokers in London, employed by him to sell his goods imported, and were in the habit of accommodating him with their acceptances, upon having such goods, or the bills of lading for them put into their hands. In 1809 the bankrupt sent out the Latona to St. Petersburgh with a cargo, which he had purchased and paid for, consigned to Krehmer, Lang & Co. of that place, who were to return the proceeds to him in Russian produce. Krehmer, Lang & Co. were interested in one-third of the profit and loss of the outward adventure, and in one-half of the profit and loss of the homeward adventure. They, in October, 1809, purchased goods with such proceeds and shipped them on board the Latona under bills of lading of that date, which were received by the bankrupt unindorsed in February, 1810. In the same month the defendants, on the security of these bills of lading (which were sent to them by Grant), accepted and duly paid for him sixteen bills of exchange to the amount of £30,000. In March, 1810, Grant became bankrupt. The Latona, although her cargo was put on board in October, 1809, was obliged to pass the winter at St. Petersburgh, during which time Krehmer, Lang & Co., without the knowledge either of Grant or the defendants, took from on board her, and disposed of in Russia, certain of the goods comprised in the before-mentioned bills of lading. But they afterward put on board certain other goods, for which the bankrupt obtained from them bills of lading, dated August, 1810, (being *after* the bankruptcy), which he inclosed unindorsed in a letter to the defendants. The Latona arrived in London in November following, when the whole of her cargo, consisting of such part of the goods mentioned in the original bills of lading as were not taken from on board the ship at St. Petersburgh, and the goods mentioned in the bills of lading of August, 1810, were taken possession of by the defendants, who afterward sold the same, and applied the proceeds in reduction of the balance due to them from the bankrupt. Grant, in his examination at the trial, stated that the goods in dispute were his property; but he further stated in explanation, that Krehmer, Lang & Co. were interested in the adventures outward and homeward in the proportions before mentioned. The case being reserved for the opinion of the Court of Common Pleas, it was contended for the plaintiffs that they were entitled to recover at least the substituted part of the cargo, and that the right to recover went to the entirety, and not to a moiety only, of the goods; for, that Krehmer

Broker participating in profits.

SEC. 122. Upon the principles on which the case of Meyer v. Sharpe was decided, it has been held that, if a broker agree to participate in the profits of the goods which he is employed to sell, such agreement will not make him a partner with his principal in the goods themselves, whatever it may do in the profits. In such case, it should seem, that his being a *broker* will be strong evidence against his partnership in the goods.[1]

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and Lang were never partners and joint owners of this cargo, but only partners in the profits. On the other hand, it was contended for the defendants, that, if Grant had not transferred the entire right in the goods to the defendants, yet, at all events, they had a right to retain the share of Krehmer and Lang, who were partners with Grant in the cargo. Moreover, according to the doctrine of Fox v. Hanbury, Cowp. 445, Krehmer and Lang had, after and notwithstanding the bankruptcy of Grant, a right to consign the whole investment to the defendants, which they had done by their bills of lading; and the plaintiff could not maintain trover for any part of the cargo. The court decided that, by virtue of the bills of lading, the defendants had a right to retain the goods originally shipped in part indemnity against their acceptances of Grant's bills; but that the plaintiffs had a right to recover the value of the substituted goods for that Grant had sworn that these goods were wholly his property; and although he had said that Krehmer and Lang were interested in the adventure, there was a plain and clear distinction between the being partners in the goods, and being interested in the adventure. Krehmer and Lang, by the direction and order of Grant, assigned these goods to the Sharpes, which would give them the legal property, if Krehmer and Lang were the owners of these goods; but, if they were the goods of Grant, Krehmer and Lang could not assign them at all without the order of Grant, and Grant had become incapable to give the order, for he ceased to have property in them; all belonged to his assignees. The plaintiffs were therefore entitled to recover the substituted goods only. . It is clear that Krehmer and Lang were not partners with Grant in the goods, either by agreement or by any act of the parties. Supposing, therefore, the goods had been lost at sea, the loss would have fallen entirely upon Grant. "*Lorsque deux personnes contractent entre elles une société pour vendre en commun certaines choses qui appartiennent à chacune d'elles et en partager le prix, il faut bien examiner qu' elle a été leur intention. Si elle a été de mettre en société* les choses mêmes, la société sera des choses; *et si l'une des choses vient à périr avant la vente que les parties se proposoient d' en faire, la perte en sera commune. Mais si elle a été de mettre en société* non les choses mêmes, mais le prix de la vente *qui en seroit faite le perte tombera en entier sur celui des associés à qui la chose appartenoit.* Pothier, *Traité du Contrat de Société*, chap. 2, s. 1. See Boynton v. Page, 13 Wend. (N. Y.) 425; Bonis v. Lauvreer, 8 La. An. 4; Cameron v. Watson, 10 Rich. Eq. (S. C.) 102; Yoke v. Barnett, W. & S. (Penn.) 86; Horan v. Hull, 1 B. Mon. (Ky.) 159.

[1] In Smith v. Watson, 2 B. & C. 401; 3 D. & R. 751, an action for money lent, etc., was brought by the assignees of one Sampson, a bankrupt, who carried on business under the firm name of George Holden & Co., against the bankers with whom the bankrupt kept cash. The bankrupt, in 1823, paid into the hands of the defendants a bill of exchange drawn by him in the name of G. Holden & Co., upon one Le Cointe, for 1,689*l.* This bill was afterward duly accepted and presented, and the amount received by the defendants; and it appeared that there was due to the bankrupt, provided the whole proceeds of the bill belonged to him, a balance of 493*l.* 2*s.* 9*d.* That sum the defendants afterward paid under an indemnity, to one George Gill, who claimed to be a partner with the bankrupt in the proceeds of the bill. The defense was that Gill was a partner with Sampson in considerable speculations in whalebone; that the bill was drawn upon Le Cointe, upon account of a parcel of whalebone purchased by him, and which was the joint property of Gill and the bankrupt; and

Summary.

SEC. 123. It is to be observed, that, in Smith v. Watson, *ante*, there was no evidence that Gill was to be liable for any *loss* in the transaction. But it seems clear, on the authority of Meyer v. Sharpe, that such a stipulation would have made no difference; and, in the case just cited, Holroyd, J., says — "Assuming it to have been agreed between Sampson and Gill that the latter should make purchases of whalebone, and in lieu of brokerage should have one-third of the profits arising out of the sales, and that he should even bear a proportion of the losses, I am of opinion that such an agreement did not vest in him any interest in the whalebone purchased with the money of Sampson."

Intention of parties controls.

SEC. 124. But, though one person supply goods for an adventure, and another only his time, trouble, and credit, yet, if there be words

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that the defendants were therefore justified in paying to Gill the balance due upon that bill. In support of this case it was proved that there had been a verbal agreement between Sampson and Gill, that the former should buy whalebone, through Gill, as his broker and, that, as a remuneration for his trouble, Gill should receive one-fourth of the profits arising from the sale, and bear one-eighth proportion of the losses. Under this agreement various parcels of whalebone were bought and sold, which yielded a considerable profit; but all the transactions under it were concluded in 1822. Sampson then entered into other speculations in 1823, and continued to employ Gill as a broker; and, upon these latter transactions, it was agreed that Gill should receive one-third of the profits. It did not appear whether he was to bear any proportion of the losses on these latter transactions. All the witnesses stated that Sampson employed Gill to purchase and sell whalebone, as a broker, and that he never spoke of him otherwise than as his agent. Upon this evidence, it was contended that Gill was not a partner in the property purchased, although he might be liable, as a partner, to third persons, in respect of any claims arising out of the speculations before mentioned. The Court of King's Bench were of that opinion, and held that the plaintiffs were entitled to their verdict. Bayley, J. — "Had the whalebone been purchased in the joint names of Sampson and Gill, the property in it would have been joint, and the defendants would have been justified in making this payment to Gill; but there is no evidence to show that the whalebone was purchased in the name of Gill, or that he ever had any property in it. It is said, that the jury ought, upon the evidence, to have found that Gill was a partner in this property; I think, however, that the inference is the other way. All the witnesses speak of Gill as a broker, who was to be paid for his trouble in a particular way, viz., by a share of the profits. Now, a right to share in the profits of a particular adventure may have the effect of rendering a person liable to third persons as a partner, in respect of transactions arising out of the particular adventure in the profits of which he is to participate; but it does not give him any interest in the property itself, which was the subject-matter of the adventure. Gill's right to claim property in the whalebone must arise out of the terms of the bargain with Sampson; and looking to them, it appears clearly, that it was not joint property. It may be assumed that it was purchased in the name of Sampson only, for Gill was a mere agent, and was to have a proportion of the profits in lieu of brokerage. Considering the question in this view, I am clearly of opinion that Gill had no property in the whalebone, or in the proceeds of the bill."

in the agreement implying a joint undertaking, these words will be deemed evidence of an intention to share jointly the goods, and the parties will be adjudged partners therein; and the evidence will be rendered stronger in favor of the partnership, if the agent partner be not a broker.[1]

Power of partner to dispose of his interest in the stock.

SEC. 125. In the words of Eyre, C. J., "partners may, by their acts, convert the joint property of the general partnership into the separate property of an individual, or into the joint property of two or more partners, or *e converso*."[2] These transactions, if done *bona fide*,

[1] In the case of Reid v. Hollinshead, 4 B. & C. 867; 7 D. & R. 444, Davidson & Co. were general American commission merchants, and also transacted business upon commission, and they occasionally purchased goods on their own account. The plaintiffs wrote to Davidson & Co. a letter, of which the following is an extract: "We hereby authorize you to purchase one thousand bales of bowed cottons of good quality, at the lowest price at which you can obtain it, against your drafts on us at three months' date, you to be allowed to be one-third interested therein, acting in the business free of commission." Davidson & Co. replied: "We are happy that you think favorably of an investment in cotton, and make due note of your order of one thousand bales of boweds. We shall be happy to hold one-third interest therein, charging no commission. In expectation that you might authorize us to do something in this way, we picked up 137 bales on Saturday, at 12*d.*, which we consider a bargain, and enter them accordingly to the *joint account*." The plaintiffs wrote to Davidson & Co.: "We duly note by your favor of the 14th instant, that you take one-third share in the proposed purchase of 1000 bales of cotton, and that you have already secured 137, at what appear favorable terms. You must judge whether our *joint speculation* is still advisable." From time to time more cotton was purchased by Davidson & Co., and, in the subsequent correspondence which took place between the same parties, the transaction was always referred to coupled with the terms *joint account, joint concern, joint speculation*, and *joint security*. The Court of King's Bench were of opinion that Davidson & Co. were interested as partners in these goods. Abbott, C. J. "We think the letters that passed between the plaintiffs and Davidson & Co. clearly show that the parties understood this as a joint concern or partnership in the goods. Such a partnership may well exist, although the price is, in the first instance, advanced by one party, the other contributing his time, and skill, and security, in the selection and purchase of the commodities. It is true that the plaintiffs, in their first letter, stipulate that Davidson & Co. shall act in the business free of commission, and this circumstance was relied on as making the present case parallel to that of Smith v. Watson; but the facts of the two cases are very different. In the present case, Davidson & Co. were not brokers; the correspondence is, in our opinion, the language of persons to be jointly interested in the purchase as well as the sale of the goods. Davidson & Co., before these transactions, occasionally purchased on their own account, though they were general American commission merchants, and also transacted business upon commission; and in our opinion the stipulation that they should act in the business free of commission, plainly denotes that they were to act in it as merchants, and not as agents."

[2] The partners, while they have the control of the joint stock, may, by a *bona fide* agreement between themselves, sever their interest in the property, and make that which was before joint property the separate property of each, even though the effect is to destroy the equitable preference of the joint creditors. Allen v. Center Valley Co., 21 Conn. 130; Menagh v. Whitwell, 52 N. Y. 160; Dimon v. Hazard, 32 id. 65. In the case first cited above, Church, C. J., said: "While the business of a copartnership is going on, and there is no dissolution

and for a valuable consideration, are binding upon third persons, and materially affect their interests. For instance, in equity and bankruptcy, joint property is the fund for the payment of the joint creditors

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by death, bankruptcy, insolvency, etc., requiring the marshaling of assets, there is no legal objection to a *bona fide* distribution of the copartnership funds, among the members of the firm, or a change of them from joint to separate estate. Indeed, it is the purpose of all business operations, whether copartnership transactions or otherwise, to benefit individuals." The same doctrine was held in Menagh v. Whitewell, *ante*, and Dimon v. Hazard, *ante*, but in each of them it was held that such division must be free from the taint of fraud. In Ex parte Ruffin, 6 Ves. 119, Lord Eldon held that the joint creditors have no lien on the partnership effects, either in law or equity, until execution, and it may be proper to modify this expression by saying until they have acquired a lien thereon by some legal process, as the same rights are acquired by attachment of the property under *mesne* process or other legal proceeding that creates a lien upon the property. Washburn v. Bank of Bellows Falls, 19 Vt. 283; Bardwell v. Perry, 19 id. 297; Lawton v. Levy, 2 Edw. Ch. (N. Y.) 199; Griffin v. Orman, 9 Fla. 52; Treadwell v. Brown, 43 N. H. 290; Reese v. Bradford, 13 Ala. 847. Until such lien is acquired in some of the modes provided by law, a court of equity cannot interfere. Freemen v. Finnell, 1 S. & M. (Miss.) Ch. 627; Robb v. Stevens, 1 Iowa, 198. When such lien is acquired, their equity to have the debts paid out of the joint fund before the separate debts of the partners are paid, is worked out through the rights of the partners themselves. "That copartnership creditors have no specific lien, legal or equitable, *a priori* upon the joint funds," said Church, C. J., in Allen v. Center Valley Co., *ante*, "we consider to be well settled. In either case the lien is created by the levy of the writ of attachment or of execution upon the property of the debtor. *The partners have the lien*, and especially the solvent ones, *and have a right to insist that the joint funds shall pay the joint debts, and in this way, and by enforcing the equities or lien of the partners, the copartnership creditors come to their rights, whatever they are, and thus their rights are worked out.*" It is sometimes said, in some of the cases, that partnership creditors have in equity a lien upon partnership property for the payment of their claims, as against the separate creditors of the partners. But this statement is too broad, for no such lien exists until a lien under legal process had been acquired, and then only through the equities of the partners themselves except in certain cases where fraud exists. "The creditors," said Lord Eldon, in Ex parte Ruffin, *ante*, "who had a demand in respect of joint debts, had clearly no lien whatsoever upon the partnership effects. They had power of suing, and by process creating a demand, that would directly attach upon the partnership effects. But they had no lien upon or interest in them in point of law or equity. If any creditor had brought an action, the action would be joint, his execution might be either joint or several. He might have taken in execution both joint and separate effects. It is also true that the separate creditors of each by bringing actions might acquire a certain interest even in the partnership effects; taking them in execution in the way in which separate creditors can affect such property. But there was no lien in either. The partnership might dissolve in various ways; first by death; secondly by the act of the parties; that act extending to nothing more than mere dissolution; without any special agreement as to the disposition of the property, the satisfaction of the debts, much less any agreement for an assignment from either of the parthers to the others. The partnership might also be dissolved by the bankruptcy of one or both, and by effluxion of time. If it dissolved by death, referring to the law of merchants and the well-known doctrine of this court, the death being the act of God, the legal title in some respects, in all the equitable title, would remain, notwithstanding the survivorship; and the executor would have a right to insist that the property should be applied to the partnership debts. I do not know that the partnership creditors would have that right, supposing both remained solvent. So, upon the bankruptcy of one of them there would be an equity to say the assignees stand in the place of the bankrupt, and can take no more than he could, and conse-

in the first instance; and then, if any thing remains, of the separate creditors of each partner, according to their proportion of the stock. But if the joint property be converted *bona fide* into separate property

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quently nothing, until the partnership debts are paid. So, upon a mere dissolution, without a special agreement, or a dissolution by effluxion of time, to wind up the accounts, the debts must be paid, and the surplus be distributed in proportion to the different interests. In all these ways the equity is not that of the joint creditors, but that of the partners with regard to each other, that operates to the payment of the partnership debts. The joint creditors must of necessity be paid in order to the administration of justice to the partners themselves. When the bankruptcy of both takes place, it puts an end to the partnership certainly; but still it is very possible, and it often happens in fact, that the partners may have different interests in the surplus; and out of that a necessity arises that the partnership debts must be paid, otherwise the surplus cannot be distributed according to equity, and no distinction has been made with reference to their interests, whether in different proportions, or equally." Ex parte Ruffin, 6 Ves. 119. It follows as a necessary consequence of this position, that the partners may convert the joint property into separate property; for, having no lien on the property, the joint creditor, when notice of the dissolution is given, cannot prevent the partners from effectually transferring it by *bona fide* alienation; and if one of the partners thus becomes a new purchaser and is put into possession, the joint creditor cannot follow it into his hands. Ex parte Ruffin, 6 Ves. 127; Ex parte Fell, 10 id. 347; Ex parte Williams, 11 id. 3; Ex parte Rowlandson, 1 Rose, 416; Campbell v. Mullett, 2 Swanst. 575; and see Lingen v. Simpson, 1 Sim. & Stu. 600; Taft v. Buffum, 14 Pick. 322; Fowler v. Piatt, Wright, 206; Menagh v. Whitwell, *ante;* Allen v. Center Valley Co., *ante;* Eimon v. Hazard, *ante.* But if no change of possession follow the agreement, the property, as respects joint creditors, is still to be considered as partnership property. Ex parte Harris, 1 Madd. 583. In Ex parte Williams, 11 Ves. 3, Lord Eldon said: "The creditors are not injured by the agreement of partners to dissolve the partnership, and that from that time what was joint property shall become the separate property of one, notice of the dissolution being given, as either a consideration is paid; or which for this purpose is equal to consideration, a covenant is entered into to pay the debts and indemnify the retiring partner, so conceived as not to leave any lien upon the property. Upon any other principle the conclusion must be that a partner could not retire from Child's house, as the effects may be distributed twenty years hence among the creditors if they remain so. If creditors do not like the arrangement they may go to each of the partners and desire payment." In the same case he said: "I have frequently, since I decided the case, Ex parte Ruffin, considered it, and I approve that decision. In a subsequent case the dissolution took place only a week before the question arose; and the true question, I thought, was upon the *bona fides* of the transaction; whether that which had been joint estate had become separate estate. The grounds upon which I went in Ex parte Ruffin were these. Among partners clear equities subsist, amounting to something like lien. The property is joint; the debts and credits are jointly due. They have equities to discharge each of them from liability, and then to divide the surplus according to their proportions, or if there is a deficiency, to call upon each other to make up that deficiency according to their proportions. But while they remain solvent, and the partnership is going on, the creditor has no equity against the effects of the partnership. He may bring an action against the partners, and get judgment, and may execute his judgment against the effects of the partnership. But, when he has got them into his hands, he has them by force of the execution, as the fruit of the judgment; clearly not in respect of any interest he had in the partnership effects, while he was a mere creditor, not seeking to substantiate or create an interest by suit. There are various ways of dissolving a partnership; effluxion of time; the death of one partner; the bankruptcy of one, which operates like death; or, as in this instance, a dry, naked agreement that the partnership shall be dissolved. In no one of these cases can it be said that to all in-

of one partner,[1] it immediately becomes the fund for the payment of the separate creditors of that partner in the first instance; and then, if any thing remains, of the joint creditor. It is clear, therefore, that under this power of disposition which the partners possess, the *order of payment* to their creditors may be affected, though of course the debt itself can in no case be defeated. Of this subject we shall treat more at large when we come to consider the bankruptcy of partners.

Effect of seizure in foreign country.

SEC. 126. The interest of partners in the partnership property is not altered by seizure of the property in a foreign country, followed by restitution *in specie*. Thus, if A and B be two partners, A resident here and B in a foreign country, and, upon a declaration of war between the two countries, the partnership effects abroad be seized by the foreign government, and afterward B's share be restored, and the rest confiscated and sold, it appears, that upon taking the partnership accounts in this country, the goods restored will be held to be partnership effects, and A's estate will be credited with a share proportioned to his share in the goods seized.[2] But if no part of the goods be restored, but the government which made the seizure decree a money compensation to be made to B, the money when paid will not be held to be part of the partnership estate. but is B's separate property, vested in him by way of *gift* from the government.[3]

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tents and purposes the partnership is dissolved, for the connection still remains until the affairs are wound up. The representatives of a deceased partner, or the assignees of a bankrupt partner, are not strictly partners with the survivor, or the solvent partner; but still in either of those cases that community of interest remains that is necessary, until the affairs are wound up; and that requires that what was partnership property before shall continue, for the purpose of a distribution, not as the rights of the creditors, but as the rights of the partners themselves require; and it is through the operation of administering the equities as between the partners themselves, that the creditors have that opportunity; as in the case of death it is the equity of the deceased partner that enables the creditors to bring forward the distribu ion." 11 Ves. 5, 6. The partners may during the partnership convert joint into separate property, or separate into joint; and the property will at the dissolution be held to possess that character which is then impressed upon it; but to operate such a conversion, the possession must be changed, Ex parte Harris, 1 Madd. 589, and the transaction must be free from all taint of fraud. In Menagh v. Whitwell, *ante*, it was held that where the transaction was tainted with fraud, the creditors might pursue the property on execution, and Church, C. J., in Allen v. Center Valley Co., said: "Had fraud been proved, and the rights of these creditors recognized, a further question would have claimed more of our attention."

[1] However, if it be not converted into land, it will, in case of bankruptcy, still go to the joint creditors, it being in the "order and disposition" of the partnership. Campbell v. Mullett, 2 Swanst. 573.

[2] Thompson v. Ryan, 2 Swanst. 565, in notes.

[3] In the case of Campbell v. Mullett, 2 Swanst. 551, Zacharie and Vochez, residing at Baltimore, and Coopman, a French subject resident at St. Domingo, were merchants and partners, and own

Rights of assignees of partner.

SEC. 127. Where restitution has been decreed *in solidum* to the whole firm, and one of the partners is a bankrupt, it seems clear that his assignees have a right to the bankrupt's share of the property restored. But in cases of this nature the Court of Admiralty will decline to assist the assignees; though, on the other hand, it will interfere if the bankrupt's share is outstanding, and he has a right to restitution. In the case of The Jefferson,[1] a petition was presented to the Court of Admiralty on behalf of the assignees of a bankrupt who had been partner with some persons in America, and who had received restitution jointly with the other partners, praying that a severance might be made as to his share, and that it might be directed to be paid out of the registry to the assignees. *Sed per* Sir W. Scott—"I thought at first that this question had arisen on the reserved share of that partner, whose national character has not yet been satisfactorily made out to the court; but now understanding that the share of this bankrupt was amongst the property restored to the house of trade in America, I can have no doubts. All the sever-

ers of certain ships captured by British privateers. After these captures had taken place, a treaty of amity was entered into between the King of England and the President of the United States. By the 7th article of that treaty, commissioners were appointed for awarding compensation to American subjects who had suffered losses by capture. The assignees of the partnership in England accordingly presented several memorials to the commissioners, praying compensation and relief for the loss sustained by Zacharie, Coopman and Vochez, as copartners, by reason of the capture and condemnation of their ships. In consequence of this memorial, the commissioners awarded certain sums to the two Americans, but with express exclusion of the French citizen, as being an alien enemy. The partnership having become insolvent, the joint creditors claimed the benefit of the award. But Sir William Grant held that they had no interest in the money so awarded, as their right could only depend on the supposition that Coopman had an equitable claim on this fund, and then on the general principle that the equities of creditors must be worked through the medium of the partners. But he was of opinion that Coopman had no such claim, and that this case differed from that of Thompson v. Ryan, *ante*, in the circumstance that, in the latter case, there was restitution of the thing itself; the very thing which had impressed on it the character of partnership property remained *in solido* in the possession of one partner untouched by the sentence of condemnation. "Here," said his Honor, "the thing is irrevocably gone, the sentence not being subject to reversal by any suit that could be instituted in any municipal court. This is not a case in which property is recovered in a court of law by the medium of a sentence and as matter of right. The principle on which this case depends is that the fund in question is for the first time created by the award; and though in some respects arising out of the antecedent capture of joint property, yet not connected with it as a continued claim of property, pursued in the usual course in which right is ascertained. It is more analogous to gifts by individuals to one of several partners, in case of casual loss to the partnership; a grant to one and not to the rest. I cannot declare that the creditors of Coopman have any interest in a fund which I think does not belong to him."

[1] 1 Rob. 323.

ance that was necessary in this case to determine the national character of the parties, has been already made. Restitution stands decreed to this house. I am *functus officio*, and I shall not begin again at the prayer of the assignees, who now say that one of the partners is likewise an English merchant and a bankrupt. They must resort to some other authority to make the discrimination between this American partnership stock, for the purpose of subjecting a partner's share to a British bankruptcy. It is no part of the duty of the Court of Admiralty to do this, and I dismiss the petition."

CHAPTER VII.

OF THE PERSONAL RIGHTS AND OBLIGATIONS OF PARTNERS.

SEC. 128. Of the rights and obligations of partners.
SEC. 129. What transactions operate as breach of contract.
SEC. 130. Rule in Featherstonhaugh v. Fenwick.
SEC. 131. Partner's duty as to joint property.
SEC. 132. Bound to work for interest of firm.
SEC. 133. Must not assume position that will bias him against interests of firm.
SEC. 134. Rule where surviving partner is executor of deceased partner.
SEC. 135. Duty as to accounts.
SEC. 136. One partner cannot exclude his copartner.
SEC. 137. Must consult copartners on important matters.
SEC. 138. May enter into sub-partnership.
SEC. 139. Each agent for the others.
SEC. 140. Stock must be used to augment trade.
SEC. 141. Power of majority.
SEC. 142. Rule in Const v. Harris.
SEC. 143. Duty of surviving partner.
SEC. 144. Rule where firm consists of distinct firms.
SEC. 145. Where equity will interfere.

Of the rights and obligations of partners in general.

SEC. 128. Mutual confidence in the conduct of a partnership was always inculcated by the civilians. Under the general name of *societas* they classed both a partnership in trade and a partnership in marriage;[1] and accordingly, in some countries, the mode of distribution of effects under these two species of connection became the same.[2] In

[1] Vinn. Comm. lib. 3, tit. 26, sect. 2; Pothier, *Contr. de Soc.* chap. 3.

[2] Huber, lib. 3, tit. 26; Van Leewen, Comm. 410. The relation of partners is one that is predicated upon the mutual confidence that each reposes in the other, and consequently calls for the exercise of the strictest good faith by each. *In Societatis contractibus fides exuberet*, Cod. IV, tit. 37, l. 3, says Mr. Lindley, page 492: "The utmost good faith is due from every member of a partnership toward every other member, and if any dispute arise between partners touching any transaction by which one seeks to benefit himself at the expense of the firm, he will be required to show, not only that he has law on his side, but that his conduct will bear to be tried by the highest standard of honor. See Blisset v. Daniel, 10 Ha. 522, 536. Thus, if one partner knows more about the state of the partnership accounts than another, and concealing what he knows, enters into an agreement with that other, relative to some matter as to

our own country, where commercial transactions have risen to such magnitude and importance, the mutual faith of partners is indispensable to the welfare of the society. The result is that even in the greatest concerns this faith is, frequently, as much of necessity as of choice, unlimited. Absolute and unqualified fraud, therefore, committed by

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which a knowledge of the state of the accounts is material, such agreement will not be allowed to stand by a court of equity. See Maddeford v. Austwick, 1 Sim. 89. This obligation to protect fairness and good faith is, moreover, not confined to persons who actually are partners. It extends to persons negotiating for a partnership, but between whom no partnership as yet exists; see Hichens v. Congreve, 1 R. & M. 156; Fawcett v. Whitehouse, id. 132, noticed with other cases *infra*, and also to persons who have dissolved partnership, but who have not completely wound up and settled the partnership affairs, see Lees v. Laforest, 14 Beav. 250; Clegg v. Fishwick, 1 Mac. & G. 294; Perens v. Johnson, 3 Sm. & G. 419; Clements v. Hall, 2 De G. & J. 173, and most especially is good faith required to be observed when one partner is endeavoring to get rid of another or to buy him out. Blisset v. Daniel, 10 Ha. 493; Maddeford v. Austwick, 1 Sim. 89; Perens v. Johnson, 3 Sm. & G. 419; Chandler v. Dorsett, Finch, 431. Notwithstanding the universal application to partners of the rule requiring the most perfect good faith, if one partner repudiates the contract of partnership and will not perform his duty toward his copartners, he cannot justly complain if they in return decline to treat him on a footing of equality with themselves. See M'Lure v. Ripley, 2 Mac. & G. 275; Reilly v. Walsh, 11 Ir. Eq. 22. As observed by Lord Eldon in Const v. Harris, Turn & R. 254: 'A partner who complains that the other partners do not do their duty toward him must be ready at all times and offer himself, to do his duty toward them.' But if a partner has been set at defiance by his copartners; if they have denied that he is a partner, and that he has any right to interfere in the partnership, they can derive no advantage from the circumstance that he has not performed his duty to them. See Dale v. Hamilton, 2 Ph. 276. This subject will be further adverted to in that part of the work which relates to the defenses to suits between partners. The same obligation to good faith which exists on the part of every member of an ordinary firm, exists also on the part of every member of a company; but in this latter case the obligation of each member toward the others is qualified by the comparatively small right of personal intervention in the affairs of the company which each member enjoys. It is part of the contract into which the members of a company enter, that the management of its concerns shall be confided to a few chosen individuals. But whilst this contract limits the right of each member of the company to interfere in the conduct of its affairs, and limits his obligation to exert himself for the benefit of the company, it, if possible, increases the obligation of the directors to observe good faith toward the great body of shareholders, to attend diligently to their interests, and to act within the limits of the authority conferred by them. Directors are not only agents but trustees; they are bound not to benefit themselves at the expense of the shareholders, Bennett's case, 18 Beav. 339, and 5 De G. M. & G. 284; Benson v. Heathorn, 1 Y. & C. C. C. 326; York and North Mid. Rail. Co. v. Hudson, 16 Beav. 485; Maxwell v. the Port Tennant Co., 24 Beav. 495; Aberdeen Rail. Co. v. Blaikie, 1 Macqu. 461; nor have they any right to favor one set of shareholders more than another. Richardson v. Larpent, 2 Y. & C. C. C. 507; Harris v. The North Devon Rail. Co., 20 Beav. 384. The duty of directors to shareholders is so to conduct the business of the company, as to obtain for the benefit of the shareholders the greatest advantages that can be obtained consistently with the trust reposed in them by the shareholders and with honesty to other people. Directors should remember that they are not the masters but the servants of the shareholders, and although it is true that the directors have more power, both for good and for evil, than is possessed by the shareholders individually, still that power is limited, and accompanied by a trust, and is to be exercised *bona fide* for the purposes for which it was given, and in the manner contemplated by those who gave it. See, as to the duty of di-

one partner against another, is a crime of no ordinary stamp. *In rebus minoribus socium fallere, turpissimum est; neque injuria; propterea quod auxilium sibi se putat adjunxisse, qui cum altero rem communicavit. Ad cujus igitur fidem confugiet, cum per ejus fidem lædi-tur cui se commiserit? Tecti esse ad alienos possumus; intimi multa apertiora videant necesse est; socium vero cavere qui possumus? quem etiam si metuimus, jus officii lædimus. Recte igitur majores eum, qui socium fefellisset, in vivorum bonorum numero non putarunt haberi oportere.*[1]

What transactions operate as breach of contract.

SEC. 129. Not only gross frauds, but transactions of a more plausible nature, such as intrigues for private benefit, are clearly offenses against the partnership at large, and as such are relievable in a court of equity. For, in the words of Lord Eldon, there is an implied obligation among partners to use the property for the benefit of those whose property it is.[2]

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rectors to attend to the provisions of the company's deed of settlement, Brown's case, 19 Beav. 97; Lawes' case, 1 De G. M. & G. 421; and generally, as to the duties of directors, the cases cited in the last two notes, and The Shrewsbury and Birmingham Rail. Co. v. The London and N. W. Rail. Co., 4 De G. M. & G. 115; and 6 H. L. Ca. 113. The foregoing general principles may be regarded as the basis of the law of partnership, so far as it relates to the rights and obligations of partners as between themselves, and they will be found to be more or less illustrated throughout the whole of the present book. Those cases, however, which more especially relate to the obligation of partners and directors not to benefit themselves at the expense of their copartners and coshareholders, and to the duties of majorities, require to be specially noticed." "Good faith," he adds, "requires that a partner shall never obtain a private advantage at the expense of the firm. He is bound in all transactions affecting the partnership to do his best for the common body, and to share with his copartners any benefit which he may have been able to obtain from other people, and in which the firm is in honor and conscience entitled to participate; *Semper enim non id quod privatim interest unius ex sociis servari solet, sed quod societati expedit.* Dig. xvii. tit. 2, *pro socio*, l. 65, §5. It is proposed to examine the application of this rule to partnerships as well as to companies. There are two modes in which, more especially, partners and directors attempt unfairly to acquire gain at the expense of their copartners and shareholders, viz.: either by directly making a profit out of them, or by appropriating to themselves benefits which they ought to have acquired, if at all, for the common advantage of themselves and others. It may be laid down as a general rule, that one partner is not allowed to derive profit at the expense of the firm from any dealings between him and the partnership, unless it is clearly agreed that he is to have such profit. In Bentley v. Craven, 18 Beav. 75, one of the several partners was employed to purchase goods for the firm. He, unknown to his copartners, supplied them, at the market price, with goods previously bought by himself when the price was lower, and he so made a considerable profit. But it was held that the transaction could not be sustained, and that he was accountable to the firm for the profit thus made.

[1] Cic. *pro Roscio*, cap. xl. noticed by Puffendorf, lib. 5, c. 9.

[2] 15 Ves. 229. The doctrine here laid down is well exemplified by the case of Fawcett v. Whitehouse, MS. and see 1 Russ & My. 132. Knight & Co. being partners and proprietors of certain iron works, which they held for a

Rule in Featherstonhaugh v. Fenwick.

SEC. 130. The principles which are the foundation of the foregoing decisions were long ago inculcated by the civilians, especially in that particular case where a *dissolution* is contemplated with a view to pri-

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long term of years, and finding the trade unprofitable, employed Whitehouse to look out for a capitalist to take the property off their hands. Whitehouse then prevailed upon Fawcett and Shaw to join with him in carrying on the concern in partnership; and accordingly the lands, mines and other premises were demised to the new partnership for a term of years. Immediately on the execution of the deed, Whitehouse received from Knight & Co. the sum of 12,000*l.*, for the purpose, as was pretended, of enabling him to advance the capital required for the partnership into which he was then entering, but in reality, by way of premium for his services in procuring responsible tenants for the premises. The sum was at first advanced in the form of a conditional loan, but it was afterward converted into an absolute gift. The whole of this transaction was studiously concealed by Whitehouse from his copartners, and about three years after the commencement of the partnership, he retired, receiving 13,500*l.* for his share. The transaction with Knight & Co. having afterward come to light, a bill was filed by the remaining partners against Whitehouse, praying that, as to two-thirds of the sum of 12,000*l.*, he might be declared a trustee for the partnership. Sir John Leach having decreed in favor of the plaintiffs, that decree was affirmed by Lord Lyndhurst, who, in the course of his judgment, said, that where there are several partners, and, in the course of a whole transaction one acts as an agent for the others, and he stipulates for a particular advantage for himself, he shall not have the benefit of such stipulation. Here there was an evident anxiety in Whitehouse to gain such an advantage, and to conceal it from his partners; and the transaction amounted to a fraud. The same equitable doctrine was carried still further in the case of Russell v. Austwick, 1 Sim. 52. There several persons conducted the business of common carriers from London to Falmouth. A separate part of the road was allotted to each, and it was expressly agreed that no partnership should exist between them; that no one should be answerable for the debts of the other, but that each should receive the money paid in his particular district, and account quarterly for the balance. The defendant, Austwick, conducted the business in London and its neighborhood. Some years after the commencement of the partnership, Austwick, by a letter dated the 11th of January, 1817, on behalf of himself and his copartners, made a proposal to the deputy master of the mint to convey new silver from London to several towns upon the line of road between London and Falmouth, at certain rates of carriage, which were specified in a letter, and for an additional payment of 5*s.* per cent on the value of the packages, by way of insurance for safe conveyance. The proposal was accepted and the agreement made. Afterward, Austwick entered into a further agreement with the master of the mint, to cause silver coin to be conveyed from London to towns not in the line of road from London to Falmouth, nor specified in the letter of the 11th of January, 1817. By this new agreement Austwick guaranteed the mint against any loss which might happen in respect of the silver coin, when it was not passing on the line of road from London to Falmouth, but on provincial or cross roads; and the mint, in consideration of this guarantee, were to pay, not 5*s.* per cent for insurance, according to the first agreement, but 7*s.* 6*d.* per cent for all silver coin sent from the mint, without any distinction whether it was delivered at the several towns specified in the first agreement, or whether it was sent, partially or wholly, by provincial or cross roads. In settling with his copartners in respect of this transaction with the mint, Austwick accounted with them only for their shares of the profits made according to the first agreement. On the other hand, the copartners claimed to have the moneys received under both agreements divided between themselves and Austwick, in proportion to their respective shares. They accordingly filed their bill against Austwick for that purpose, and Sir John Leach decided in favor of their claim, observing that it was sufficiently plain from the circumstances of the case, that the defendant Austwick did not apprise the officers of the

vate benefit.[1] "The renunciation of the society," says Pothier, "is not made in good faith, when a partner renounces in order to appropriate to himself alone the profits which the partners proposed to acquire in contracting that relation."[2] In recent times the case of Featherstonhaugh v. Fenwick[3] seems to illustrate the doctrine here

mint that he was treating for himself in exclusion of the plaintiffs, and therefore that, upon the settled principles of equity, he could not exclude the plaintiffs from the same proportion of the profits under the second agreement, as they were entitled to under the first. The preceding case was succeeded by another, where a partner, who superintended exclusively the accounts of the concern, agreed to purchase his copartner's share of the business for a sum which he knew from accounts in his possession, but which he concealed from his copartners, was an inadequate consideration. The agreement was set aside. Maddeford v. Austwick, 1 Sim. 89.

[1] Inst. lib. 3, tit. 26, sect. 4.

[2] Contr. de Soc. chap. 8, sec. 4, art. 150.

[3] 17 Ves. 298; 2 Hov. Supp. 478. When a partner trades with the partnership property, even though professedly on his own account, he is bound to account to his copartners for the profits realized therefrom, the rule being that, when there is a confidential relation — as principal and agent — the principal may compel the agent to account for the profits he has made out of his property. Coursin's Appeal, 79 Penn. St. 220; Solomon v. Solomon, 2 Kelly (Ga.), 18; Stoughton v. Lynch, 1 Johns. Ch. (N. Y.) 467; Eason v. Cherry, 6 Jones' Eq. (N. C.) 261; Pierce v. Daniels, 25 Vt. 624; Kelly v. Greenleaf, 1 Story (U. S.), 93; Holden v. Peace, 4 Ired. (N. C.) Eq. 223. He is bound to exercise the utmost good faith, not only as to the prosecution of the business, but also in the formation of the firm itself, and if by fraudulent statements or fraudulent concealments of facts he induces a person to enter into partnership with him, a court of equity will dissolve the partnership and relieve the deceived party as far as can be done without infringing the rights of third persons. Howell v. Harvey, 5 Ark. 270; Fawcett v. Whitehouse, 1 R. & M. 132; Fogg v. Johnston, 27 Ala. 432; Ingraham v. Foster, 31 id. 123. But where one partner complains that his copartner has not discharged his duty to him, he must show that he has always been ready to discharge his duty to his copartner. Eldon v. Harris, Turn. & R. 524; Reilly v. Walsh, 11 Ir. Eq. 22; McLure v. Ripley, 2 Mac. & G. 275. As has previously been stated, one partner will not be permitted to benefit himself at the expense of the firm, or to appropriate to himself benefits that ought to have inured to the firm. Thus, he will not be permitted, unknown to the firm, to supply it with goods formerly bought by him at a less rate, charging the firm the ruling rate at the time when he supplies them. He is bound to inform the firm of the facts, and if, knowing the facts, they take the goods of him, he is entitled to the benefits resulting from the increase in the price, but if he conceals the fact, the firm, upon becoming aware of them, are only liable for the price actually paid by him. Love v. Carpenter, 30 Ind. Thus, in an English case, Bentley v. Craver, 18 Beav. 75, one of several partners was employed to purchase goods for the firm. He, unknown to his copartners, supplied them, *at the market price*, with goods previously bought by himself when the price was less, and thus realized quite a profit. The court held that he was bound to account to the firm for the profit so made by him. "The case is this," said the Master of the Rolls, "four persons establish a partnership for refining sugar, one of them is a wholesale grocer, and from his business is peculiarly cognizant with the variations in the sugar market, and has great skill in buying sugar at a right and proper time for the business. Accordingly the business of selecting and purchasing the sugar for the sugar refinery is intrusted to him. He being the person to buy, it is his duty and business to employ his skill in buying the sugar for the refinery at the time he thinks most beneficial. Having according to his skill and knowledge at a time when he thought it likely to rise, and it having risen, and the firm being in want of some, he sells his own sugars to the firm without letting the firm know that it was his sugar that

laid down. The plaintiff and Fenwick were partners at will in the business of glass manufacturers, and for that purpose had taken a lease of some glass-houses and a free-stone quarry. Fenwick's son having afterward been admitted into the partnership, he and his father applied for a renewal of the lease, in their own names alone,

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was sold," and accordingly it was held that the firm was entitled to that profit. The same rule prevails where one partner buys goods for the firm of another firm of which he is a member, without disclosing the fact. Aberdeen R. R. Co. v. Blakie, 1 Macq. 461; Benson v. Heathorn, 1 Y. & C. 326. The question in all such cases is, not whether the firm got the property at its real value at the time, but whether the partner furnishing it, unknown to the company, procured it at a time when it was his duty to have procured it for the company, and at a price less than that at which the company took it. Bank, etc., v. Tyrell, 5 Jur. (N. S.) 924; Gaskell v. Chambers, 26 Beav. 360. If he enters into a secret partnership with others in business of the same kind or nature, he will be liable to his copartners for his share of the profits. Thus in Rhea v. Sunyhue, 39 Cal. 579, the defendant entered into an arrangement with the plaintiffs to purchase, on their joint account, a tract of land at a price not to exceed thirty-four thousand dollars, with the mutual understanding that S should consummate the purchase for the least price for which the land could be bought. S purchased for thirty thousand dollars, but represented to his associates that the price was thirty-four thousand dollars, and received from each his proportion of that sum. Held, the false representation of S was a fraud upon his associates, and that he was liable for the excess paid, with interest. In an Irish case, Lock v. Lynam, 4 Ir. Ch. 189, two partners entered into an agreement as partners in obtaining contracts for supplying goods for the public service, and one entered into secret arrangements with others, by virtue of which he was to receive a part of the profits in those concerns, on application of the other partner to share in the last named profits, the lord chancellor intimated an opinion that the plaintiff was entitled, but referred the case to a master to determine the state of accounts; to state whether any secret partnership was entered into, as claimed, and to report all the particulars. This principle was well illustrated in an English case, Hicken v. Congreve, 1 R. & M. 150, which, although arising between the shareholders in a joint-stock company, is equally applicable in a case of ordinary partnership. In that case the company was formed to work a mine, and was principally got up by three of the defendants; it was proposed that a lease of the mine should be purchased by the company, and a lease to the company was executed by the owner of the property for £25,000. This sum was accordingly charged to the company, but it afterward turned out that £10,000 only had been, in fact, paid to the owner for the lease, and that the remaining £15,000 had been distributed among the directors. The three principal promoters of the company alleged that the property had been sold to them, on their private account, before the company had come into existence, that £25,000 was a fair price for the company to pay for the lease, and that the £15,000 was only a fair profit on a re-sale, the original purchase being entirely at the personal risk of the three. They said that the lease was taken directly to the company, and that the amount of the consideration money was stated to be £25,000, with the knowledge of the lessor, and merely for the purpose of simplifying the title. But it was admitted that £10,000 only reached the lessor's hands, and that the £15,000 had been divided amongst the defendants, as alleged in the bill. A motion was made by the plaintiffs that the three principal defendants might be ordered to pay into court such sums, part of the £15,000, as appeared by their answers to be then in their hands, and an order to that effect was made accordingly. Beck v. Kantorowicz, 3 K. & J. 230; there five persons proposed to purchase a mine, and to get up a company to work it. One of them, Kantorowicz, negotiated on behalf of himself and coadventurers with the owners of the mine, and agreed with the owners for a purchase from them, at a sum of £85,000, and he represented to his coadventurers that this sum was the least which the owners would take for the mine. In point of fact, however, there was an agreement between Kan-

without communicating the fact to the plaintiff. They stated to Wilkinson, the agent of the lessor, that they were determined to have no further connection in trade with the plaintiff, though, at that moment, they had not apprised him of their intention to dissolve the partnership. By agreement executed between the Fenwicks and Wilkinson

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torowicz and the owners, that if the mine was purchased at that price he was to have £20,000 for his trouble; but this was unknown to the other adventurers and to the company which was afterward formed. Upon the supposition that £85,000 was the price of the mine, a contract for the sale of it at that price was entered into between the owners of the one part, and Kantorowicz and his four coadventurers of the other. Part of the purchase-money was to be paid in shares in the company proposed to be formed. Shortly afterward a prospectus was issued, with a view to the formation of the company, and in the prospectus it was stated that a contract had been entered into for the purchase by the company of the entire property for £125,000, including all preliminary expenses, and a premium to the parties who had incurred the risk and the responsibility of the original purchase. The company was formed. The agreement between Kantorowicz and the owners was afterward discovered, and a bill was filed by three of the committee of management of the company, on behalf of themselves and other shareholders, for the purpose of compelling Kantorowicz to account to the company for the £20,000 premium which he had received in shares from the vendors of the mine. On the part of Kantorowicz it was insisted that he had an interest in the mine, and was a selling party, and that, therefore, he practiced no fraud on the four original adventurers; and second, that even if the transaction could not be upheld as between him and them, the company could not complain, as he and the other promoters avowedly sold the property to the company for £125,000, and the company had got all they ever expected, or had contracted to have. See, too, Ex parte Perrier, 7 Ir. Ch. Rep. 256; Foss v. Hardbottle, 2 Ha. 489. But it was held upon the evidence, that Kantorowicz had no interest in the mine, and that, as between him and the other promoters, the transaction could not for one moment stand. With respect to the more difficult question which arose between Kantorowicz on the one side, and the company on the other, it appeared in the first place that two of the original promoters were members of the committee of management. In this latter capacity they became, as it were, agents for the company, and were, as such, bound to buy for the company at as reasonable a price as possible, although in their character of grantees they were entitled to sell at any price they liked. It also appeared that the £125,000 at which the company was to buy was fixed by the committee of management, upon the assumption that £85,000 was, in fact, to be paid to the vendors of the mine, and that the difference between £85,000 and £125,000 would cover the preliminary expenses and what was considered to be a fair premium for the promoters. This premium was alluded to in the prospectus, and was a premium of £60,000 to be paid out of the difference between the £85,000 and the £125,000. Another premium, payable out of the £85,000 to one of the promoters alone, was never contemplated in drawing up the prospectus. Upon these grounds it was held not to be competent to Kantorowicz to get a bonus of £20,000, in addition to his share of the £30,000, and that having kept back the transaction as to the £20,000, he ought to be considered as having joined the other four promoters in stipulating for payment by the company of a premium of £30,000, and no more. He in fact allowed them, in the exercise of their judgment as to what was a right premium to demand of the company, to contract with the company for the £30,000, and that was the contract which the court held ought to be performed as between the company and the promoters. Although nothing is said in the contract of partnership, in reference thereto, each partner is in law regarded as contracting to devote his best endeavors to promote the interests of the firm and to do nothing intentionally to jeopardize its interests. Of course the nature of the business, its extent, and the circumstances existing at the time when the partnership was entered into may largely qualify this implied contract. As if at the time when a person enters into

the lease was renewed from the 22d of November following. The Fenwicks then gave the plaintiff notice of their intention to dissolve the partnership on the same 22d of November. Sir William Grant held, clearly, that the lease so renewed was the property of the partnership of the plaintiff and the Fenwicks. "It is clear," he said, that "one partner cannot treat privately and behind the backs of his copartners, for a lease of the premises where a joint trade is carried on, for his own individual benefit; if he does so treat, and obtains a

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partnership with another, such person *knows* that he is engaged in another business which he also intends to continue, and which will be likely to occupy a portion of his time and attention, he cannot complain that he does not devote *all* his time to the business of the firm. But if he conducts his other business in such a manner as is likely seriously to affect the solvency of the firm, or as threatens the destruction of the joint property, a court of equity, upon proper application, will interfere by injunction to stop the mischief. Gratz v. Bayard, 11 S. & R. (Penn.) 41; Niles v. Thomas, 9 Sim. 607. One partner must account for any profit or advantage that results to him from the use of partnership property, as, where he occupies a dwelling-house belonging to the firm, he must account to his copartners for the rent. Holden v. Pean, 4 Ired. (N. C.) Eq. 223. So if he employs the funds or property of the firm in a private venture, he must account to the firm for the profits realized therefrom, Crawshay v. Collins, 15 Ves. 218; Solomon v. Solomon, 2 Kelly (Ga), 18; Brown v. Litton, 1 P. Wms. 140; Eason v. Cherry, 6 Jones' Eq. (N. C.) 261, and whether a profit is realized or not, he would be chargeable with interest upon the partnership funds employed in his private business. Pierce v. Daniels, 25 Vt. 624; Kelly v. Greenleaf, 3 Story (U. S.), 93; Carter v. Horne, 1 Eq. Ca. Ab. 13. As to all advantages acquired by him in his own name, which should inure to the benefit of the firm, he stands as a trustee for his copartners, as, where he, without the knowledge of his copartners, procures the renewal of a lease of premises used by the firm, in his own name; Mitchell v. Read, 61 Barb. (N. Y.) 310; affirmed Ct. of Appeals, 61 N.Y. 123; Leach v. Leach, 18 Pick. (Mass.) 68; Anderson v. Lemon, 11 N. Y. 236; Dougherty v. Van Nostrand, 1 Hoff. Ch. (N. Y.) 68; Cader v. Huling, 27 Penn. St. 84; Evans v. Gibson, 29 Mo. 223; Smith v. Ramsey, 6 Ill. 373, or when he purchases property leased by the firm, the purchase inures to the benefit of his copartners upon payment of their share of the purchase-money. Lafflin v. Nagler, 9 Cal. 662; Moreau v. Safferans, 3 Sneed (Tenn.), 395; Wheatley v. Calhoun, 12 Leigh (Va.), 264. Where one partner, during the existence of the firm, negotiated for and obtained in his own name the exclusive use of a right, it was held that he held it in trust for the firm. Weston v. Ketcham, 39 N. Y. Sup. Ct. 54; see, also, Fairchild v. Fairchild, 64 N. Y. 471; where the same was held as to real estate, the title to which was taken in the name of one partner. When one firm buys goods of another firm of which one of its members is also a partner, knowing the facts, such partner is not bound to account to it for his share of the profits on such purchase. Freck v. Blakiston, 83 Penn. St. 474. Upon the same principle the owners of a vessel are entitled to all profits made by the master during the voyage. Thus in Fanning v. Chadwick, 3 Pick. (Mass.) 420, the plaintiff and two others were owners of a vessel — one-eighth by plaintiff, one-eighth by J. B. Fanning, and three-quarters by defendant. The vessel sailed on a whaling voyage, under command of defendant. When he returned, the account of the whaling voyage was settled. It was afterward discovered the defendant had received compensation on the voyage for services rendered to a privateer, and in saving wrecked property, for which he had rendered no account; one-eighth of which the plaintiff claimed to recover in an action of assumpsit. It was held, that the money so earned belonged to all the owners, whether they owned as partners or tenants in common, and that assumpsit was a proper action, as there was only one item unsettled.

lease in his own name, it is a trust for the partnership, and this renewal must be held to have been so obtained."

Partner's duty as to partnership property.

SEC. 131. In what has preceded, we see that the same rules and tests are applied to the conduct of partners as are ordinarily applied to that of trustees. A trustee ought strictly to pursue the tenor of his way, without perverting it, directly or indirectly, to his own personal advantage.[1] So, there is an obligation imposed upon a partner *the instant* he receives partnership property, either to apply it to partnership purposes, or to charge himself as debtor with it in the partnership books.[2] And, indeed, it is not always sufficient for a partner to charge himself as a debtor in the partnership books with merely the sums due from him to the partnership, with interest thereon. If he applies the sums received by him as a partner in any profitable private speculation, he must account to his copartners for the profits by the money so applied.[3]

Partners bound to work for interest of firm. Rule in Long v. Majestre.

SEC. 132. As it is the duty of partners to devote themselves to the interest of the firm, it seems clear that no man has a right to engage in any business or speculation which must necessarily deprive the partnership of a portion of his skill, industry, or capital. In the American case of Long v. Majestre,[4] A and B carried on business as partners in the name of B, but with the funds of A and B, without any dissolution of the partnership or rendering any account to A, and with-

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[1] 1 Madd. Chan. 140; Richardson v. Chapman, 7 Bro. P. C. 324; Mitchell v. Reed, 61 N. Y. 123.

Duty of partner: winding up business of dissolved firm.—After the dissolution of a firm, one of its members cannot act as the agent of a creditor of the firm in holding obligations due the firm, as collateral security, for a note due from the firm to such creditor, and taking a conveyance of land in settlement of such an obligation; and in such a case the creditor, in an action on the firm note, is not bound to account for the value of such land or of such alleged collaterals, where it appears that they were never in his possession, that he never authorized such alleged agent to hold them for him, and never received any payments thereon, and that the land was not conveyed to him but to such alleged agent. Such conveyance to one of the former partners, in settlement of a debt due the firm, may inure to the benefit of the firm, but does not inure to plaintiff's benefit. Bray v. Morse, Wis.

[2] Ex parte Yonge, 3 Ves & B. 36.

[3] Stoughton v. Lynch, 1 Johns. Ch. 470. And see Burton v. Wookey, *infra*.

[4] 1 Johns. Ch. 305; Pierce v. Daniels, 24 Vt. 624; Soules v. Burton, 36 id. 652. The question as to how far one partner is restricted from entering into any other business in the absence of any stipulation in reference thereto in the contract, is to be determined in view of the nature and character of the business, its necessities and the evident expectation of the parties in view of all the circumstances. Law v. Cross, 1 Blackf. (U. S.) 533; The Potomac, 2 id. 581; Caldwell v. Lichen, 7 Paige's Ch. (N. Y.) 483.

out his consent, entered into partnership with C, and carried all the funds of A, in his hands, into the new copartnership. On the death of B, A filed a bill against his administratrix and C for an account. It was held that he was entitled to an account from C of the transactions and profits of the partnership between him and the intestate, and of the personal estate of the intestate in his hands. "The principles of courts of equity," observes Sir John Leach, "will not permit that parties, bound to each other by express or implied contract to promote an undertaking for the common benefit, shall any of them engage in another concern which necessarily gives them a direct interest adverse to that undertaking. For example, there is, necessarily, some degree of rivalry between a morning and an evening paper, especially in the country. It might clearly, therefore, be made a question whether it would be a due act of management in the partnership concern of a morning paper, to assist, with its property and its labor, the publication of any other newspaper, so as to enable the majority of the partners in that respect to bind the minority." [1]

Must not assume position calculated to bias him against proper discharge of his duty. Rule in Burton v. Wookey.

SEC. 133. The principles which have just been discussed may be carried still further; for it has been expressly laid down that no partner who owes a duty toward another can place himself in a situation which gives him a *bias* against the discharge of that duty. In Burton v. Wookey,[2] the plaintiff and defendant entered into partnership together, to deal in *lapis calaminaris*. The defendant, who was a shopkeeper, was to take an active part in the concern, and to purchase the *lapis calaminaris* from the miners, in whose neighborhood he lived. Many of the miners were, before the partnership, in the habit of dealing at his shop, and continued so for some years after the partnership, receiving from the defendant ready money for the *lapis calaminaris*, and paying for their shop goods afterward, as they would have done to any other shopkeeper; but, in the year 1817 or 1818, owing, as the defendant alleged, to the distress of the times, a new course of dealing took place between the defendant and the miners; in the place of paying them for the *lapis calaminaris* with money, he paid them with shop goods, and in his account with the plaintiff, he charged him as for cash paid, to the amount of the price

[1] Glassington v. Thwaites, 1 S.& S.133.

[2] Madd. & Geld. 367. But in Glassington v. Thwaites it was held that a *temptation* to abuse the partnership property is not sufficient to induce the court to interfere by *injunction*.

of the goods. The question was whether he could justify this charge, or whether he must not divide the profit made by him on the sale of the goods with the plaintiff. Sir John Leach: "It is a maxim of the courts of equity, that a person who stands in a relation of trust or confidence to another, shall not be permitted, in pursuit of his private advantage, to place himself in a situation which gives him a bias against the due discharge of that trust or confidence. The defendant here stood in a relation of trust or confidence toward the plaintiff, which made it his duty to purchase the *lapis calaminaris* at the lowest possible price; when, in the place of purchasing the *lapis calaminaris*, he obtained it by barter for his own shop goods, he had a bias against a fair discharge of his duty to the plaintiff. The more goods he gave in barter for the article purchased, the greater was the profit which he derived from the dealing in store goods; and as this profit belonged to him individually, and as the saving by a low price of the article purchased was to be equally divided between him and the plaintiff, he had plainly a bias against the due discharge of his trust or confidence toward the plaintiff. I must, therefore, decree an account of the profit made by the defendant in his barter of goods, and must declare that the plaintiff is entitled to an equal division of that profit with the defendant."

Rule when surviving partner is executor of deceased partner.

SEC. 134. It frequently happens that surviving partners are appointed the executors of their deceased copartner. In many cases, this arrangement may be almost matter of necessity, but the inconveniences arising from it, generally speaking, outweigh its advantages. For it is clear that surviving partners so situated have inconsistent duties to perform. It is true that the difficulties of this situation are not so obvious, where the parties claiming under the testator are all *sui juris* as where some of them are infants; but even in the former case, the surviving partner cannot, without the full knowledge and consent of these parties, make his situation of executor a means of advantage to his copartnership; and in the latter case, the difficulties, in the absence of specific contract, seem to be insuperable, unless the whole partnership concern be wound up, or recourse be had to a court of equity.[1]

[1] This is strongly illustrated by the important case of Wedderburn v. Wedderburn, 2 Keen, 722; 4 Myl. & C. 41, in which arrangements which had been entered into between executor partners and the legatees of their deceased copartner were put an end to, although confirmed by deed after the

Duty as to accounts.

SEC. 135. The good faith of the partners is mutually pledged to each other, that the business shall be conducted with their actual personal interposition, enabling each to see that the other is carrying

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legatees had come of age, and acted upon for a long series of years; and a decree was made for an account to the legatees of the profits made by the surviving partners subsequent to their copartner's death, the ground of the decision being, that the legatees had been placed under a disadvantage from the double position in which the executors stood. This was a strong case, because the partnership was under articles which authorized a settlement of accounts between the executors of a deceased partner and the surviving partners, although they did not provide for the case of a surviving partner being appointed executor. The facts were as follows: A, B and C, in 1796, became partners as merchants, under articles for seven years, and it was provided, that if either partner died in the meantime, the partnership should be determined, as to his share, from the 1st of May following his death; and that thereupon an account should be taken, and, after payment of debts, "payment, appropriation and delivery" should be made between the surviving partners and the executors of the deceased partner, of the residue of the moneys, goods, etc., of the partnership. In 1801, B died, and appointed his wife and surviving partners, A and C, his executors and guardians of his infant children, who were his residuary legatees. A and C only proved the will, and having caused a valuation and account of the partnership's assets to be made, a balance sheet was settled up to the 1st of May, 1801, showing what amount was considered due to the testator's estate (which included outstanding credits to a large amount), and his estate was credited accordingly in the partnership books, and the partnership continued by the surviving partners, but no severance of the assets was made. In May, 1809, the eldest son came of age, and an account was stated by the executors, of the testator's residuary personal estate, but which assumed, as its basis, the valuation and account made on the testator's death. Another account was stated of the debts and credits remaining unpaid and uncollected, showing what was then divisible; and another of the moneys expended for the eldest son's maintenance. A deed dated September, 1809, between A and the eldest son, was executed, on which these accounts were indorsed, and A covenanted for the payment, by installments, of the share due to the eldest son, so far as the same had been realized, and the eldest son declared he was "content and satisfied with the disclosures thus far made and accounts thus far given," etc., and it was provided he should not be prevented from claiming any further share, "not as yet received, or fallen in, or accounted for." In 1810, 1815, 1821, 1826, and 1830, changes took place in the partnership firm. There were three younger children, who attained twenty-one respectively, in 1812, 1813, and 1820, when similar accounts, founded on the same basis, were stated to each of them by the executors; and a similar deed of settlement executed by the two former, and a release by the latter, and further divisions of the testator's assets made accordingly. In 1816, the only other child died an infant, and then also a division of assets was made; and in 1822, a deed of release was executed by the trustees of the settlement of one of the daughters, in respect of a balance not included in the deed executed by her. Upon a bill being filed in 1831, by the several children and their representatives, against A and C and the other surviving partners, praying for a participation of the gains made by the partnership, since the death of A, Lord Langdale, M. R., was of opinion that the relief must be granted as prayed; holding that A and C being executors and guardians as well as surviving partners, and the release being partial only, and founded on insufficient knowledge by the *cestui que* trusts of the partnership affairs and accounts, the plaintiffs were not precluded, by their deeds or by lapse of time, from inquiring into the mode in which the assets of the old firm had been dealt with, and claiming a share in the profits arising from the testator's assets which had been used in the business of the successive partnerships. Upon appeal to Lord Cottenham, C., his Lordship affirmed the decision of Lord Langdale, observing, that had the representatives of the testator

it on for their mutual advantage, and not destroying it.[1] Hence, it is the duty of each to keep precise accounts, and to have them always ready for inspection.[2]

One partner cannot exclude his copartner.

SEC. 136. It follows from these considerations, that one partner cannot exclude another from an equal management of the concern,[3] whether the partnership be in full operation, or whether it be only subsisting for the purpose of winding up the affairs.[4] This remark, however, must be received with some limitation: for if one partner were solely interested in the partnership property *in specie*, the other sharing in the profits only, it could hardly be said that the latter had an equal power in the management of the property *in specie*. In a case where a mortgagee of mines in possession was called upon by the mortgagor, his partner, to expend more money on them, the mortgagor insisting that the mines were injured for the want of such expenditure, Lord Eldon said, that, taking this not as a matter of mortgage, but as a partnership, he should like to hear to what expense a partner could be called on to go, if he happened to be a very large creditor of the partnership trade.[5] However, in all ordinary matters relating to the partnership, the powers of the partners are co-extensive. For instance, it has been held that one of two partners, joint tenants of a house where their business is carried on, has a right to authorize a joint weekly servant to remain in the house, though the other partner has regularly given him a week's notice to leave the service.[6]

Must not incur great expenses without consulting his copartners. Rule in Jeffreys v. Smith.

SEC. 137. As one partner cannot, in general, exclude the other from

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not been his surviving partners, their duty would have been to have followed, as closely as possible, the provisions of the deed and the directions of the will; and any settlement they might have come to with the surviving partners, would have been binding; that the union of the two characters in the same person rendered any binding settlement extremely difficult, and a strict adherence to the provisions of the deed could hardly have been so conducted as to have excluded future investigation and inquiry; but that here the executors did not attempt to observe those provisions, or to follow the directions of the will, but assumed to themselves the power and right of selling as executors, and purchasing as partners: that the transaction of 1801 had no effect whatever in altering the position of the testator's property and interest, and that the rights of his children were to be considered precisely as they would have been, if no such transaction had taken place.

[1] 16 Ves. 51.

[2] Rowe v. Wood, 2 Jac. & W. 558.

[3] Ibid.

[4] Wilson v. Greenwood, 1 Swanst. 481.

[5] Rowe v. Wood, 2 Jac. & W. 556.

[6] Donaldson v. Williams, 1 C. & M. 345.

the exercise of his partnership rights, so it is contrary to good faith that he should in any way transgress the ordinary privileges of a partner in the management of the concern; as, for instance, by ordering expensive repairs, or otherwise incurring unnecessary expense, though for partnership purposes.[1] And here we may again advert to that general rule, which indeed is essential to the constitution of a trading partnership, that no member of the society can introduce a stranger without the consent of the copartners.[2] Even where, by virtue of some special agreement, or in a particular case, as that of mines, a partner has power to *assign* his share in the partnership, it seems doubtful whether there is not a degree of confidence reposed in the retiring partner that he will select a proper person as assignee.[3] The contrary, however, was holden in the case of Jeffreys v. Smith.[4] The plaintiff and Guppy were partners in a mine. Guppy finding that the concern was likely to be ruinous, agreed, in January, 1819, to assign his four-sixteenths to Hodgson, and, by an agreement of the 13th of December of the same year, Hodgson assigned two of these sixteenth shares to J. S. On the 14th of December of the same year, Guppy sent a notice to the plaintiff that he had assigned his shares, and that, as to him, the partnership was to be at an end. The style of the firm was then changed to John Jeffreys & Co. In November, 1821, the plaintiff filed his bill for a dissolution and account, there being several parties concerned. It was admitted at the hearing of the cause, that J. S. was a needy person, and that Hodgson was not in opulent circumstances. Sir J. Copely held, that Guppy ceased to be a partner on the 13th of December, and in the course of his judgment observed as follows:—"It is said that the assignment was colorable; that is, that it was made for the sake of securing the assignor from future liability. Suppose he made it with that view, he had a right so to protect himself from future liability. It is alleged that the assignee was not a responsible person. Let it be so: Guppy, for the purpose of securing himself, had a right to assign to a person not responsible. The only ground of objection would be, that, though there was an assignment in form, there was an understanding between the parties that the assignee should be a trustee for the assignor. Here there is no pretense for such a supposition. I must hold, therefore, that, at all events, the assignment, coupled with

[1] Dig. Lib. 17, tit. 2, s. 68; Pothier, *Contr. de Soc.* chap. 5, s. 1.

[2] *Ante*, p. 18; also, note 1, page 19.

[3] See 2 Bell's Comm. 621.

[4] 3 Russ. 158.

the notice, freed Guppy from future liability." It should appear from this case that the moral obligation imposed upon partners, to look to the eligibility of the assignees of their respective shares, is not sufficient to influence a court of equity in directing an account. This at least seems to be the case when such assignees are not absolutely insolvent; and, perhaps, to hold otherwise would be to introduce too much of refinement into equitable doctrines. However, in cases where a power of appointing assignees exists, the court, though not adverting to the *manner* in which this power is exercised, will, nevertheless, take care that its *extent* is not abused. And therefore, if A, having authority for that purpose, appoint that his executor shall be a partner with B, this will not bind B to a partnership with the executor of A's executor.[1]

Partner may enter into sub-partnership.

SEC. 138. Although the *delectus personæ*, which is inherent in the nature of partnership, precludes the introduction of a stranger against the will of any of the copartners, yet, as we have seen incidentally,[2] no partner is precluded from entering into a *sub-partnership* with a stranger: *nam soci mei socius, meus socius, non est.*[3] In such case, the stranger may share the profits of the particular partner with whom he contracts, and, not being engaged in the general partnership, will of course not be liable for their debts,[4] and, upon the bankruptcy of the particular partner, may prove against his separate estate.[5]

Each partner agent for his copartner.

SEC. 139 The power of one partner to bind the other in contracts relating to the partnership will be more properly considered, when we treat of the relative rights of partners and third persons; but it may here be stated that the general principle which governs all partnerships in trade is this, that each individual partner constitutes the others his *agents* for the purpose of entering into all contracts for him within the scope of the partnership concern; and, consequently, that he is liable to the performance of all such contracts, in the same manner as if entered into personally by himself.[6]

Stock must be used for augmentation of trade — No claim for contribution when he pays out money through mistake on his part or fraud of others, if negligent.

SEC. 140. The stock of the partnership is only to be employed in

[1] Crawshay v. Maule, 1 Swanst. 251.
[2] *Ante*, p. 44, see note *contra*, p. 76.
[3] Dig. Lib. 17, tit. 2, s. 20
[4] Sir Charles Raymond's case, 2 Rose, 255; Brown v. De Tastet, Jac. 284. See 2 Bell's Comm. 636.
[5] *Ex parte* Dodgson, Mont. & M. A. 445.
[6] 6 Bing. 792.

the augmentation of the trade, for the mutual benefit of the partners. neither of them can make use of it for their own private advantage. Therefore, if one copartner borrow money of the other on his note, he shall pay interest for it, though he had more money in the stock than he borrowed.[1] But, unless there be an agreement to the contrary, it is the ordinary course that each partner should be able to dispose of the partnership stock for the augmentation of the trade, and to negotiate bills and notes in the name of the firm, and, where he has advanced money, to receive contribution. However, it seems he has no claim to contribution when he has paid away money through imposition on the part of others, or mistake on his own part.[2]

Power of majority.

SEC. 141. It is said by a learned writer that, in the absence of an express stipulation, a majority must decide as to the disposal of the partnership property ; or, if no majority can be obtained to decide as to such disposal, or there are but two partners in the firm, one or more partners may manage the concern as they may think fit, provided it be within the rules of good faith, and warranted by the circumstances of the case.[3] It will be observed that this opinion is given with considerable caution, and perhaps it may be laid down that, in a partnership without articles, the power of the majority to bind the minority is confined to the ordinary transactions of the partnership.[4] *Prima facie* the rights of partners are equal; and, therefore, in matters out of the routine of business, it seems unreasonable that the minority should be driven to the alternative of dissolving the partnership or yielding to the wishes of the majority. In one case it is said to have been decided that, in all sea adventures, the acts of the majority shall bind the whole, [5] but there provision was made to that effect by deed.

Rule in Const v. Harris.

SEC. 142. In Const v. Harris,[6] Lord Eldon expressed his opinion that the majority of partners had a right to bind the minority, provided their conduct was that of men acting *bona fide*, and not conspiring to baffle and defeat the minority on every occasion. His

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[1] Beecher v. Guilburn, Moseley, 3.

[2] M'Ilreath v. Margeteson, 4 Doug. 278; In re Webb, 2 Moore, 500.

[3] Chitty's Laws of Commerce 1, Vol. 3, p. 234.

[4] See 6 Ves. 777; 5 Bro. P. C. 489. It seems clear that the majority of the members of a club have no right to bind the minority to the adoption of acts which are inconsistent with the original objects of the club.

[5] Falkland v. Cheney, 5 Bro. P. C. 476.

[6] Turn. & Russ. 516, 525.

Lordship said — "I call that the act of all which is the act of the majority, provided all are consulted, and the majority are acting *bona fide* — meeting, not for the purpose of negativing what any one may have to offer, but for the purpose of negativing what, when they are met together, they may, after due consideration, think proper to negative. For a majority of partners to say 'we do not care what one partner may say; we, being the majority, will do what we please' is, I apprehend, what this court will not allow." The majority of partners never represents the whole body except where there has been a voice called for from the minority. The court will generally take the opinion of the minority to have been fairly overruled.[1]

Duty of surviving partners.

SEC. 143. As the power of partners with respect to rights created pending the partnership remains after the dissolution,[2] so also do their mutual obligations. It is, therefore, the duty of those who are appointed to wind up the affairs of the partnership, to do every thing for the utmost advantage of the concern. No partner can make any use of the property inconsistent with that purpose,[3] nor, in performance of this business, can he claim to himself any particular reward or compensation for his trouble; as, for instance, by charging commission for getting in the debts.[4] And all compositions for debts after dissolution and before separation, are for the benefit of the partnership.[5]

Rule when firm consists of distinct firms.

SEC. 144. Generally, the same rules which regulate the rights and duties of partners, where the firm consists of individual members only, will be equally applicable when the firm consists of several distinct firms, or partly of distinct firms and partly of individual members. Therefore, if A and B as partners engage in a speculation with C, A and B are, with reference to C, as one individual; consequently A is answerable to C in respect of the dealings of B in the joint speculation.[6]

When equity will interfere.

SEC. 145. We have thus attempted to give an outline of the obligations of partners, when they are not bound by particular restrictions of their

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[1] Per Lord Eldon, S. C.
[2] Per Mansfield, C. J., 1 Taunt. 104.
[3] 1 Swanst. 507.
[4] Whittle v. M'Farlane, 1 Knapp. Priv. C. C. 312. See *post*, p. 142.
[5] Beak v. Beak, 2 Swanst. 627.
[6] Ault v. Goodrich, 4 Russ. 490.

own. How far a court of equity will interfere to give relief upon the breach of any of these obligations, must depend upon the merits of each particular case. It will never refuse to interfere where the breach is attended with circumstances of palpable injustice. On the other hand, mere differences of temper, casual disputes, and other minor grievances, are matters too trivial to induce a court of equity to settle the terms of partnership. In the words of Lord Eldon, "Where partners differ, as they sometimes do when they enter into another kind of partnership, they should recollect that they enter into it for better and worse, and this court has no jurisdiction to make a separation between them, because one is more sullen or less good-tempered than the other. Another court, in the partnership to which I have alluded, cannot, nor can this court in this kind of partnership, interfere, unless there is a cause of separation, which in the one case must amount to downright cruelty, and in the other must be conduct amounting to an entire exclusion of the partner from his interest in the partnership."[1]

[1] 1 Jac. & W. 592; Wray v. Hutchinson, 2 Myl. & K. 235.

CHAPTER VIII.

PERSONAL OBLIGATIONS.

SEC. 146. Rights and obligations of partners under contract.
SEC. 147. Grounds upon which specific performance is decreed.
SEC. 148. When contract is continuous and profits uncertain.
SEC. 149. Action for damages for breach of contract.
SEC. 150. Rule in Hercy v. Birch.
SEC. 151. When equity will enjoin dissolution.
SEC. 152. What must be shown to maintain action for damages.
SEC. 153. Rules for construction of contract — Gainsborough v. Stark.
SEC. 154. How far acts of partners affect construction
SEC. 155. Nature of business.
SEC. 156. Time when partnership begins.
SEC. 157. Term of.
SEC. 158. Style of firm.
SEC. 159. Shares to be advanced.
SEC. 160. Several rights in real property.
SEC. 161. Profits to be distributed.
SEC. 162. Personal duties of partners.
SEC. 163. Keeping proper books.
SEC. 164. Not exercising same trade on separate account.
SEC. 165. Express stipulations against.
SEC. 166. *Expressio unius est exclusio non.*
SEC. 167. When partner retires before term is ended.
SEC. 168. Decision of differences by the majority.
SEC. 169. Acquiescence in deviation from terms of contract, effect of.
SEC. 170. Annual account.
SEC. 171. When equity treats provisions of contract as waived.
SEC. 172. Errors may be stipulated against.
SEC. 173. General account upon dissolution.
SEC. 174. Executors or legatees carrying on trade of deceased partner.
SEC. 175. Power of appointment need not be strictly executed. Rule in Ponton v. Dunn.
SEC. 176. Construction of clause for substitution.
SEC. 177. Representative of deceased partner must conform to terms of will.
SEC. 178. Executors treated as partners in certain cases.
SEC. 179. When children succeed to business of deceased partner.
SEC. 180. Expulsion clause.

SEC. 181. Arbitration.
SEC. 182. Partnership by deed must be dissolved by deed.
SEC. 183. Liquidated damages.
SEC. 184. When real estate is subject of arbitration.
SEC. 185. Deed of dissolution must be specified as to time when it takes effect.
SEC. 186. What such deeds usually contain.
SEC. 187. When retiring partner leaves capital in the firm.
SEC. 188. Taking annuity does not create liability as partner.
SEC. 189. Effect of taking usurious interest.
SEC. 190. Incoming partners.
SEC. 191. Rule when partners are indebted to firm. Simpson v. Rackman.
SEC. 192. Deed of trust made by one partner.
SEC. 193. Rule in Belcher v. Sikes as to deed of dissolution as to individual matters.
SEC. 194. As to ownership of stock.
SEC. 195. Courts of equity will not relieve, except.

Rights and obligations of partners under the articles.

SEC. 146. Before the partnership is actually constituted, there is frequently a written agreement between the parties to enter into partnership, which agreement is not considered as the final contract between them, but merely as expressing an intention that such contract shall be completed by subsequent acts, or by articles of partnership.[1] It should be noticed, therefore, before we examine the different clauses of the articles themselves, that a court of equity will, under certain circumstances, compel the specific performance of an agreement to enter into partnership. This point seems to have been clearly settled by Lord Hardwicke in the case of Buxton v. Lister.[2] There, A and B agreed to purchase certain trees at a price payable by installments, the purchasers to have eight years for disposing of the same, and articles of agreement to be drawn and perfected as soon as could conveniently be, etc. Lord Hardwicke held that specific performance of this agreement might be decreed. He added, "suppose two partners should enter into an agreement, by such a memorandum as in the present case, to carry on a trade together, and that it should be specified in the memorandum, that articles should be drawn pursuant to it, and before they are drawn one partner flies off, I should be of opinion, upon a bill brought by the other in this court for a specific performance, that notwithstanding it is in relation to a chattel interest, yet a specific performance ought to be decreed."

[1] Wats. Partn. 60.

[2] 3 Atk. 383.

In the case just cited, Lord Hardwicke observed that, although specific performance was generally decreed in matters concerning the realty only, yet there were cases where such relief might be had in personal matters. His Lordship then noticed a case of Taylor v. Neville, which was for performance of articles of sale of eight hundred tons of iron, to be paid for in a certain number of years, and by *installments*, and the relief sought was decreed; and he added, that such sort of contracts differ from those that are *immediately to be executed.*

Ground upon which specific performance is decreed.

SEC. 147. In the case before Sir John Leach, his Honor very clearly explained the doctrine laid down by Lord Hardwicke. "Courts of equity," he said, "decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not in the particular case afford a complete remedy. Lord Hardwicke observed, that such sort of contracts as that in Taylor v. Nevill differ from those that are immediately to be executed; and they do differ in this respect, that the profit upon the contract, being to depend upon future events, cannot be correctly estimated in damages where the calculation must proceed upon conjecture. In such a case, to compel a party to accept damages for the non-performance of his contract, is to compel him to sell the actual profit which may arise from it, at a conjectural price."[1]

Rule when contract is continuing and profits uncertain.

SEC. 148. These observations of Sir John Leach are peculiarly applicable to the case of a partnership, which is a *continuing* contract, and of which the profits are uncertain, and cannot possibly be estimated at any fixed amount. It is clear, therefore, upon principle, that a bill for the specific performance of such a contract will be sustainable, and it seems singular that no express decision on the subject should have appeared in the reports. A case, however, of this nature, was decided by Sir W. Grant. Upon a bill filed by a partner against his copartners, sometime after the business of the partnership had commenced, praying for a specific performance of the partnership agreement by a due execution of the articles in pursuance thereof, it was referred to the Master to settle proper articles of partnership upon the footing of the agreement; and it was ordered that the parties should

[1] Adderley v. Dixon, 1 Sim. & Stu. 611.

execute the same. And an account was decreed of all dealings and transactions between the parties.

Action at law may be brought for breach of contract.

SEC. 149. Where the plaintiff is content to take damages, and to relinquish the intention of becoming a partner, he may bring his action of *assumpsit* for breach of the agreement; but in that case he must prove, with some degree of particularity, the terms of the intended partnership.[1] In a case, however, in which it appeared that the defendant had induced the plaintiff to relinquish the command of an East India ship, by promising to admit him at the ensuing Christmas into a partnership, in which the defendant was engaged, in the room of M., who had retired, and the plaintiff was to have one-fourth of the business, undertaking, in the meantime, to procure as many orders as he could; it was held, that this agreement was sufficiently specific to enable the plaintiff to recover damages, although a court of equity might have declined to compel the specific performance of it, on the ground that the partnership, when entered into, might have been instantly dissolved.[2]

Rule in Hercy v. Birch.

SEC. 150. This brings us to observe that a court of equity has refused to compel the specific performance of an agreement of this nature, in a case where either party might immediately afterward have dissolved the partnership. Thus, by indentures between Hercy, Birch and Chambers, reciting that they had on the 25th of March last commenced as copartners in the business of a banker, it was agreed that they should continue to carry on the said business for the term of seven years; and that in case any or either of them should, after the expiration of that partnership, continue to carry on the business of a banker, either alone or in partnership with any other person, until any one or more of the parties to the indenture should have a legitimate or illegitimate son, whom the father should, by writing or by his will, desire to have introduced to the said business, and who should live to attain the age of sixteen, the party or parties to the indenture, who should so carry on the said business of a banker, should take such son, whether legitimate or illegitimate, apprentice for five years; and after the expiration of such apprenticeship should receive him into the partnership then carried on by any of the parties, and admit him to an equal share

[1] Hibbert v. Hibbert, Rolls. Trin. T. 1807.
[2] Figes v. Cutler, 3 Stark. 189.
[3] M'Neil v. Reid, 9 Bing. 68; 2 Moore & Scott, 89.

with the then partners. The business was carried on till the death of Hercy, and afterward by the survivors. By this will, in pursuance of the power under the articles of partnership, he appointed an illegitimate son to be bound apprentice in 1802, when he would attain sixteen, and afterward to be admitted into the partnership, according to the articles; and he provided by his will the qualification for that purpose required by the deed. The bill was filed by that illegitimate son, having attained sixteen years of age, against the partners praying that the defendants may be decreed specifically to perform the agreement in the said indenture, and take the plaintiff apprentice, and, at the expiration of the apprenticeship, admit him to an equal share of such business, etc. Lord Eldon dismissed the bill, observing that, even supposing the plaintiff could recover damages at law for the partner's refusal to take him apprentice, yet he was of opinion that this was such a covenant as a court of equity could not specifically execute. "No one," he said, "ever heard of this court executing an agreement for a partnership, when the parties might dissolve it immediately afterward.[1]

Equity will sometimes enjoin dissolution of the firm.

SEC. 151. It is said that Lord Eldon was not quite satisfied with his decision in Hercy v. Birch,[2] and certainly there are cases where the court will by injunction inhibit the dissolution of a partnership.[3] Where there has been a partnership under articles for a term, and the term has expired, the court would probably decree the specific execution of the articles; not, however, with a view of continuing the partnership, but of investing the party applying with certain legal rights under the articles.[4] But this can seldom be the object of the suit, where, as in the case before Lord Eldon, no partnership was commenced, and, therefore, it may perhaps be laid down as a general rule that a court of equity will not decree the specific performance of an agreement to enter into partnership unless such agreement relate to a partnership for a term.[5] And even though a court of equity will, under such circumstances, make the decree, yet, according to an old case, it will not direct an account of the profits from the time

[1] Hercy v. Birch, 9 Ves. 357; 2 Hov. Supp. 174.

[2] 1 Madd. Chan. 411, note x.

[3] Id., and see Chavanay v. Van Sommer, 3 Wooddes. Lect. 416, n.; Ramsbottom v. Parker, Madd. & Geld. 5.

[4] Id., and see Gow. Partn. 110. As to specific performance after term expired, see Mortimer v. Capper, 1 Bro. C. C. 156; Wilkinson v. Torkington, 2 You. & Col. 726.

[5] In the anonymous case in the exchequer, mentioned in 1 Madd. Chan. 411, it does not appear that the partner-

the plaintiff ought to have been admitted, as the amount of such profits might have been recovered at law.[1] When a decree is sought for the specific performance of a partnership agreement not under seal, this being but a parol agreement, evidence may, of course, be given on the other side that the agreement has been vacated by parol.

What must be shown to maintain action for breach.

SEC. 152. Where the agreement to enter into articles is itself a deed containing covenants on both sides, an action will lie on any of these covenants; but the success of such action will depend on the question whether the covenant on which it is brought was the *first* to be performed, and has been broken before the covenants on the other side were to be executed.[2] In the case of Walker v. Harris,[3] an action of covenant on an agreement for a copartnership between the plaintiff and defendant was held maintainable under the following circumstances: The plaintiff being in trade, and possessed of the lease of a house, agreed to take the defendant into partnership, and also to assign over to him a moiety of the interest in the house, "to commence from and after the 29th day of September then next, on the terms and conditions following: that is to say, the said Joseph Harris shall pay to the said Elizabeth Walker, on or before the 29th day of September next, the sum of 300*l.*, as a premium or fee to be admitted into the said partnership;" it then provided that the stock should be valued by two persons, one chosen by each of the parties; and that the defendant should advance a sum equal to the value of the stock; and after some other covenants that proper articles of copartnership should, as soon as convenient, be made out. The first breach of this covenant assigned in the declaration was that the defendant had not paid the sum of 300*l.* on the day limited, although the plaintiff was willing to take him into partnership. The defendant pleaded, first, that no articles of copartnership had ever been

ship was for a term; but, from the particularity of the provisions there stated, we may conjecture that it was. There was an agreement amongst the partners that in the case of the death of either of them they would execute a deed in favor of the executor of the person so dying, so as to constitute him a partner upon giving his bond to perform the articles of partnership. Upon a bill for the specific performance of this agreement it was decreed as prayed.

[1] Anon. 2 Ves. 630. *Sed qu.*

[2] See 1 Wms. Saund. 320, n. 4.

[3] 1 Anstr. 245. Where there is no *previous* covenant, so that the plaintiff can only bring his action on the articles themselves, of which he has not the possession, he may move for leave to inspect the partnership deed, stating, by his affidavit, that he has brought his action against the defendant for damages for not taking him into partnership, pursuant to a deed in the possession of the defendant; and likewise that he, the deponent, has neither copy nor counterpart. Morrow v. Saunders, 1 Brod. & Bing. 318.

made; second, that the half interest in the premises had not been conveyed to him. To both these pleas the plaintiff demurred, and the court allowed the demurrer, being of opinion that the covenant of the defendant was precedent to the other, and was broken before the other was to be executed.

Rule observed in construing contract—Rule in Gainsborough v. Stork.

SEC. 153. To proceed to the consideration of the partnership articles, in doing which it may be observed, in the first place, that they are subject to that general rule of law by which, where the purpose of the parties is distinctly recited or mentioned in the instrument, the words which seem of general extent are confined to the declared intention of the parties.[1] Thus in the case of Gainsborough v. Stork,[2] it was provided by the articles, "that if either of the parties should die during the fourteen years intended for the partnership, and after an account passed between them, then the surviving partner should take to his own use all the goods, ready money, and things, which, on the last casting up before such death, should happen to be in stock between them, and should pay or satisfy to the executors or administrators of the deceased partner so much money as the share of such deceased partner amounted to at the time of such last account made." Afterward they made an indorsement on the articles to the following effect: The preceding clause of the articles was in the first place recited; it was recited likewise, that in case of the death of either of the parties, there would be, in all probability, debts outstanding due to the partnership at New England and other parts beyond seas, and that by reason of such debts proving bad, and the variation of the exchange in New England and other parts, the surviving partner might be much damaged by accepting such debts according to the making up of such last account on the foot of the articles; therefore, for preventing such loss to the surviving partner, in case of the death of either of the parties before the end of the copartnership, it was agreed between them, that in case either of them should die before the expiration of the partnership, the surviving partner should not be accountable or liable to pay the executors of the deceased partner for any outstanding debts in New England, or any other parts beyond sea, which *at such death* were due to the joint trade, otherwise than as the same effects should from time to time be gotten in and received by the surviving partner, and then only for the share thereof of the

[1] See 1 Fonbl. Treat. Eq. 440; Ognel's Case, 4 Rep. 48; Copeman v. Gallant, 1 P. W. 315, notes.
[2] Barnard, 312.

partner so dying. After this indorsement had been executed, two successive accounts were settled, and nine months after the latter settlement, Gainsborough, one of the partners, died. A bill was then filed by his executor against Stork, the surviving partner, for an account of the partnership dealings, to which the defendant submitted; insisting, however, that in taking the account he ought not to be bound to take the foreign outstanding debts which accrued since the time of the last account to the time of the testator's death, and at most not till those debts should happen to be got in. But Lord Hardwicke was not of that opinion. After observing that it was very manifest that the intention of the parties was that their representatives should not be entangled in their accounts after their decease, his Lordship stated it to be his opinion that, by the plain construction of this indorsement, it only extended to such foreign debts as should be contained in the last stated account before the death of one of the partners. The indorsement recited the articles, and by those articles only such foreign debts were included as did exist before the last stated accounts previous to the death of one of the partners. The words relied upon by the counsel for the defendant were, *which at such death were due;* and from thence it was inferred that all foreign debts were included which were outstanding at the time of such death. It was indeed true that, if these words had stood by themselves, they would have included all the foreign debts which were outstanding at the time of such death; but as the indorsement had a reference to the articles wherein only such foreign debts were included which were outstanding at the time of the last stated account previous to the death of the partners, these words in it must be construed *secundum subjectum materiam.*

How far the acts of partners affect the construction of the contract.

SEC. 154. But, in the construction of partnership articles, it will be necessary to bear in mind three important observations made at different times by Lord Eldon. They are these:

1. Partnerships are regulated either by the express contract, or by the contract implied by law from the relation of the parties. The duties and obligations arising from that relation are regulated, as far as they are touched, by the express contract; if it does not reach all those duties and obligations, they are implied and enforced by the law.[1]

[1] 15 Ves. 226.

Contract to be construed in reference to implied duties. — The rights and obligations implied by law, and expressed

2. Partnership articles are read in a court of equity as not containing the clause on which the parties have not acted.[1]

3. The *transactions* of partners are always to be looked at in order that you may determine between them, even against the written articles, what clauses in those articles will not bind them, provided those transactions afford a higher probability, amounting almost to demonstration.[2]

And again, in ordinary partnerships, nothing is more clear than this, that although partners enter into a written agreement, stating the terms on which the joint concern is to be carried on, yet, if there be a long course of dealing, or a course of dealing not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have

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in the partnership contract are too numerous for special enumeration and no practical advantage would result therefrom. In reference to written contracts of partnership, if any of the stipulations have not been acted upon by the parties, a court of equity will read the contract as though those stipulations were expunged. Geddes v. Wallace, 2 Bligh, 297; Jackson v. Sedgewick, 1 Swanst. 460. "The law," said Lord Eldon, in the first case cited *supra*, "as I apprehend, is that *the transactions of partners* are always to be looked at in order that you may be able to determine between them, *even against the written articles*, what clauses in those articles will not bind them, provided those transactions afford a higher probability, amounting almost to demonstration." Thus where the articles provide that only a certain partner shall purchase stock, draw bills, or execute notes, if another partner is permitted to do these things, the firm will be bound thereby, and courts will hold that they have varied the partnership contract in this respect. Const v. Harris, T. & R. 523. "In ordinary partnerships," said Lord Eldon in the case last cited, "nothing is more clear than this, that, although partners enter into a written agreement, stating the times upon which the joint concern is to be carried on, yet, if there be a long course of dealing, *or a course of dealing not long, but still, so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct.* For instance," he adds, "if in a common partnership the parties agree that no one of them shall draw or accept a bill of exchange in his own name without the concurrence of all the others, yet, if they afterward slide into the habit of permitting one of them to draw or accept bills without the concurrence of the others, this court will hold that they have varied the terms of the original agreement in that respect." The partnership articles can never be regarded as embodying the *whole contract* between the parties. Lord Langdale in Smith v. Jeyes, 5 Beav. 505, very aptly said: "The transactions of partners with each other cannot be considered merely with reference to the express contract between them. The duties and obligations arising from the relation are regulated by the express contract between them, so far as the express contract extends and continues in force; but if the express contract, or so much of it as continues in force, does not reach to all these duties and obligations, *they are implied and enforced by the law*, and it is often matter to be collected and inferred *from the conduct and practice of the parties, whether they have held themselves, or ought, or ought not to be bound by the particular provisions contained in their express agreement.* When it is insisted that the conduct of one partner entitles the other to a dissolution, we must consider, not merely the specific terms of the express contract, *but also the* duties and obligations which are implied in every partnership contract." Blissett v. David, 10 Hare, 522.

[1] 1 Swanst. 469.

[2] 2 Bligh, 297. But see Smith v. Duke of Chandos, Barnard. 419.

changed those terms by conduct. For instance, if in a common partnership the parties agree that no one of them shall draw or accept a bill of exchange in his own name, without the concurrence of all the others, yet, if they afterward slide into a habit of permitting one of them to draw or accept bills without the concurrence of the others, a court of equity will hold that they have varied the terms of the original agreement in that respect.[1]

Nature of the business.

SEC. 155. The words of covenant at the commencement of a partnership deed, which are usually several as well as joint, and usually extend to all the succeeding stipulations, will be considered in a future section. The more important stipulations have generally reference to the nature of the business. In order to warrant the extension of a partnership to a business[2] or branch of business not originally

[1] Turn. & Russ. 523.

[2] *To be construed so as to effectuate intention and purpose of partners.—Powers of a majority of the partners*—The contract is always to be construed so as to effectuate the purpose for which the partnership is formed, and this will always be done, and their declared purpose, as stated in the contract, will always control, unless their conduct has been such as to show that such declared purpose was subsequently changed by the assent of *all* the partners, and the fact that such change was agreed upon by a *majority* of the partners does not make it obligatory upon the minority. Nautsch v. Irving, Gow on Part. App. 398; Davies v. Hawkins, 3 M. & S. 488; Glassington v. Thwaites, 1 Sim. & Stu. 131; Fennings v. Grenville, 1 Taunt. 241; Const v. Harris, 1 Russ. & Tur. 525. The majority may control as to the general management of the business, *provided the minority are consulted and permitted to make known their objections*. Johnston v. Dutton, 27 Ala. 245; Irvine v. Forbes, 11 Barb. (N. Y.) 387; Western Stage Co. v. Walker, 2 Iowa, 504; Peacock v. Cummings, 46 Penn. St. 434; Kirk v. Hodgson, 3 Johns. Ch. (N. Y.) 406; *but even the majority cannot change the business from one kind to another different from that stated in the contract.* This was well illustrated by Lord Eldon in Nautsch v. Irving, *ante*; a company was formed in the early part of the year 1824 for granting fire and life assurances. The capital was 5,000,000*l.*, divided into fifty thousand 100*l.* shares. The plaintiff was one of the original subscribers, and held fifteen shares, in respect of which he had paid the required deposit, but he had not executed the company's deed of settlement. In conformity with the rules of the company he had effected a policy with it on his life for 1,500*l.* In the summer of 1824, the act 6 Geo. I, prohibiting companies from carrying on the business of marine insurance, was repealed, and shortly afterward advertisements appeared in the newspapers, stating that the company would commence the business of marine insurance. The plaintiff, in answer to an inquiry whether this announcement was authorized by the directors, was informed that it was, and that if he objected to the course about to be pursued he might receive back his deposit with interest, and have his policy canceled and the premium returned. In reply to this the plaintiff stated that he was ready to execute any deed which was in conformity with the prospectus; that he conceived it competent for him to insist that the business in which he was a partner should be carried on according to the agreement which united the partners together; that he could not think his doing so would entitle the managers of that partnership to pay him out his capital, and deprive him of a share in a concern of which he had the highest opinion; that he therefore required the directors to abstain from any contracts or engagements relating to marine insurance, as not being contemplated by himself and those who joined the company upon the terms of the prospectus,

contemplated by the parties, the unanimous consent of all the partners is requisite, for it is competent to any individual member of a firm to insist that the business of the partnership shall be confined

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and that he required an undivided attention on the part of the directors to the objects defined therein The plaintiff afterward attended at the office of the company, to execute its deed of settlement, but finding that it contained provisions enabling the company to carry on the business of marine insurance, he refused to execute it, as not being conformable to the terms on which the company was formed. In pursuance of the advertisements, the company had commenced, and it was carrying on, the business of marine insurance; but there was no evidence to show acquiescence on the part of the plaintiff, and there was evidence to show continued opposition by him to the carrying on of such business. The plaintiff applied for an injunction to restrain the directors from effecting marine insurances, and an injunction was granted. The bill was filed by the plaintiff on behalf of himself and all others the shareholders of the company against the directors, and prayed a dissolution, and, if necessary, a receiver, and an injunction to restrain the defendants from effecting marine insurances in the name and on account of the company, and from using the name and from applying the capital of the company for such purposes. The judgment of Lord Eldon, as far as it relates to the power of a majority, is particularly valuable, and the following extracts from it are constantly referred to. With respect to the liberty given to the plaintiff to retire, his Lordship said, "An offer is made to the plaintiff that he may receive back his deposit, with interest from the date of the payment, and he is desired to consider himself as having received notice thereof. But it is not, I apprehend, competent to any number of persons in a partnership (unless they show a contract rendering it competent to them) formed for specified purposes, if they propose to form a partnership for very different purposes, to effect that formation by calling upon some of their partners to receive their subscribed capital and interest and quit the concern; and in effect, merely by compelling them to retire upon such terms, so to form a new company. This would, as to partnerships, be a most dangerous doctrine. Where a partnership is dissolved (even where it can be in a sense dissolved the instant after notice to dissolve is given, if there be no contract to the contrary), it must still continue for the purpose of winding up its affairs, of taking and settling all its accounts, and converting all the property, means, and assets of the partnership, existing at the time of the dissolution, as beneficially as may be, for the benefit of all who were partners, according to their respective shares and interests; and the other partners cannot say to him to whom they have given an offer of his deposit and interest. Take that, and we have a new company, keeping the effects, means, assets, and property of the old, as the property of the new partnership. The company will indemnify the plaintiff against loss by its transactions already had, or hereafter to be had, not for the specified purposes of the institution. But the right of a partner is to hold his partners to the specified purposes whilst the partnership continues, and not to rest upon indemnities with respect to what he has not contracted to engage in. A dissatisfied partner may sell his shares for double what he originally gave for them. But he cannot be compelled to part with them for that reason; it may be his principal reason for keeping them, having the partnership concern carried on according to the contract. The original contract and the loss which his partners would suffer by a dissolution is his security that it shall be so carried on for him and them beneficially, and with augmented improvement in the value of his shares and their shares." With respect to the power of a majority he said: "If six persons joined in a partnership of life assurance, it seems clear that neither the majority nor any select part of them, nor five out of the six, could engage that partnership in marine insurances, unless the contract of partnership expressly or impliedly gave that power; because, if this was otherwise, an individual or individuals, by engaging in one specified concern, might be implicated in any other concern whatever, however different in its nature, against his consent. But if a part of the six openly and publicly professed their intention to engage the partnership in another

to the objects for which it was constituted. And, therefore, Lord Eldon decided that a joint-stock company, formed for the purpose of effecting fire and life insurances, could not, without the consent of

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concern, and clearly and distinctly brought this, to the knowledge of one or more of the other partners, and such one or more of the other partners could be clearly shown to have acquiesced in such intention, and to have permitted the other partners to have entered upon and to have engaged themselves and the body in such new projects, and thereby to have placed their partners so engaged in difficulties and embarassments unless they were permitted to proceed in the further execution of such projects, if a court of equity would not go the length of holding that such conduct was consent, it would scarcely think parties so conducting themselves entitled to the *festinum remedium* of injunction." * * * * "Courts must struggle to prevent particular members of those bodies from engaging other members in projects in which they have not consented to be engaged, or the engaging in which they have not encouraged, assented to, or empowered, or acquiesced in, expressly or tacitly, so as to make it not equitable that they should seek to restrain them. The principles which a court would act upon in the case of a partnership of six, must, as far as the nature of things will admit, be applied to a partnership of 600." * * * "They who seek to embark a partner in a business not originally part of the partnership concern, must make out clearly that he did expressly or tacitly acquiesce." In Abbott v Johnson, 32 N. H. 9, this question was considered by the court. In that case the partnership articles provided that "ardent spirits" should be neither purchased nor sold by the firm. Subsequently the majority of the company altered the articles so as to admit of their purchase and sale, and the court held that this change in the business was such a substantial alteration as released those not assenting to the change from all obligation to proceed with the firm. See, also, Livingston v. Lynch, 4 Johns. Ch. (N. Y.) 573. In Const. v. Harris, Turn. & R. 496, the proprietors of Covent Garden Theatre agreed that the profits should be exclusively appropriated to certain definite purposes. Afterward, the proprietors of seven out of eight shares entered into an agreement to apply the profits in a different manner, but they had not consulted the owner of the other eighth share, and he disapproved of the alteration. It was held by Lord Eldon, that the majority had no power to depart from the terms of the original agreement; and upon a bill filed by the one dissentient partner for a specific performance of that agreement, a receiver of the profits was appointed. In a long and elaborate judgment, Lord Eldon distinctly recognized the principle that articles which had been agreed on to regulate a partnership cannot be altered *without the consent of all the partners*. In modern cases the same principle has been constantly recognized and followed. See Morgan's case, 1 Mac. & G. 225; Davidson's case, 4 K. & J. 688; Smith v. Goldsworthy, 4 Q. B. 430; E. C. L. R. 45; Davies v. Hawkins, 3 M. & S. 488. "Indeed," says Mr. Lindley, p. 429, "it may be said never now to be disputed; the contest always turning on the question, whether the acts of the majority do or do not belong to the class under consideration, rather than to the question whether, if they do, the minority is or is not bound by them. It has been held not competent for a majority of shareholders in a company formed for the purpose of making a railway between two places, to make a railway between two other places; Bagshaw v. The Eastern Union Rail. Co., 7 Ha. 114, and 2 Mac. & G. 389; Simpson v. Denison, 10 Ha. 51; nor for the majority of the members of a fire and life insurance company to convert the company into a marine insurance company; Natusch v. Irving, *ante*, p. 511. (In Rogers v. Oxford, etc., Rail Co., 2 De G. & J. 662, the railway company had express power to become a canal company also) nor for a majority of the members of any company to employ the property or funds of the company otherwise than as contemplated by themselves and the other members; as by making presents to the directors; York and North Midland Rail. Co. v. Hudson, 16 Beav. 485; see, too, Rossmore v. Mowatt, 15 Jur. 238, V. C. K. B.; or by transferring that property and with it the business of the company to another company; compare Charlton v. Newcastle and Carlisle Rail. Co., 5 Jur. (N. S.) 1096; Winch v. Birkenhead,

all the shareholders (of whom the plaintiff was one), be extended to marine insurance, his Lordship remarking that "the court will restrain particular members from engaging other members in projects

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etc., Rail. Co., 5 De G. & S. 562; Beman v. Rufford, 1 Sim. (N. S.) 550, and Salomons v. Laing, 12 Beav. 377, with Clay v. Rufford, 5 De G. & S. 768; and see as to amalgamating, Gilbert v. Cooper, 10 Jur. 580, V. C. E., and Shrewsbury and Birm. Canal Co. v. Stour Valley Rail Co., 2 De G. M. & G. 866; or by applying the funds of the company in defraying the expenses of an application to Parliament to alter the constitution of the company, Munt v. The Shrewsbury and Chester Rail. Co., 13 Beav. 1; Simpson v. Denison, 10 Ha. 51; Vance v. The East Lanc. Rail. Co., 3 K. & J. 50; or in the purchase of shares of retiring shareholders. Hodgkinson v. National Live Stock Ins. Co., 5 Jur. (N. S.) 478 and 969. Upon the same principle, by-laws which are not warranted by the terms of the instrument which confers the power of making them, are altogether invalid; Calder, etc., Nav. Co. v. Pilling, 14 M. & W. 76; Adley v. Whitstaple Co., 17 Ves. 315; 19 id. 304; 1 Mer. 107; and a majority cannot, unless empowered so to do by the company's act, charter, deed of settlement, or regulations, forfeit shares; Barton's case, 4 Drew, 535; or reduce the capital of the company. Smith v. Goldsworthy, 4 Q. B. 430. The right of a majority of partners or shareholders, to apply to the legislature or the crown for an act of parliament or charter for the purpose of changing the constitution of the partnership or company, has occasioned much discussion and no little difference of opinion. Upon the principles laid down and enforced in Natusch v. Irving and Const. v. Harris, the minority have a right to say that no such application shall be made; and there is an instance in which a minority of a chartered society did obtain an injunction, restraining the majority from surrendering the existing charter, with a view to procure a new one materially differing from it. Ward v. Society of Attorneys, 1 Coll. 370. But the authority of this case must be considered questionable; for, although the court of chancery will, even at the instance of one dissentient shareholder, grant an injunction restraining the application of the funds of an incorporated company in defraying the expenses of obtaining an act of parliament altering the constitution of that company, Munt v. The Shrewsbury and Chester Rail. Co., 13 Beav. 1; Simpson v. Denison, 10 Ha. 51; Vance v. E. Lanc. Rail. Co., 3 K. & J. 50, and the cases there cited. It declines to go further, and to restrain shareholders in a company from applying at their own expense for an act which, if passed, will affect the whole company and change its constitution, holding that those shareholders who object to the application must oppose it in parliament. See the last cited cases, and Ware v. The Grand Junction Water Works Co., 2 R. & M. 470; and as to injunctions restraining applications to parliament, The Lancashire and Carlisle Railway Co. v. The North Western Railway Co., 2 K. & J. 293; Heathcote v. The North Staffordshire Railway Co., 2 Mac. & G. 100. See, too, Bill v. Sierra Nevada, etc., Co., 6 Jur. (N. S.) 184, where the court declined to restrain the directors of a company from applying to a foreign State for authority to alter the constitution of the company. With respect to the effect of a unanimous agreement to depart from the original basis of a partnership or company, there is a material difference between partnerships, and companies incorporated by charter or Act of Parliament A partnership, whether large or small, is an association based and depending entirely upon the agreement of its members, and consequently it is perfectly competent for *all* those members at any time to annul or vary the agreement into which they have entered, and, by making a new agreement, entirely to change the objects of the partnership, and to embark in any speculations of which they all approve. The same observation applies to those companies which resemble partnerships by being based upon a mere agreement. Keene's Executor's case, 3 De G. M. and G. 272. There can be no question but that the majority can control as to the general management of the business. As, in the case of a mercantile firm, whether certain goods shall be purchased, whether a certain sale shall be made; whether credits shall be given to a certain customer, and as to the employment or retention of employees. But in no case can the majority bind the minority to any thing expressly stipulated against

in which they have not consented to be engaged, or the engaging in which they have not encouraged, assented to, empowered, or acquiesced in, expressly or tacitly, so as to make it not equitable that they should seek to constrain them."[1]

Time of commencement.

SEC. 156. Where no time is mentioned for the commencement of a partnership, it will begin from the date of the articles, and, at law, parol evidence cannot be received to show that it was intended to commence at a future period. In a late case this rule was adhered to, although the consequence was to defeat the deed by rendering the partnership illegal.[2]

Term of partnership.

SEC. 157. Although a precise term be fixed the partnership will be dissolved, unless there be a stipulation to the contrary, by the death of any of the parties. The mode of providing for the continuation of the partnership, notwithstanding the death of any of the parties, will be considered hereafter.[3] Where a partnership for a term is dissolved by effluxion of time, and afterward the partners continue the business

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in the contract. Abbott v. Johnson, 32 N. H. 9, or which is not fairly within the scope of the partnership business. If the partners do not desire to be bound by the acts of a majority, they should stipulate to that effect in the contract. When the firm consists of two persons only, of course this rule does not apply, and the same is true in all cases where the partners are equally divided upon a question. In such cases the question must be resolved according to the legal relations of the parties."

[1] Natusch v. Irving, Gow on Partn., Appen. 407; Hogan v. Reynolds, 8 Ala. 70; New Orleans, etc., Co. v. Harris, 27 Miss. 637; Abbott v. Johnson, 32 N. H. 11; Const v. Turner, 1 T. & R. 496; Gray v. Ward, 18 Ill. 32; but if the business is extended by agreement express or implied, the company assumes all the liabilities incident thereto. Jones v. Booth, 10 Vt. 272; Taylor v. Taylor, 5 N. C. 70; Waller v. Keyes, 6 Vt. 265.

[2] Williams v. Jones, 5 B. & C. 108; Aspinwall v. Williams, 1 Ohio 94; Hunter v. Whitehead, 42 Mo. 526; Burns v. Rowland, 40 Barb. (N. Y.) 369; Ingraham v. Foster, 31 Ala. 123; Goddard v. Pratt, 16 Pick. (Mass.) 426; Azel v. Betz, 2 E. D. S. (N. Y.) 190. A mere executory agreement is not enough, Wilson v. Campbell, 5 Ill. 402; Aikins v. Hunt, 14 N. H. 208, it must be fully consummated, Rice v. Shuman, 43 Penn. St. 42; Rebone v. Chalker, 27 Conn. 130; Glover v. Tuck, 24 Wend. (N. Y.) 158; Kerrigan v. Kelley, 17 Mo. 275; Hubbell v. Wolf, 15 Ind. 209, and all conditions precedent must be performed. Beal v. Poole, 27 Md. 453; McGraw v. Pulling, Freem. Ch. 357; Norris v. Cooper, 3 H. L. Cas. 187; and if either party has an option of becoming a partner or not, the relation does not exist until the option is exercised. Gabriel v. Enill, 9 M. & W. 297. So if nothing has been done under the agreement, no partnership exists, Wood v. Connell, 2 Whart. (Penn.) 351; Vance v. Blair, 18 Ohio, 532; Metcalf v. Redmon, 43 Ill. 264; Mason v. Connell, 3 Whart. (Penn.) 381; but if a person has entered into an agreement to become a copartner with another and refuses to go on, an action lies for its breach. Skinner v. Tinker, 34 Barb. (N. Y.) 335; Vance v. Blair, *ante*; Andrews v. Garstin, 10 J. Scott, 106.

[3] Featherstonhaugh v. Fenwick, 17 Ves. 298.

as usual without any new agreement, the latter partnership is a partnership at will. Where, therefore, A and B had been in partnership under articles requiring twelve months' notice of dissolution, and the partnership expired by effluxion of time, and the parties continued to trade as before, this latter partnership was held to be dissoluble *instanter* at the will of either party.[1] But where a partnership is prolonged under the circumstances just mentioned, all the covenants of the old partnership, with the exception of that for duration, are infused into the transactions of the new partnership, and even a covenant for duration for the same length as the former partnership may be implied from circumstances. Thus in a case where the term limited by the articles for the continuance of a partnership expired, and one of the partners resident in America, being desirous of renewing the connection, transmitted to his copartner in London the articles, with an indorsement of the renewal of them for a similar term, and the copartner continued to discharge his former duties as a copartner without any charges for commission, but never sent any formal renewal of the articles; it was held in America that the partnership continued for the term stated in the indorsement, and was not determinable at any time at the will of either of the parties.[2]

Style of firm.

SEC. 158. Where the members of a partnership contract by covenant, that the firm shall be A, B, C and D, it is a breach of that covenant for A to sign those instruments to which the covenant refers in the name of A & Co. So, also, strictly speaking, it is no less a breach of that covenant for D to sign his own name, adding "for self and partners."[3]

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[1] Per Sir A. Hart, 1 Molloy, 466.

[2] Dickinson v. Bold, 3 Desaus. 501.

[3] 2 Jac. & W. 268; Crawford v. Collins, 45 Barb. (N. Y.) 269, and the law does not require that it should contain the names of all, Bayard v. Johnson, 2 Pet. (U. S.) 297, or any of the partners. It may be a name appropriate to a corporation as "The Citizens' Bank," "The Union Saving Company;" Crawford v. Collins, *ante*, or indeed any name that the parties see fit to give it, and may change it *ad libitum*. Billingsby v. Dawson, 27 Iowa, 211. If no name is agreed upon, the name finally adopted or used is to be regarded as the name of the firm. Winship v. U. S. Bank, 5 Pet. (U. S.) 564; U. S. Bank v. Binney, 5 Mas. (U. S.) 189. "The name," says Mr. Lindley, pp. 165-174, under which a firm carries on business, is in point of law a conventional name, applicable only to the persons who, on each particular occasion when the name is used, are members of the firm." A firm is usually described in legal proceedings as certain persons trading or carrying on business under, and using the name, style and firm of, etc. Such a description is sufficient, even in pleadings at law, see Smith v. Ball, 9 Q. B. 361; Tigar v. Gordon, 9 M. & W. 347. Ball v. Gordon, id. 345; Wright v. Welbie, 1 Chitty, 49, where the persons referred to are not parties to the action; and the description is not objectionable on the ground that one person only uses the name or style in question

Shares to be advanced.

SEC. 159. If any share is to be advanced by installments, this is *debitum in præsenti solvendum in futuro;* and therefore the partner admitted upon these terms is a debtor to the partnership for the unpaid installments. In a case where a *sole* trader agreed, in consideration

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Bass v. Clive, 4 Camp. 78. Whenever a firm is spoken of by its name or style, the courts admit evidence tending to show what persons did in fact constitute the firm at the time in question. Carruthers v. Sheldon, Taunt. 15; Bass v. Clive, 4 M. & S. 14; Stubbs v. Sargon, 2 Keen. 255, and 3 M. & Cr. 507; Latouche v. Waley, Hayes & Jones (Ir. Ex.) 43. If persons trade or carry on business under a name, style, or firm, whatever may be done by them under that name, is binding as much as if real names had been used. This is seen every day in the case of bills of exchange and promissory notes; and even in the case of more formal instruments there can be no doubt of their validity, although some of the executing parties may be described as A & B. See Brutton v. Burton, 1 Chitty, 707, a warrant of attorney; Evans v. Curtis, 2 C. & P. 296, an agreement for a lease; Moller v. Lambert, 2 Camp. 548, a bond; Latouche v. Waley, Hayes & Jones (Ir. Ex.) 43. How far the firm is bound by instruments on which its true name does not appear, will be seen hereafter. But as the name of a firm is only a conventional mode of designating the persons composing it, any variation amongst these persons is productive of a new signification of the name. If, therefore, a legacy is left to a firm, that is, a legacy to those who compose it at the time the legacy vests, see Stubs v. Sargon, 2 Keen, 255, and 3 M. & Cr. 507. In Mayberry v. Brooking, 7 De G. M. & G. 673, a legacy of a debt due to A was held to pass A's interest in a debt due to him and his copartners, and if a legacy is left to the representatives of an old firm, it will be payable to the executors of the survivors of the partners constituting the firm alluded to, and not to its successors in business. Kerrison v. Reddington, 11 Ir. Eq. 451. Again, if trustees are authorized to lend money to a firm, and, after the death or retirement of one of the members, the trustees lend to the remaining members, this, it seems, would be a breach of trust on the part of the trustees. See Fowler v. Raynal, 2 De G. & Sm. 749, and 3 M. & G. 500. So an authority given to a firm of two partners cannot it is apprehended, be exercised by them and a third person afterward taken into partnership with them. Barron v. Fitzgerald, 6 Bing. N. C. 201. So, if there be a firm, A, B and C, and it has an agent D, and C retires from the firm, though D continues the agent of the firm, he is no longer the agent of C, but only of A and B. See Jones v. Shears, 4 A. & E. 832. So if A and B are solicitors in partnership, and they take in a new partner C, and a person who was a client of A and B, and was indebted to them continues to employ A, B and C, A and B will not have any lien for their old debt on those deeds of the client which may have come into the possession of A, B, and C, as his solicitors. Re Forshaw, 16 Sim. 121; and Pelly v. Wathen, 7 Ha. 351, which also shows that A and B's lien on documents in their possession is not lost by their taking C into partnership. As to the effect of a dissolution of partnership, of solicitors on their lien, see Vaughn v. Vanderstegen, 2 Drew. 409; Griffiths v. Griffiths, 2 Ha. 687. Upon the same principle, namely, that the firm is not distinguishable from its members, and that the name of the firm is only a conventional name for those members, if a firm is appointed by its mercantile name to any office, *e.g.*, the office of trustee, guardian or executor, the partners in the house at the time of its appointment to the office are the persons who, in point of law, are considered as filling it. De Mazar v. Pybus, and Knudson v. Pybus, 4 Ves. 649. The firm, as such, cannot hold an office, nor can rights, personal to the members of a given firm, be exercised by new members who may be introduced into it. See Barron v. Fitzgerald, 6 Bing. N. C. 201; E. C. L. R. 37; Stevens v. Benning, 1 K. & J. 168. Although the name by which a firm is known is not the property of the firm, and there is apparently nothing at common law to prevent persons from carrying on business in partnership under any name they please (provided it does not purport to be the name of a corporation), yet a name may be a trade-mark, and, if it is, the use of it by others will

of a sum payable by installments, to take two persons into partnership with him for a term of eighteen years, and became bankrupt five months after the commencement of the partnership, when only one installment was due, it was nevertheless held that the two persons having bought the right of becoming partners, and having received

be illegal, if they pass off themselves or their own goods for the firm, or the goods of the firm whose name is made use of. See Knott v. Morgan, 2 Keen, 213; Welch v. Knott, 4 K. & J. 747. Moreover, if this is done intentionally, the illegality will not be effected by the circumstance that the imitators of the trade-mark are themselves of the same name as those whose mark they imitate. Holloway v. Holloway, 13 Beav. 209; Burgess v. Burgess, 3 De G. M. & G. 896. But there can be no trade-mark without past use. Therefore, where the founder of a bank, called "The Bank of London," sued a rival company, established under the same name for imitating and passing themselves off as his bank, the action failed on the ground that the plaintiff did not show that he had established himself in business as a banker, so as to entitle him to complain of what the defendants had done. Lawson v. The Bank of London, 18 C. B. 84; E. C. L. R. 66.

In legal proceedings.—The non-recognition of the firm, in a mercantile sense, is very apparent when it has to sue or be sued at law, for, 1. A firm can neither sue nor be sued otherwise than in the names of the partners composing it. The Dutch West India Company v. Moses, 1 Str. 612; De Groat v. Darby, 7 Rich. (S. C.) 218; Martin v. Kelly, Cheeves (S. C.), 215; Heaton v. R. R. Co., 16 Ind. 275; Davis v. Hubbard, 4 Blackf. (Ind.) 56; Marshall v. Hull, 8 Yerg. (Tenn.) 101; Bentley v. Smith, 3 Cai. (N. Y.) 170; Seeley v. Schenck, 8 N. J. L. 65; Smith v. Canfield, 8 Mich. 493; Seeley v. Schenck, 1 Penn. St. 55; but after verdict the judgment will stand; Pate v. Bacon, 6 Munf. (Va.) 219; Brownson v. Metcalf, 1 Handy (Ohio), 188; Gilman v. Cosgrove, 22 Cal. 356. 2. Consequently, no action can be brought by the firm against one of its partners, nor by one of its partners against it, for in any such action one person, at least, would appear both as plaintiff and as defendant, and it is considered absurd for any person to sue himself even in form. De Tastet v. Shaw, 1 B. & Ald. 664; Richardson v. The Bank of England, 4 M. & Cr. 171, 172; Barley v. Harris, 8 N. H. 233; Williams v. Henshaw, 12 Pick. (Mass.) 378; Andrews v. Allen 4 S. & R. (Penn.) 241; Westerloo v. Evertson, 1 Wend. (N. Y.) 354; Smith v. Small, 54 Barb. (N. Y.) 223; Wright v. Eastman, 44 Me. 232; and if one of the partners is a member of another firm, neither firm can sue the other at law, but must proceed in equity; Haven v. Wakefield, 39 Ill. 518. 3. For the same reason one firm cannot bring an action against another, if there be one or more persons partners in both firms. Bosanquet v. Wray, 6 Taunt. 597; Mainwaring v. Newman, 2 Bos. & P. 120; Haven v. Wakefield, 39 Ill. 518; Banks v. Mitchell, 8 Yerg. (Tenn.) 112; Young v. Buck, 1 Penn. St. 490; Calvitt v. Markham, 4 Miss. 343; Engliss v. Furniss, 4 E. D. S. (N. Y.) 587. Again, if one member of a firm draws a bill on the firm, and it is accepted in the name of the firm, he cannot sue the firm on such a bill, for he, as one of the firm, is liable as an acceptor, and ought, therefore, to be a defendant to the action in which he is plaintiff. See Neale v. Turton, 4 Bing. 149; Portland Bank v. Hyde, 11 Me. 196; De Jarneth v. McQueen, 31 Ala. 230; Lawrence v. Clark, 9 Dana (Ky.), 259. This ought not to be forgotten by those who draw bills on unincorporated companies, of which they are themselves members. Another most important consequence of the principle, that on any change amongst the persons composing a partnership there is in fact a new partnership, and not a mere continuation of the old one, is that, although, upon a change in a firm, it may be agreed between the members of the old and new firms that the rights and obligations of the old shall devolve upon the new partners, this has no effect upon third parties unless they accede to it. As to them, it is *res inter alios acta*, and there is no principle either of law or equity by virtue of which their existing rights or obligations can be affected, either for better or for worse, by agreements to which they are strangers. This subject will be alluded to hereafter. The difference between the way in

the consideration for their money, the bankrupt's assignees were entitled, at the respective periods, to receive the *whole* of the remaining installments.[1]

Several rights in real property, etc.

SEC. 160. When there is real property, fixtures, etc., it is sometimes

which a firm is regarded by lawyers and mercantile men, is never more apparent than when a claim made by a firm is met by a defense founded on the conduct of one only of its members. If the conduct in question were always imputable to the firm upon recognized principles of agency, the rule precluding the firm from suing by reason of the conduct of one of its members would be open to no objection, and would be perfectly consistent with mercantile notions. But the rule goes much further than this, and has been carried to an extent which can scarcely be considered satisfactory, although its conformity with established technicalities is not perhaps to be disputed. It is laid down as a general principle of law, that what a person has no right to do himself, he cannot acquire a right to do by associating others with him. See in addition to the cases cited *infra*, Salomons v. Nissen, 2 T. R. 674; Brandon v. Scott, 7 E. & B. 234. Thus, it being a rule that a trustee cannot claim from his *cestui que trust* compensation for trouble, or loss of time in the execution of the trust, it has been held that if one of a firm of solicitors is a trustee, and the firm acts as solicitors in the matter of the trust, the firm cannot claim payment for its services, the disability of one of its members thus extending to them all. See Broughton v. Broughton, 2 Sm. & G. 422, and 5 D. & G. M. & G. 160; Christophers v. White, 10 Beav. 523; Collins v. Carey, 2 id. 128; Matthison v. Clark, 3 Drew. 3. So, if one member of a firm is guilty of fraud in entering into a contract on behalf of the firm, his fraud may be relied on as a defense to an action on the contract brought by him and his copartners; for their innocence does not purge his guilt. See Kilby v. Wilson, Ry. & Mood. 178. So if one partner resident abroad sells partnership goods, and he knows they are to be smuggled into this country, and he is privy to their being so smuggled, then, although his copartners are innocent, the firm cannot recover the price of such goods. Biggs v. Lawrence, 3 T. R. 454. So if one of several partners draws a bill in his own name, and the bill is accepted upon condition that he will provide for it when due, he cannot, by indorsing that bill to the firm to which he belongs, entitle himself and his copartners to sue upon it. Sparrow v. Chisman, 9 B & C. 241, E. C. L. R. 17; and see Richmond v. Heaphy, 1 Stark. 202. These cases were not decided on the ground that the act of the one partner is imputable to the firm; and the principle governing them is applied where the circumstances are such as to exclude the doctrine of agency. For example, if a partner pledges partnership property, and in so doing clearly acts beyond the limits of his authority, still, as *he* cannot dispute the validity of his own act, he and his copartners cannot recover the property so pledged by any action at law. Brownrigg v. Rae, 5 Ex. 439. So, although a partner has no right to pay his own separate debt by setting off against it a debt due from his creditor to the firm, yet if he actually agrees that such set-off shall be made, and it is made accordingly, he and his copartners cannot afterward in an action recover the debt due to the firm. See Wallace v. Kelsall, 7 M. & W. 264; Gordon v. Ellis, 7 Man. & Gr. 607. As observed by Lord Tenterden, in Jones v. Yates, 9 B. & C. 532, and see Richmond v. Heaphy, 1 Stark. 202: there is no instance "in which a person has been allowed as plaintiff in a court of law to rescind his own act, on the ground that such act was a fraud on some other person; whether the party seeking to do this has sued in his own name only, or jointly with such other person." This doctrine has been carried so far, that even where the partner whose conduct is relied upon as an answer to an action by the firm is dead, the surviving copartners have been held not entitled to sue. In Ex parte Bell, 1 M. & S. 751, one of a firm advanced money of the firm to a stranger

[1] Akhurst v. Jackson, 1 Swanst. 89.

covenanted, that each party shall have a several right therein. It may be observed, that, upon the bankruptcy of the firm, the several interests in the real property so circumstanced will be distributable to the separate creditors of each partner respectively.

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for an illegal purpose; and it was held, after the death of the partner who advanced the money, that the survivors could not recover it from the person to whom it was lent. The decision did not proceed upon the ground that the loan was not a partnership loan, with which the firm had nothing to do, but upon the ground that it was impossible to separate the guilty from the innocent partners, and that the death of the former could not entitle the others to sue. So if a firm has become bankrupt, its assignees are in no better position than the partners themselves would have been in, and are therefore liable to be defeated on similar grounds. Jones v. Yates, 9 B. & C. 532. Notwithstanding the above decisions, it has been held that if a partner in collusion with a debtor to the firm gives him a receipt for his debt although no payment or any thing equivalent to payment is made, an action for the recovery of the debt is nevertheless maintainable by the firm, *i. e.*, by the partner giving the receipt and his copartners. Henderson v. Wild, 2 Camp. 561; Farrar v. Hutchinson, 9 A. & E. 641. A receipt, however, does not preclude the person giving it from showing that the money therein expressed to be received, was not in fact received; Skaife v. Jackson, 5 Dow. & Ry. 290; nor does it discharge the debt. On these grounds the cases now alluded to are considered distinguishable from those establishing the rule above noticed. Again, a right of set-off which might be pleadable to an action brought by one partner is not pleadable to an action by him and his copartners; See Gordon v. Ellis, 2 C. B. 821; nor if one partner covenants not to sue for a partnership debt, will this preclude him from joining with his copartners in an action for the recovery of that debt. See Walmsley v. Cooper, 11 A. & E. 216. In each of these cases it is said that there is only a right of cross action against the one partner; and although such right might be relied on as a defense to an action by him alone, it is held not to affect the firm to which he belongs. It is certainly difficult to recognize all the decisions upon this subject. All the cases establishing the rule in question were decided before pleas and replications on equitable grounds were allowed at law. Brandon v. Scott, 7 E. & B. 234, is an exception to this remark, but no replication on equitable grounds was there pleaded. How far they would be acted on if an equitable replication were pleaded, it is impossible to say. The writer however ventures to submit that the application of the rule is only justifiable when the conduct of the one partner can be regarded as the conduct of the firm, in accordance with established doctrines of the law of agency.

As regards sureties and securities.— It is a fundamental principle of the law of suretyship, that any act on the part of the principal creditor which alters the risk of the surety, discharges him from future liability. See as to sureties, the note to Arlington v. Merrick, 2 Wms. Saund. 414. As to the discharge of apprentices and their sureties by a change in the firm to which they are bound, see Lloyd v. Blackburne, 9 M. & W. 363; R v. St. Martins, 2 A. & E. 655. If, therefore, a person becomes surety *to* a firm, it is important to ascertain whether he clearly contemplated changes in the firm, and agreed to become surety to a fluctuating body or not. If he did, his liability is not discharged by any change amongst the members constituting the partnership at the time he became surety; Pease v. Hirst, 10 B. & C. 122; Metcalf v. Bruin, 12 East, 400, and 2 Camp. 422; and see Barclay v. Lucas, 1 T. R. 291, Kipling v. Turner, 5 B. & Ald. 261; but if no such intention can be shown, then a contract of suretyship entered into with a firm will be deemed to be binding so long only as the firm remains unchanged; and consequently any change in it whether by the death, Holland v. Teed, 7 Ha. 50; Strange v. Lee, 3 East, 484; Weston v. Barton, 4 Taunt. 673; Pemberton v. Oakes, 4 Russ. 154; Simson v. Cooke, 1 Bing. 452; Chapman v. Beckington, 3 Q. P. 703, E. C. L. R. 43, or the retirement, Myers v. Edge, 7 T. R. 254; Dry v. Davey, 10 A. & E. 30, of a partner, or by the introduction of a new partner, Wright v. Russell, 2 Wm. Blacks. 934, immediately puts an end to the surety's liability so far as subse-

Profits to be distributed.

SEC. 161. The profits are usually proportioned to the shares. But where an agreement constituting a partnership is silent as to the amount of the shares of the respective parties, it seems to be the rule in England, to consider them as entitled to the profits equally.[1]

quent events are concerned. In all such cases the surety's position and risk are altered, and whether he has in fact been damnified by the change or not, he has a right to say *non in hæc fœdera veni*. Similar doctrines apply to cases where a person becomes surety *for* the conduct of a firm. Bellairs v. Ebsworth, 3 Camp. 52; University of Cambridge v. Baldwin, 5 M. & W. 580; Simson v. Cook, 1 Bing. 452. Moreover, a person who becomes surety for another is not necessarily surety for his conduct as a partner, and obviously not for the conduct of himself and his copartner. The London Assurance Co. v. Bold, 6 Q. B. 514. Again, if a person becomes surety to several people for the conduct of a servant in their employ, and those people are afterward incorporated, the surety is discharged; for the person created by the act of incorporation is different from the persons in whose employ the servant was, and with whom the surety contracted. Dance v. Girdler, 1 B. & P. (N. R.) 34. On precisely similar grounds it is conceived that a person who becomes surety to a corporation for the conduct of one of its servants would be discharged by the amalgamation of that corporation with another; for the two together would be a different body from either of its amalgamated members. In the Eastern Union Rail. Co. v. Cockrane, 9 Ex. 197, and the London, Brighton and South Coast Rail. Co. v. Goodwin, 3 Ex. 320, the surety was not discharged; but the statute amalgamating the two companies contained an express provision on the subject. Questions nearly akin to these arise where securities have been deposited with bankers to secure future advances, and a change has occurred in the banking firm before the making of some of the advances. *Prima facie*, the securities extend only to those advances which were made by the firm whilst its members continued the same as when the securities were deposited. See per Lord Eldon in Ex parte Kensington, 2 V. & B. 83. And similarly, if a partner pledges his separate property for future advances to be made to his firm, and he afterward dies, an advance made after his death to his surviving partners will not be chargeable against the property pledged. Bank of Scotland v. Christie, 8 Cl. & Fin. 214. It has even been held in bankruptcy that if a person deposits deeds as a security for advances to be made to *him*, the security does not cover advances to him and his partners. Ex parte Green, 2 Gl. & J. 246. However, it is established that an equitable mortgage by deposit of title deeds may be extended even by parol to cover advances made after a change in the firm with which the deeds are lodged. Ex parte Lloyd, 1 Gl. & J. 389; Ex parte Lane, De Gex, 300. And although a legal mortgage to a firm cannot be converted into an equitable mortgage merely by parol, Ex parte Hooper, 2 Rose, 328; it may be so converted by a written agreement, and may as an equitable mortgage become available as a security for advances made after a change in the firm to which the legal mortgage was originally given. Ex parte Parr, 4 D. & C. 426. Owing to these doctrines a security given to a firm for advances to be made by it, is, upon a change in the firm, readily made a continuing security; and a slight manifestation of intention on the part of the borrower that it should so continue, will enable the new firm to hold the securities until the advances made by itself, as well as those made by the old firm, have been repaid. See Ex parte Kensington, 2 Ves. & B. 79; Ex parte Marsh, 2 Rose, 239; Ex parte Loyd, 3 Deac. 405; Ex parte Alexander, 1 Gl. & J. 409.

[1] Quine v. Quine, 18 Miss. 155; Towner v. Lane, 9 Leigh (Va.), 272; Farr v. Johnson, 25 Ill. 522; Roach v. Perry, 16 id. 37; Collins v. Jackson, 31 Beav. 645; Wolfe v. Gilmer, 7 La. An. 585; Lee v. Lashbroke, 8 Dana (Ky.), 215; Moore v. Barr, 11 Iowa, 198; Gould v. Gould, 6 Wend. (N. Y.) 267; Stein v. Robertson, 30 Ala. 391. But this is not uniformly the rule, and it seems that if there is any thing to indicate a contrary interest, the question of the extent of the interest of each partner is for the jury. Peacock v. Peacock, 16 Ves. 56; Thompson v. Williamson, 7 Bligh (N. R.), 432; Jackson v. Crapp, 32 Ind. 428; Saulman v. Copeland, 8 Bligh (N.R.), 932; Warner v. Smith, 2 W. & S. (Penn.) 157; Struther v. Barr, id. 156.

Personal duties of partners.

SEC. 162. Under this head may be classed the various duties of partners, which are usually contained in the articles, but which necessarily arise from their connection ; such as the employing themselves diligently, being faithful to each other, the not borrowing money on the partnership account, etc. And here it may be remarked that courts of equity cannot in general, from the nature of the subject, compel the performance of such of these duties as are of a *positive* nature, and must, therefore, in case of the breach of any of them, leave the parties to their remedy at law. But courts of equity will interfere by injunction to restrain the breach of negative duties between partners, even in cases where, if the relation of partners did not exist, they might refuse to interfere on the principle of not giving partial relief.[1] It seems scarcely necessary to remark that the implied obligations between partners are so strong, that no inference can be raised in favor of payment of a salary to any partner for the discharge of his duties.

Keeping of proper books, etc.

SEC. 163. It is usually not only provided that proper books of account shall be kept, but that they shall be open to the inspection of all the partners. This, like many others of the rights declared by the articles, is no more than the legal right of a partner in all cases. If a partner receives moneys and does not enter the receipts in the books, or if he does not have them *open to the inspection of the partners,* it is a ground of serious complaint.[2]

Not exercising the same trade on separate account.

SEC. 164. In partnership engagements, a covenant that the partners shall not carry on for their private benefit that particular commercial concern in which they are jointly engaged, is not only permitted, but is the constant course.[4] But a covenant not to practice on the partner's separate account does not extend to prevent him from canvassing for future business.[5]

Express stipulations against.

SEC. 165. If several persons enter into partnership, under a stipulation that the copartners or any of them shall not, during the continuance of the copartnership, engage in any business otherwise than upon

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[1] Kemble v. Kean, 6 Sim. 335; Kimberly v. Jennings, id. 340.

[2] Franklin v. Robinson, 1 Johns. Ch. 157. See *ante*, p. 130.

[3] Per Lord Eldon, 1 Jac. & W. 593.

[4] Morris v. Colman, 18 Ves. 438; Universities of Oxford and Cambridge v. Richardson, 6 id. 706.

[5] Coates v. Coates, Madd. & Geld. 287.

the account and for the benefit of the *same* copartnership, and, after the execution of the articles, one of the partners with the consent of the others becomes a partner in a separate firm, the articles of partnership, coupled with such consent, will not operate to make the other partners of the original firm partners also in the separate firm.[1] But a person may, by the decree of a court of equity, become a partner in the separate business of his copartner, entered into without his consent, in violation of the articles.[2]

Expressio unius est exclusio non.

SEC. 166. It has been observed by a learned writer[3] that the rule *expressio unius est exclusio alterius* applies to these covenants, and therefore, if a party covenant not to be engaged in a particular business, it is to be presumed that all others were intended to be left open to him. Upon this principle, where the proprietors of a morning paper had bound themselves by a covenant not to engage in any other *morning* paper, Sir John Leach held that this afforded a conclusion that it was the intention of the parties that they might engage in an evening paper. He held, nevertheless, that it was not competent for such as did engage in an evening paper, to publish in it information obtained at the expense of the morning paper, until after it had been published in the morning paper, this being inconsistent with their duties as partners in the latter.[4]

Rule when one partner elects to retire before expiration of term.

SEC. 167. Where, by articles of partnership, it was covenanted that the trade (which was of a brewer) should continue for eleven years, with a proviso that, if either of the parties should be so minded, on giving six months' notice to the other, he should be at liberty to quit the trade and mystery of a brewer, and the other party should be at liberty to continue the trade on his own account, it was held that the party giving notice could not carry on the trade elsewhere on his own account, that he must elect either to continue the partnership, or entirely to give up such trade.[5]

Decision of differences by the majority.

SEC. 168. Sometimes a clause is contained for the purpose of deciding differences in this manner, and where the parties are numerous,

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[1] Bosanquet v. Wray, 6 Taunt. 597; 2 Marsh. 319.

[2] Somerville v. Mackay, 16 Ves. 382; 2 Hov. Supp. 450.

[3] Jarman's Conveyancing, Vol. 7, p. 98.

[4] Glassington v. Thwaites, 1 S. & S. 132.

[5] Cooper v. Watlington, 2 Chit. 451; S. C., 3 Doug. 413.

as in banks, newspaper offices, etc., such a provision may be highly useful. But if it be intended that in case of difficulties the majority shall have power to sell the whole concern, that intention should be clearly expressed; otherwise it may be annulled by some other part of the instrument. In the case of Chapple v. Cadell,[1] it was agreed that a partnership in the publication of certain newspapers, consisting of a number of persons, should be managed by a committee of five, and by general meetings, at which the vote of the majority was to be binding, with a provision that any one wishing to retire should first offer his share to the committee at a certain price, and, if they declined to buy, he might then sell it to any other person; it was held that the majority were not able to sell the whole concern without the consent of all; but that, where all but two were desirous of retiring, they might sell their own shares without making an offer of them to the committee.

Deviation from terms of contract acquiesced in cannot afterward be subject of complaint.

SEC. 169. In a case[2] in which the wishes of the majority were to be ascertained under a particular mode of notice prescribed by the articles, and that mode had been in two instances deviated from, Sir J. Leach held that it was much too late for any of the partners who had acquiesced in the alteration to complain, and his Honor observed in conformity with Lord Eldon's doctrine, that though the parties would at law be bound exactly and in all points by the articles, yet in the consideration of a court of equity it was otherwise.

Annual account.

SEC. 170. The articles generally direct an annual account, valuation and balance of the moneys, stock in trade, and credits of the partnership, and likewise an annual account of the debts due to the partnership. In a case where partnership articles directed that a yearly settlement should be made on the 25th of March, and if a partner died his estate should share in no profits subsequent to the last yearly settlement, and the last settlement was on the 5th of November, 1811, and a partner died in February, 1813, it was held that his estate should share profits up to the 5th of November, 1812.[3]

When equity treats provisions of contract as waived.

SEC. 171. Here we may again advert to the second general rule,

[1] Jac. 537. On the powers of the majority in general, see *ante*, p. 129.

[2] Glassington v. Thwaites, Rolls, Mich. T. 1831.

[3] Pettyt v. Janeson, Madd. & Geld. 146.

which we have already stated respecting the construction of partnership articles.[1] Upon the principle laid down in a former page, it was held in the case of Jackson v. Sedgwick,[2] that stipulations in articles of partnership for an annual settlement of accounts, and for payment to the representatives of a deceased partner of an allowance in lieu of profits since the last annual account, proportioned to the amount of his share of profits during two years preceding, are waived in equity by omission through several years to settle annual accounts, and by engaging in business to which the stipulations cannot be applied without injustice; accordingly, in the same case, an injunction was granted to restrain the representatives of a deceased partner from proceeding on a bond given by the surviving partners for repayment of his share according to the articles, before the settlement of accounts of transactions pending at his decease, on which a loss was subsequently sustained.

Partners may agree to account so as to estop claims on account of errors.

SEC. 172. Partners may agree that after an account is settled during their lives, it shall, notwithstanding any error, be conclusive after their deaths.[3] But clauses of this nature will not be binding in cases where the error has arisen from the fraud of any of the partners. Where, by articles of partnership, it was agreed that just and true accounts should be made out half-yearly, and signed by the partners, and that such accounts should not be afterward called in question, except for errors discovered in the life-time of all the partners, and the accounts were made out by one of the partners, and after the death of two of the other partners it was discovered that the accounts were fraudulent, it was held by Sir Lancelot Shadwell that the fourth partner was entitled to have the accounts of the partnership taken from the date of the articles, the estates of the deceased partners being liable to bear a due proportion of the losses occasioned by the fraud.[4]

General account upon the dissolution or expiration of the partnership.

SEC. 173. This constant clause is usually followed by another, pointing out the mode of winding up the concern, and distributing the partnership property. Mr. Jarman observes[5] that "on the dissolution of a partnership there are two ordinary modes of winding up the affairs of the concern; one is by a general conversion of the partner-

[1] *Ante.* [2] 1 Swanst. 460. [3] Gainsborough v. Stork, Barnard 312. [4] Oldaker v. Lavender, 7 Sim. 239. [5] See 7 Jarm. Conv. 31.

ship assets, and dividing the produce, after providing for debts, among the partners, in proportion to their respective interests. The other is for one partner to purchase the share of the other, usually at a valuation. The former is the mode in which the property is dealt with by a court of equity in the absence of express stipulation, and indeed in every case is necessarily the rule where there is no positive agreement, without which, of course, neither partner can claim to take the share of the other at a valuation, their rights being equal.[1] The latter mode of arrangement is generally stipulated for in articles, in the event of the dissolution of the partnership by the death, expulsion, or voluntary retirement of either of the partners, especially where the property consists of an interest in land, stock or machinery which is essential to carrying on the trade." A clause that his share shall be taken at a valuation has sometimes been applied to the case of the bankruptcy of a partner. It is very doubtful, however, whether a provision in the articles that, on the bankruptcy of a partner, his share shall be taken by the solvent partners at a sum to be fixed by valuation, and payable by installments in a course of years, is not void by the law of bankrupts. For, if such a provision were permitted, the effect would be that a partner could by contract control the disposition of his property in the event of his own bankruptcy. In the case of Wilson v. Greenwood,[2] a clause of this nature was contained, not in the original articles, but in a subsequent deed, which was executed in order to extend to bankruptcy a provision in the articles applicable to death alone, and evidently made in contemplation of that event; on which ground Lord Eldon held it to be clearly void, without deciding the general question as to the validity of such provisions in the articles themselves. It may here be remarked, that, where articles stipulate for a division of the partnership stock at the end of the partnership, a sale, and not a specific division of the articles, is intended.[3]

Executors or legatees carrying on the trade of their deceased partner.

SEC. 174. Where a partnership is constituted for a long term of years, a clause is generally introduced, empowering the representatives of the deceased partner to carry on the trade in conjunction with the survivors, for the benefit of the widow and children of the

[1] See Featherstonhaugh v. Fenwick, 17 Ves. 298.

[2] 1 Swanst. 481. See 7 Jarm. Conv. 32. But see D. Sir W. Grant, 1 Swanst. 89.

[3] Rigden v. Pierce, Madd. & Geld. 353. But see Cookson v. Cookson, *ante*.

deceased partner;[1] for otherwise, notwithstanding the length of term, the partnership would expire.[2]

In cases of this nature, if it be clearly the primary object of the articles to perpetuate the partnership, courts of equity will assist in the attainment of that object; and therefore, although the articles may likewise partake of the nature of a *settlement*, yet the interests of the persons taking under the settlement will be made subservient to the primary object of the parties — the continuance of the partnership.[3]

Power of appointment need not be strictly executed—Rule in Ponton v. Dunn.

SEC. 175. As the leading object of a deed of partnership is to limit and settle the respective interests of the partners *inter se*, and not to make a settlement for persons claiming under the partners individually, it follows that a power of appointment by will, given to one of the partners by the deed of partnership, need not be executed strictly, in order to be effectual. In the case of Ponton v. Dunn,[4] it was stipulated by a partnership deed, that the testator's interest in the part-

[1] Pemberton v. Oakes, 4 Russ. 154.

[2] Crawford v. Hamilton, 3 Madd. 254. See *ante*, p. 74.

[3] In Balmain v. Shore, 9 Ves. 500; 2 Hov. Supp. 187, by certain articles of partnership it was covenanted, that in case of the decease of any copartners no benefit or advantage of survivorship should be had or taken by the others of them in anywise; but that, upon the death of any of the said copartners, the share of him or them so dying should go and of right belong to his or their widow or widows, during her or their life or respective lives. And, after the decease of such widow or widows, her or their share or shares in the said joint trade should go and of right belong and appertain unto, and be equally divided among their respective children (if more than one), share and share alike. It was also provided that if any of the parties should be disposed to sell his share of the trade, he should offer it, in the first instance, to the others. The question was, whether, under this instrument, all the children took vested interests in the partnership shares, as they were born, so that, though some died before their mothers, yet their shares were transmissible; or whether such children only were entitled as were living at the deaths of their respective mothers. Sir William Grant held clearly that those children only were entitled who were living at the deaths of their respective mothers. He said, it must be admitted that if this were a settlement of a sum of money or other property, the children would take vested interests; and the words "after the decease of such widow," etc., would postpone, not the commencement of the interest, but only the commencement of the possession. But he thought that the words must receive their construction from the consideration of the particular instrument. The primary object was to constitute a partnership, and to ascertain the manner in which the shares were to be enjoyed in succession. It was but a secondary object (and through that medium), to give a benefit to the families; and it appeared to him that the object of this clause was to designate and ascertain who were to supply the vacancies as they should happen; that no interest was intended in anticipation to any one; but that the object was to provide for the filling up of that vacancy which might happen by the death of any party interested in the partnership. That this was the more evident, from the provision as to the sale of a share, which was perfectly incompatible with the supposition that the children, as they were born, should take vested isterests in the partnership shares of their parents.

[4] 1 Russ. & Myl. 402.

nership concern, after his death, and during the term of his partnership, should go to such persons as he should, by will, *name* or *appoint*, and, in default of appointment, that it should devolve to his wife; in case of her death to his children in equal shares; and in case of the death of all his children, to his executors or administrators. The testator made a will, not containing any allusion to the power by which he gave all his estate and effects to one of his children. It was held that according to the true construction of the partnership deed it was not intended to create a technical power of appointment, but to reserve to the testator an absolute power of disposition by will; and, consequently, that the testator's interest in the partnership passed by this bequest.[1]

Mode of construing clause providing for substitution.

SEC. 176. Clauses providing for the admission into the firm of a deceased partner's representatives will in general be construed as giving to them an option to become partners, and not as constituting them partners absolutely; for, to produce the latter effect (assuming that such effect can be produced), the intention should be unequivocally expressed.[2] Thus, where, in a deed of partnership, the term of which was to be nineteen years, it was provided that, if either of the partners should die during that term, "the widow or other legal personal representative of the partner so dying should be let into the said partnership concern, and be and become a partner therein, in the same manner, and upon the same stipulations," etc., "as the partner so dying stood at the time of his decease;" but so that any future husband of any such widow should not interfere in the management of the concern; it was contended that this clause, though giving an option to the widow, was absolute, if she declined, as to the personal representatives. Alexander, C. B., however, was of opinion that it was a covenant only to permit them to become partners if they thought proper, and that they were entitled to a reasonable time for declaring their election after their testator's decease; for which purpose an opportunity should be given them *of inspecting the partnership accounts*.[3]

[1] It seems that the bequest of a *share* in a joint-stock concern will not pass profits accruing after the making of the will, but that a bequest of the *whole* of a man's interest in a partnership will pass such profits. See D. Sir S. Romilly arguendo, Norris v. Harrison, 2 Madd. 277.

[2] 7 Jarm. Conv. 33.

[3] Pigott v. Bagley, M'Clel. & Y. 569. In the case of Wainwright v. Waterman, 1 Ves. 311, by a power under the articles, one of two partners appointed his executors to carry on the trade in his room, and desired them to nominate J a partner, and gave J a legacy of 4000*l.* when he should become a partner, but directed it to sink into the estate if he should die before twenty-one, or decline to be a partner, and gave

Representative of deceased partner under a will must comply with its terms as to substitution rule in Crawshay v. Maule.

SEC. 177. It seems reasonable that, when a continuation of the partnership is clearly intended by the articles, a representative or legatee, who is appointed partner by a will made in pursuance of the articles, should abide by the terms of the will, by becoming a partner, if he elect to take the benefit of the will. In the case of Crawshay v. Maule,[1] the testator, Crawshay, was, it is true, a *sole* trader; yet, the language there used by Lord Eldon seems to warrant the observation which has just been made. Crawshay, being possessed of certain mines and iron works held under leases, bequeathed them in shares to his executors, A, B and C, as partners. A, B, and C carried on the concern for some time in partnership, but without articles. B assigned his share to A; C died. Although it was held on general principles that at C's death the partnership between him and A was dissolved, and that C's executor could not compel A to continue the partnership with him for the benefit of C's children, yet Lord Eldon said: "If Mr. Crawshay, the testator, had thought proper by his will to declare that his legatees should continue the partnership, as long as the longest of the leases should endure, no person claiming under that will could enjoy the benefit conferred by it, without submitting to the inconvenience which it imposed." But where a person is appointed a partner by will, the articles not expressly intending a continuation of the partnership, the appointee may elect either to become a partner, or, if necessary, to have the whole partnership concern wound up for his benefit. Thus, in Kershaw v. Matthews,[2] the residuary legatee of a deceased partner claimed under some clauses of the partnership deed

the rest among his grandchildren. Afterward, the testator by a codicil expressed himself thus: "It shall be entirely in the discretion of my executors, whether to appoint J to be a partner or not, any direction in my will to the contrary notwithstanding; and if they do not think proper to appoint him, the legacy given to him to be void." The testator died before J attained his age of twenty-one. J afterward filed his bill against the executors, praying to be admitted a partner from the time of his attaining the age of twenty-one; for an account of the profits from that time; and to have his legacy paid him. Lord Thurlow decreed according to the prayer of the bill, being of opinion that though, by the terms of the codicil, the executors had the right to exclude the plaintiff from the partnership, yet, under the circumstance of the case, they could not avail themselves of that right. The only question was whether, as they differed in opinion about admitting the plaintiff, some being for it, and some against it, it was possible to exclude the plaintiff, under all the circumstances. He thought not. If the executors had *united* in declaring that he was unfit to be admitted, they had a right to exclude him; and the consequence must have been, unfortunately, that he must have lost the 4,000*l.* and all the rest; but, as the circumstances were, and as they made no such declaration, either before he was twenty-one or at that time, the plaintiff was entitled.

[1] 1 Swanst. 512.

[2] 2 Russ. 62; 1 Russ. 361; the author has searched for this case in the Registrar's book in vain.

to be admitted a partner, or to have it declared that the partnership was dissolved. Lord Eldon — "If there is a partnership carried on under the articles which stipulate that, upon the death of a partner, he shall be succeeded in the business either by some person whom he shall appoint, or by his executors, it may happen that his appointees or his executors do not think proper to come into his place on the same terms on which he was a partner in the concern. In that case the death of the party puts an end to the partnership.[1] The stipulation may be, that the appointee or executor of the deceased partner is to be a partner only if he does this or that particular thing. If the executor or appointee refuses to comply with the proviso, the whole concern must be wound up."

Executors treated as partners in certain cases.

SEC. 178. Where, by articles of partnership, it is agreed that the executors or administrators of a partner dying shall continue the partnership *if they think fit*, they will be considered partners, unless they give notice within a reasonable time to the contrary.[2]

When children succeed to the firm surviving partner not entitled to charge for services.

SEC. 179. Where the children succeed to the share of their parent, the surviving partner is not entitled to an allowance for his management, time or labor in carrying on the trade. In such case, although he may be the sole conductor, he is considered as carrying on the

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[1] Wimble v. Wimble, 6 Beav. 501; Holland v. King, 7 M. G. & S. 727; Pigot v. Bagley, 1 Mc. & G. 574.

[2] Morris v. Harrison, Colles' P. C. 157; Davis v. Christian, 15 Gratt. (Va.) 37; Alsop v. Mather, 9 Conn. 587; Creagh v. Creagh, 13 Ir. Ch. 46; Edgar v. Cook, 4 Ala. 588. An executor, although directed by the will to continue the business, is not bound to do so. Thus in Jaquin v. Buisson, 11 How. Pr. (N. Y.) 387, Jaquin and Buisson formed a partnership in France, to carry on the business of selling liquor and sugar plums in New York, for ten years. The articles contained a clause declaring the decease of Jaquin should not operate a dissolution; his heirs should be considered as having succeeded him from the last inventory; and they should have three months from decease for declaring they intended to continue partnership on same basis, or to transform it into a partnership en commandite. Held, 1. No representative of an estate can be bound to become a partner with a survivor so as to make themselves personally responsible, or subject them to the duties of partners without their consent. A partner may by articles, or his will, direct the whole of his estate to remain in the firm, and be liable to the debts incurred in the business carried on subsequent to his death. He must demonstrate such an intention in the most positive, unequivocal manner. Where articles of copartnership were entered into in France, if the business is to be carried on in the United States, they are subject to the laws of the State in which the business is carried on, and the laws of the State as to special partners not having been complied with, the death of Jaquin dissolved the copartnership, and Buisson had the right to close up the business. But he is bound to make his election in a reasonable time. Madgwick v. Wimble, 6 Beav. 501; Pigot v. Bagby, *ante*.

trade for the benefit of himself and his copartners, and, therefore, to entitle him to an allowance, there should be a stipulation to that effect.[1]

We have already had occasion to remark on the disadvantages attending the appointment of a surviving partner as executor to his deceased copartner.

Clause of expulsion.

SEC. 180. This, though a usual clause in articles of partnership, is generally confined to such acts as are most strongly in contravention of the partnership agreement, as bankruptcy, insolvency, etc. It has been held that the word "insolvency," in clauses of this nature, means an inability to pay the partner's just debts, and does not merely import that he should have been discharged under the Insolvent Debtors Act.[2]

Where it was provided by articles of partnership that it should be lawful for the partners to dissolve the partnership, as to any partner who should make any mortgage, pledge, sole assignment, or other disposition of his share of the partnership stock and effects, or who should become bankrupt or insolvent, or should permit any part of the partnership property to be taken in execution for his separate debt, it was held that a partner was not under this provision debarred from *giving* a warrant of attorney, but only that, in case it produced a certain effect, his copartners were empowered to determine the partnership.[3]

Arbitration.

SEC. 181. A stipulation that disputes arising between the partners shall be referred to arbitrators to be named by the respective partners is almost invariably inserted in deeds of partnership.[4] How far an

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[1] Burden v. Burden, 1 Ves. & B. 170. See *ante*, p. 142.

[2] Barker v. Gossage, 2 C. M. & R. 617, 1 Tyr. & Grang. 105; Biddlecombe v. Bond, 4 Ad. & Ell. 332; 5 Nev. & Man. 621.

[3] Mills v. Osborne, 7 Sim. 37.

[4] Where one partner gave his son a power of attorney "to act on his behalf in dissolving the partnership, with authority to appoint any other person as he might see fit, it was held that this gave the son power to submit the accounts to arbitration. Henley v. Soper, 8 B. & C. 16. Provision in articles of partnership that all matters of difference between partners shall be submitted to arbitration and that there shall not be *any suit at law or equity* is binding upon the parties. Halfhide v. Fenning, 2 Brown's Ch. 336; but a mere provision that no action at law shall be brought does not prevent the bringing of a bill in equity as to matters not embraced within the scope of the provision as to arbitration. DePusey v. Biderman, 1 Del. Ch. 82; Mitchell v. Harris, 2 Ves., Jr., 129. And when so inserted, an award made under a valid submission is binding. Parkes v. Smith, 15 Ad. & El. (N. S.) 297; Riley v. Rupert, 34 Mo. 524; Coleman v. Coleman, 12 Rich. (S. C.) 183; Brink v. New Amsterdam F. Ins. Co., 5 Robt. (N. Y.) 104; Haynes v.

arbitration may be enforced on the footing of this clause is a point which will be considered hereafter. With regard to the power of the arbitrator, when named and in the performance of his duty, it may be remarked, that when the reference is of all matters in difference between the parties, he may clearly direct the partnership between them to be dissolved.[1] And where the terms of the dissolution are left to his discretion, he may impose upon the parties any of the ordinary terms of dissolution. Thus, it is a very usual condition accompanying a dissolution of partnership that one of the partners shall not carry on business within a certain distance of the other, and, where it was agreed by two partners, A and B, by submission to arbitration to dissolve the partnership, and that all matters in difference between them and the terms and conditions on which the copartnership should be dissolved, should be referred to an arbitrator, it was held that the arbitrator had not exceeded his authority, in determining that it should not be lawful for B, during the life-time of A, to carry on the partnership business within thirteen miles of A.[2] However, in a case where by articles it was declared that the partnership should be bound by all usual and customary conditions of partnership concerns, as fully as though the usual covenants, clauses and provisos were inserted, and that either party should have power to dissolve the partnership, upon notice, *all disputes to be referred to arbitration*, and the arbitrators to have a power of dissolving the partnership, if they should think proper. Lord Eldon held it questionable whether the covenant to refer extended to the settlement of all accounts posterior to the dissolution.[3] When the arbitrator directs that one of the partners shall receive all the outstanding debts, the award ought to make provision for whatever that partner may receive in respect of *dubious* debts, and any over receipt in respect of good debts will come within the same principle as a receipt on account of the dubious debts.[4]

Partnership by deed must be dissolved by deed.

SEC. 182. Where houses or other real property belonging to the

Forksall, 13 Mo. 115; Kimball v. Walker, 30 Ill. 482; Ebert v. Ebert, 8 Md. 358; Gibson v. Moore, 6 N. H. 549. But one partner cannot submit, Armstrong v. Robinson, 5 G. & J. (Md.) 422; Harrington v. Higham, 13 Barb. (N. Y.) 661; Abbott v. Dexter, 6 Cush. (Mass.) 108; McBride v. Hogan, 1 Wend. (N. Y.) 337; Wood v. Shepherd, 2 P. & H. Va.) 457; Jones v. Bailey, 6 Cal. 345, unless the others subsequently ratify the act. Buchanan v. Curry, 19 Johns. (N. Y.) 142; Halleck v. Marsh, 25 Ill. 50; Mackay v. Bloodgood, 9 id. 286.

[1] Green v. Waring, 1 W. Bl. 475.

[2] Morley v. Newsome, 5 Dowl & Ryl. 317.

[3] Street v. Rigby, 6 Ves. 915.

[4] Spencer v. Spencer, 2 You. & Jerv. 256.

partnership are made the subject of division by arbitrators, it should seem, that in order to avoid a capricious mode of division, the arbitrators ought to act upon the same principles as are applicable to a partition by commissioners, under a decree of partition.[1] Where an award was made in pursuance of an agreement, under which the arbitrators had power to direct a division of the messuages of the partnership between two partners, and the arbitrators awarded that one partner should pay a certain sum to the other, and that the latter should convey all the messuages to the former, it seemed to be the clear opinion of the court of exchequer that, unless there was a previous arrangement between the partners to that effect, the arbitrators had exceeded their authority in awarding the messuages to one of the partners, rather than dividing them between both.[2] But, generally, upon a submission by partners of all actions, notes, accounts, dealings, controversies, demands, etc., relating to the partnership, an award giving to one partner all the joint property, and directing him to pay to the other partner a sum in gross, and to discharge all the debts of the firm, seems to be unobjectionable.[3]

Liquidated damages.

SEC. 183. Articles of partnership frequently conclude with a stipulation that, on the breach of any of the covenants, the offending party shall pay to the other a specific sum of money by way of liquidated damages. Such a provision is particularly useful in regard to some species of covenants, the non-performance of which is likely to be attended with an extent of injury not easily ascertainable; but it is useless where the non-performance of the covenants would be attended with an ascertained damage of a different amount.[4]

When real estate is made the subject of arbitration, arbitrators should proceed how?

SEC. 184. At law, a partnership under deed, when dissolved by consent, must be dissolved by deed, according to the general rule, that a covenant under hand and seal can only be discharged or qualified by an instrument of equal solemnity.[5] But where, from the circum-

[1] See Story v. Johnson, 2 You. & Col. 586.

[2] Wood v. Wilson, 2 C. M. & R. 241; 5 Tyr. 813.

[3] Byers v. Van Deusen, 5 Wend. (N. Y.) 268.

[4] For more on this subject, see 7 Jarm. Conv. 83.

[5] Doe v. Miles, 1 Stark. 181; Rackstraw v. Imber, 1 Holt, 368; Countess of Rutland's Case, 5 Rep. 26; Blake's Case, 6 Rep. 44. But in this country a partnership under deed may be dissolved by parol. Gardiner v. Bataille, 5 La. An. 597; Goddard v. Pratt, 16 Pick. (Mass.) 412; Addams v. Tutton, 39 Penn. St. 447.

stance of the partnership having been constituted by deed, or of there being an express covenant to that effect, it is necessary, in order to effect a legal dissolution, that it should be by deed, it is a sufficient compliance with the legal requisition, if a submission to arbitration and an award directing a dissolution are made under seal.[1] And in a court of equity it is apprehended that, upon a bill filed for a dissolution and account of such a partnership, it would be competent for the defendant to show that the partnership had been dissolved by parol, and that an account had been already settled.

Deed of dissolution must be specific as to time when it takes effect.

SEC. 185. When partners enter into a deed of dissolution, such deed, in order to have *immediate* operation, ought to contain express words to that effect. For it has been held that a covenant by two of several partners, to convey to the other partners on or before a day named, all their interest in the partnership concern, is not a dissolution, even as between the parties, but amounts only to an agreement for a future dissolution.[2]

What deeds of dissolution usually contain.

SEC. 186. The deed of dissolution usually contains a declaration that the partnership is dissolved—an assignment of the retiring partner's share of the stock, credits,[3] and good-will to the remaining partner, in consideration of a repayment of the retiring partner's capital—a covenant of indemnity to the retiring partner against the debts of the old firm—and a mutual release of all actions, etc., on the partnership account.

Rule when retiring partner leaves his capital in the firm.

SEC. 187. If the retiring partner leave his share of the capital in

[1] Hutchinson v. Whitfield, Hayes' Ir. Exch. Rep. 78.

[2] Emmet v. Butler, 7 Taunt. 599.

[3] Where two partners dissolve partnership, and one of them assigns to the other his share of the partnership credits, in consideration of a sum of money paid by the latter, the deed is not liable to the *ad valorem* duty on purchases. Belcher v. Sikes, 6 B. & C. 244. "It is observable," says Mr. Jarman, "that in this case the assignment was not confined to the assignor's share in the partnership credits, but extended to his share in the other joint effects; it is understood, however, that there were no other effects; and the reasoning of the court evidently applies only to such a case, being founded solely on the nature of the subject, as consisting of *choses in action*, and not on the nature of the transaction as between partners on a dissolution. It would be unsafe, therefore, to consider the case as an authority for the exemption, when the assignment operates upon other property transferred jointly with the credits for one entire consideration, in which case it is clear that the *ad valorem* duty, if payable in respect of any part of the consideration money, must apply to the whole. In order to exempt the assignments of credits, the consideration money should be apportioned." 7 Jarm. Conv. 309.

the firm, we have seen that, under a particular mode of receiving the produce of such capital, he may still be exposed to the liabilities of a partner; care, therefore, should be taken to avoid such consequences.

Retiring partner receiving annuity is not thereby made a partner—Rule in Holyland v. De Mendez.

SEC. 188. It seems clear, that an agreement by a retiring partner to receive an annuity out of the firm, so long as the continuing partner remains in possession of the partnership premises, would not constitute the annuitant a partner. And the decision in Holyland v. De Mendez[1] seems to sanction this remark. There it was agreed, on the dissolution of a partnership, that the continuing partner should, in consideration of an assignment to him of the partnership property, including a lease of the premises on which the business was carried on, secure to the retiring partner the payment of an annuity, by bond, conditioned to be void on payment of the annuity, "or in case he should at any time after the expiration of the then existing lease be dispossessed of and compelled to quit the premises, without any collusion, contrivance, act, or default of his own." The continuing partner obtained a renewal of the lease, and afterward became bankrupt, and the renewed lease passed under the assignment of his estate. It was held that this was not such an eviction or dispossession as was contemplated by the agreement, in the event of which the annuity was to cease.

Rule when usurious interest is taken.

SEC. 189. Under the same circumstances, namely, of a partner retiring and leaving his capital in the firm, it will be necessarily unsafe to reserve a usurious rate of interest for the capital left in the firm; though this observation, perhaps, only applies to a usurious agreement in the deed of dissolution itself. For where, by a deed of dissolution between A, B and C, A and B covenanted to replace C's share of the capital by installments, and afterward a new agreement was entered into by parol, which secured a usurious rate of interest to C, it was held that the effect of considering the latter agreement void was, not to invalidate, but to set up the original agreement and make that binding on the parties, for that the second agreement was not a performance of, but a substitution for the former transaction.[2]

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[1] 3 Mer. 134.

[2] Parker v. Ramsbottom, 3 B. & C. 257.

Incoming partners.

SEC. 190. If there be *incoming* partners, and they undertake to pay the debts of the old partnership, they should enter into an express covenant for that purpose. Where, however, from inaccuracy in the penning of the instrument, there is no express covenant to that effect, a court of law will imply one from the general tenor of the deed.[1] But an incoming partner, in the absence of an express agreement, or circumstances from which the law will imply one, is not responsible for the debts existing against the old firm, prior to his coming into it.[2]

"Nothing is better settled," says the court in the Pennsylvania case cited in the last note,[3] than that an incoming partner is not liable on the contracts and engagements of the firm, entered into before he became a member of it." And it seems that a parol promise of such partner, subsequently made, to pay the debt is not obligatory,[4] and no member of the firm can make him liable therefor, by giving the note of the new firm therefor, without his assent,[5] nor by accepting a bill drawn on the new firm.[6] They may assume such prior debts, and their assumption thereof may be implied from his acts, and the manner in which the business is subsequently conducted, as well as from his declarations,[7] and but slight evidence will be required to establish it.[8]

Thus, where a new firm is established, and a schedule of property, debts and liabilities is taken, and the new firm continues to trade up

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[1] Thus in Saltoun v. Houston, 1 Bing. 433, upon the retirement of Simon Fraser, the elder, from the firm, an indenture was executed by him and the new partner, Simon Fraser, the younger, and Houston. The deed *reciting* that whereas it had been agreed by and between the parties, that the whole of the debts and credits of S. Fraser, senior, should be received and paid by S. Fraser, junior, and Houston, and that the balance due to Fraser, senior, amounting to 38,033*l.* should be accounted for and paid by them in manner thereinafter mentioned, and reciting that S. Fraser, senior, had assigned the debts and credits to them, witnessed that it was agreed, that, in consideration of 12 000*l.* paid to Fraser, senior, by Houston, and for raising 24,000*l.* as Fraser, junior's, share of the capital, the sum of 36,000*l.*, part of the 38,033, was to be retained by Fraser, junior, and Houston, and the remaining 2,033*l* paid to Fraser, senior, by installments; and if any of the debts should prove bad, the loss should be borne by Fraser, junior, and Houston. The Court of Common Pleas held clearly that, although the agreement to pay the debts of the old firm was contained in a *recital*, yet the deed taken altogether amounted to a *covenant* for that purpose.

[2] Hart v. Tomlinson, 2 Vt. 101; Davies v. Evans, 39 id. 185; Beall v. Poole, 27 Md. 658; Cadwallader v. Blair, 18 Iowa, 420; Weed v. Richardson, 2 D. & B. (N. C.) 535; Fagan v. Long, 30 Mo. 224; Babcock v. Stewart, 58 Penn. St. 180; Barrett v. Dickson, 8 Cal. 116.

[3] Babcock v. Stewart, 58 Penn. St. 180.

[4] Davies v. Evans, 39 Vt. 185; Sternburgh v. Callahan, 14 Iowa, 257.

[5] Waters v. Maddox, 7 La. An. 645.

[6] Beall v. Poole, 27 Md. 658.

[7] Updyke v. Doyle, 7 R. I. 462; Hughes v. Waldo, 14 La. An. 848.

[8] Ex parte Pul, 6 Ves. 603.

to the time of its insolvency, and no distinction is taken in the payments or balances, or between the debts or assets of the new, or what was the old firm, and the creditors of the old firm continued to deal with the new as they had done with the old firm, it was held that the proof established that the new firm assumed the payment of the debts of the old firm, and that the creditors had by their conduct accepted the new in discharge of the old firm.[1]

When an individual enters into partnership with another person who had previously contracted in his own name for certain property which went into the firm, the fact that it was not delivered until after the partnership was formed, does not, in the absence of a new contract, charge the firm with liability therefor. Thus, where one Wright bought a lot of mules, which were to be delivered before a given day, on security being furnished for the purchase-money. After the contract, and before delivery of the mules, Wright & Duncan entered into a qualified partnership, by which it was agreed Wright should put in this lot, and others, and Duncan should put in mules owned by himself, and the whole was to become partnership property. It was held, that as there was no partnership when the purchase was made by Wright, Duncan was not liable on the note given for the mules.[2]

So, also, in another Kentucky case,[3] it appeared that on March 2, 1824, Elijah H. Reed and Elijah W. Craig entered in an article of agreement under seal, in which it was stipulated that Reed, having engaged one hundred and fifty-six hogsheads of tobacco, binding himself to buy as much more as would be sufficient to load three boats, which he had bought, agreed that Craig should be admitted into an equal partnership, and a joint and equal concern, in the three boat loads of tobacco so engaged, and to be engaged by him, Reed, the same to be paid for one-half by each, the whole to be shipped by Reed on their joint account and risk; Craig at liberty to pay one-half of all costs and charges on the tobacco shipped, in currency, at the rate of two for one of specie; and whereby Reed acknowledged the receipt of one thousand dollars in currency as one-half of immediate wants in paying for tobacco bought for cash. Alverson, in his suit, claimed both parties were liable to him for the tobacco purchased by Reed of him. The article of partnership was dated March 10, 1824.

[1] Rolfe & Bailey v. Bank of Australia, 3 Moore (N. S.), 365.

[2] Duncan v. Lewis, 1 Duv. (Ky.) 184.

[3] Craig v. Alverson, 44 J. J. Marsh. (Ky.) 612.

Craig claimed he was only a sub-purchaser from Reed, who purchased of the plaintiff before any partnership was formed. It was held that if Reed purchased the tobacco before any partnership was formed, and the vendor sold to Reed individually, the undertaking by Craig to pay half the costs was an individual undertaking to Reed, and did not render him liable as an original partnership purchaser.

Mr. Lindley, in commenting upon the liability of an incoming partner, says :[1]

"The doctrine that each partner has implied authority to do whatever is necessary to carry on the partnership business in the usual way is based upon the ground that the ordinary business of a firm cannot be carried on, either to the advantage of its members or with safety to the public, unless such a doctrine is recognized. The existence of a partnership is, therefore, evidently presupposed; and although persons negotiating for a partnership, or about to become partners, *may* be the agents of each other before the partnership commences, such agency, if relied on, must be established in the ordinary way, and is not to be inferred from the mere fact that the persons in question were engaged in the attainment of some common end, or that they have subsequently become partners. This is shown by the cases already referred to, when the difference between partnerships and inchoate partnerships was being discussed. Almost all those cases, in fact, arose in consequence of attempts made to fasten liability on the defendants, by reason of some act done by other persons, alleged to be their partners; and each of those cases in which the plaintiff failed is an authority for the proposition that so long as there is no partnership there is no implied authority similar to that which exists after a partnership is formed.[2] But, although this is

[1] 1 Lindley on Partnership, 312–318.

[2] See Gabriel v. Evill, 9 M. & W. 297, where it was held that no partnership existed, the option to become a partner not having been exercised.

In order to constitute a partnership, the agreement must be consummated.—The mere fact that a partnership was contemplated; Kerrigan v. Kelly, 17 Mo. 275; Rice v. Shuman, 43 Penn. St. 42; Rebaul v. Chalker, 27 Conn. 114; or that an executory agreement to that end existed, does not render either of the parties liable for the acts of the others. Thus, in Reboul v. Chalker, *ante*, the parties had entered into an agreement to become partners from three years from May 1st, 1855. Goods were purchased by one of the parties *before* May 1st, to be used by the firm. The court held that the parties to the agreement could not be held liable for the goods, as it was still within the power of either of them to recede from the agreement. See also a similar case, Rice v. Shuman, *ante*, where a similar doctrine was held; also, Hubbell v. Wolf, 15 Ind. 209; Moody v. Rathbun, 7 Minn. 98. In order to create a partnership, and a consequent liability as partners, the agreement must have been consummated and the business entered into under the agreement. Wilson v. Campbell, 10 Ill. 402; Atkins v. Hunt, 14 N. H. 208; Lane v. Roche, 1 Riley's Ch.

undoubtedly law, still if persons agree to become partners as from a future day, upon terms to be embodied in a deed to be executed on that day, and the deed is not then executed, but they nevertheless commence their business as partners, they will all be liable for the acts of each, whether those acts occurred before or after the deed.[1] For the question in such a case is not, When was the deed executed? but rather this, When did the partners commence to carry on business as such? The agency begins from that time whether they choose to execute any partnership deed or not.

Where there is an agreement for a partnership, and there is nothing to lead to the conclusion that the partnership was intended to commence at any other time, it will be held to commence from the date of the agreement.[2]

The agency of each partner for the firm commencing with the partnership, and not before, it follows that the firm is not liable for what may be done by any partner before he becomes a member thereof. So that if several persons agree to become partners, and to contribute each a certain quantity of money or goods for the joint benefit of all, each one is solely responsible to those who may have supplied him with the money or goods agreed to be contributed by him;[3] and the

(S. C.) 215. But where the agreement is consummated, that is, where it has been acted upon by the parties, they are partners, and in the absence of any agreement to the contrary, their liability attaches *from the date of the agreement*, or if it is by parol, from the time when the contract was actually made, Hunter v. Whitehead, 42 Mo. 526; Ingraham v. Foster, 33 Ala. 123; Austin v. Williams, 2 Ohio, 64; Azel v. Betz, 2 E. D. S. (N. Y. C. P.) 190; Goddard v. Pratt, 16 Pick. (Mass.) 426; Thurston v. Perkins, 7 Mo. 33. If a person has an election, whether to become a partner or not, he does not become liable as such until his election is made and acted upon. In re Hale, 15 Johns. Ch. 300.

Even though an agreement to form a partnership is perfected, yet if the agreement is never acted upon, and the partnership is not set on foot, no liability attaches to the parties thereto, as partners. Thus in Mason v. Connell, 1 Whart. (Penn.), the parties entered into articles of partnership for three years, from September 1, 1828. A creditor claimed that he had sold goods to the ostensible partner in whose name the business was conducted. The defense made was that although the agreement was signed, no business had ever been transacted under the agreement. Judge Rodgers, in charging the jury, page 387, says: "But the defendants say that they executed the articles of September 1, yet that nothing further was done in pursuance of it; that in effect, as soon as the partnership was formed, it was dissolved. *If this be true, they are not liable.* If they merely executed the articles without more, the plaintiffs have no right of action, that is to say, if John Connell continued to carry on business on his own account after the partnership, defendants *cannot be charged.* In such a case, the *partnership has not commenced.*" Again, page 388: "If then, you should be of the opinion that nothing more was done than the mere execution of the articles, then your verdict should be for the defendant." See, also, Wood v. Connell, 2 Whart. (Penn.) 551. In such cases, third persons cannot avail themselves of the contract, but the person violating it may be liable to the other party in damages. Skinner v. Yonker, 34 Barb. (N. Y.) 335; Vance v. Blair, 18 Ohio, 532.

[1] Battley v. Lewis, 1 Man. & Gr. 155.

[2] See Williams v. Jones, 5 B. & C. 108.

[3] See Greenslade v. Dower, 7 B. & C. 635; Dickinson v. Valpy, 10 id. 141, 142; Fisher v. Taylor, 3 Hare, 229, 230.

fact that the money or goods so supplied have been brought in by him as agreed, will not render the firm liable.[1]

Upon this principle, apparently, it was held in Wilson v. Whitehead,[2] that the author and publisher of a work were not liable for the paper supplied for it; the paper having been ordered by and supplied to the printer, who was to share the profits of the work. The agreement between the parties was that one should be the publisher, and make and receive general payments; that another should be editor; and that the third should print and find the paper for the work, charging it, however, to the account of the three at cost price. The profits were to be equally divided amongst the three. It was, therefore, urged that all were liable for the paper supplied; but it was held otherwise; for the printer was not authorized to buy the paper except on his own account, and when he had bought it he might have used it for some other book. The case was likened to that of coach proprietors, where each horses the coach for one or more stages, and each agrees to bring into the concern the work and labor of his horses, and none of the others has any interest in them, though all share the profits.[3]

The two well-known cases of Saville v. Robertson,[4] and Gouthwaite v. Duckworth,[5] further illustrate the principle now in question. The cases closely resemble each other in many respects: for in each there was an agreement for a joint adventure in goods; in each an attempt was made to compel a person who did not order the goods to pay for them, on the grounds that he was in partnership with the person who did order them, and that they were supplied and used for the joint adventure; and in each the defense was that the goods were ordered before any partnership commenced, so that the defendant was not liable for the purchase made by his copartner. In Saville v. Robertson the defense was proved and prevailed, whilst in Gouthwaite v. Duckworth the defendant was compelled to pay. In order to explain the apparent conflict between the two cases, it is necessary to state shortly the material facts in each.

In Saville v. Robertson,[6] several persons agreed to share the profit and loss of an adventure in goods, of a kind to be fixed by a majority, but no one was to have any share or proportion in the adventure other

[1] Smith v. Craven, 1 Cr. & J. 500; Nicholson v. Ricketts, 8 W. R. 211.

[2] 10 M. & W. 503.

[3] Barton v. Hanson, 2 Taunt. 49, which shows that in such a case each is alone liable for hay, etc., supplied to his own horses.

[4] 4 T. R. 720.

[5] 2 East, 421.

[6] 4 T. R. 720.

than to the amount of the goods ordered and shipped by himself, and no adventurer was to be answerable for any thing ordered or shipped by any co-adventurer. One of the adventurers having ordered goods and not paid for them, it was contended that his co-adventurers were liable for them, on the ground that he and they were partners. But the court held that no partnership commenced until the goods were on board; each partner was to bring in his share only, and his copartners were not liable to persons who supplied him with the means which enabled him to bring in such share.

In Gouthwaite v. Duckworth,[1] Browne & Powell, who were in partnership, were indebted to Duckworth, and it was agreed that all three should join in an adventure in the purchase and sale of goods; that the goods should be bought, paid for, and shipped by Browne & Powell, and that the proceeds of the sale should be remitted to Duckworth, who should deduct thereout the amount of his debt, and then share the profit of the adventure with Browne & Powell. It was also agreed that in the event of a loss, Duckworth should share it. In consequence of this agreement, Browne bought goods for the adventure on credit, and it was held that all the three, viz., Browne, Powell & Duckworth, were liable to pay for them, for the goods were bought in pursuance of the agreement for *the adventure*, and although it was never intended that Duckworth should pay for the goods, yet it was thought that the adventure commenced with the purchase of the goods, and that Duckworth was therefore liable. There is considerable difficulty in supporting this decision, if rested on the ground of partnership and implied agency resulting therefrom, for it is not easy to see how any partnership existed prior to the purchase of the goods. But if rested on the ground of agency independently of partnership, there is not the same difficulty. For although the goods were to be paid for by Browne & Powell, that might be regarded as nothing more than a stipulation to take effect as between them and Duckworth; it did not necessarily exclude the inference that as Browne & Powell were to buy for the adventure, they were at liberty to procure the goods on the credit of all concerned.[2]

As the firm is not liable for what is done by its members before the partnership between them commences, so upon the very same principle a person who is admitted as a partner into an existing firm, does not by his entry become liable to the creditors of the firm for any thing done before he became a partner. Each partner is, it is true,

[1] 2 East, 421. [2] See Young v. Hunter, 4 Taunt. 582, the judgment of Gibbs, J.

the agent of the firm, but, as before pointed out, the firm is not distinguishable from the persons from time to time composing it; and when a new member is admitted he becomes one of the firm for the future, but not as from the past, and his present connection with the firm is no evidence that he ever expressly or impliedly authorized what may have been done prior to his admission. It may perhaps be said that his entry amounts to a ratification by him of what his now partners may have done before he joined them.[1] But it must be borne in mind that no person can be rendered liable for the act of another on the ground that he has ratified, confirmed, or adopted it, unless, at the time the act was done, it was done on his behalf.[2] Therefore, in Young v. Hunter,[3] where Hunter & Co. had ordered goods of the plaintiff for sale in the Baltic, and *afterward* it was agreed between Hunter & Co. and Hoffham & Co. that the latter should join in the adventure, and share the profit and loss, it was held to be clear that Hoffham & Co. were not liable to the plaintiff to pay for the goods.

So in Ex parte Jackson,[4] a person who was indebted by bond for money borrowed to carry on a trade, took two other persons ostensibly into partnership. After two years, a joint commission of bankruptcy issued against the three, and it was held that the bond debt was not provable as a partnership debt against the joint estate, but remained what it was originally, the separate debt of the obligor.

Again, in Beale v. Mouls,[5] the members of a provisional committee of a company entered into a special agreement with the plaintiff for the manufacture of a steam carriage. Afterward, but before the contract was completed, the defendant Mouls became a member of the committee, and interested himself in the completion of the carriage. Several alterations and payments on account were also made whilst he was a member, and with his knowledge. The carriage was completed, but the committee then refused to take it or to pay for it. In an action brought against Mouls and the other members of the committee, it was held that Mouls was not liable. He was not liable on the special contract, for he was no party thereto by himself or any agent, and he could not be made liable on any implied contract, for the existence of a special excluded any implied agreement relative to the same subject-matter. It follows from the principles on which this case was determined, that if the carriage had been accepted by the committee,

[1] See Horsley v. Bell, 1 Bro. C. C. 101, note, per Gould, J.
[2] Wilson v. Tumman, 6 Man. & Gr. 236.
[3] 4 Taunt. 582.
[4] 1 Ves. Jr. 131.
[5] 10 Q. B. 976. See, too, Brenmer v. Chamberlayne, 2 Car. & Kir. 569; Kerridge v. Hesse, 9 C. & P. 200.

Mouls would not have been liable to pay for it. The delivery and acceptance in such a case would have been in pursuance of the contract, to which *ex hypothesi* he was no party; and no liability could attach to him by virtue of any implied contract to pay that which became payable by virtue of an express contract made with other people. It has, indeed, been expressly decided, that if several members of a committee order goods, and then a new member joins the committee, he is not liable to pay for the goods though they are delivered after he joined it.[1]

Cases, however, of this kind must not be confounded with those in which a new though tacit contract is made after the introduction of a new partner. Dyke v. Brewer[2] illustrates the distinction alluded to. In that case the plaintiff agreed with the defendant, A, to supply him with bricks at so much per thousand, and began to supply them accordingly; the defendant B then entered into partnership with A, and the plaintiff continued to supply bricks as before. It was held that both A and B were liable to pay, at the rate agreed upon, for the bricks supplied to both after the partnership commenced. The ground of this decision was, that as A had not ordered any definite number of bricks, each delivery and acceptance raised a new tacit promise to pay on the old terms; although if all the bricks delivered had been ordered by A in the first instance, he alone would have been liable to pay for them.[3]

If an incoming partner chooses to make himself liable for the debts incurred by the firm prior to his admission therein, there is nothing to prevent his so doing. But it must be borne in mind, that even if an incoming partner agrees with his copartners that the debts of the old shall be taken by the new firm, this, although valid and binding between the partners, is, as regards strangers, *res inter alios acta*, and does not confer upon them any right to fix the old debts on the new partner.[4] In order to render an incoming partner liable to the creditors of the old firm, there must be some agreement to that effect entered into between him and the creditors, and founded on some sufficient consideration. If there be any such agreement, the incom-

[1] Newton v. Belcher, 12 Q. B. 921; Whitehead v. Barron, 2 Moo. & Rob. 242. In Beech v. Eyre, 5 Man. & Gr. 415, the goods were both ordered and supplied at a time when there was evidence to show that the defendant was one of the committee.

[2] 2 Car. & Kir. 828.

[3] Helsby v. Mears, 5 B. & C. 504, is another case turning on the same principle as is explained by Lord Denman in Beale v. Mouls, 10 Q. B. 976.

[4] See per Parke, J., in Vere v. Ashby, 10 B. & C. 298; Ex parte Peele, 6 Ves. 601; Ex parte Williams, Buck. 18.

ing partner will be bound by it, but his liabilities in respect of the old debts will attach by virtue of the agreement, and not by reason of his having become a partner.

An agreement by an incoming partner to make himself liable to creditors for debts owing to them before he joined the firm, may be, and in practice generally is, established by indirect evidence. The courts, it has been said, lean in favor of such an agreement, and are ready to infer it from slight circumstances ;[1] and they seem formerly to have inferred it whenever the incoming partner agreed with the other partners to treat such debts as those of the new firm.[2] But this certainly is not enough, for the agreement to be proved is an agreement with the creditor, and of such an agreement an arrangement between the partners is not evidence.[3]

As an instance where an incoming partner made himself liable for debts contracted by the firm before he joined it, reference may be made to Ex parte Whitmore.[4] In that case Warwick and Clagett became partners. Warwick, who had had dealings with merchants in America, informed them that he had taken Clagett into partnership, and requested them to make up their accounts and transfer any balance due to or from him (Warwick) to the new firm. These instructions were repeated and confirmed by Warwick and Clagett, and were acted on. A debt owing from Warwick was placed to the debit of the new firm, and a bill was drawn on the firm for the amount of the debt and was accepted, but was dishonored. On the bankruptcy of the firm it was held that the debt in question had become the joint debt of Warwick and Clagett, and not only so, but that the joint liability of the two had been accepted in lieu of the sole liability of Warwick.

Before leaving this subject, it may be as well to observe that, as an incoming partner does not, by the fact of entering the firm, take upon himself the then existing liabilities thereof, if after he has joined the firm his copartners give a bill or note in their and his name for a debt contracted by them alone, this is *prima facie* a fraud upon him, and consequently he will not be liable to a holder with notice.[5]

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[1] Ex parte Jackson, 1 Ves. Jr. 131; Ex parte Peele, id. 604.

[2] See Cook's Bank. Law, 534 (8th ed.) citing Ex parte Bingham, and Re Staples; Ex parte Clowes, 2 Bro. C. C. 595.

[3] Ex parte Freeman, Buck. 471; Ex parte Fry, 1 Gl. & J. 96; Ex parte Williams, Buck. 13; Ex parte Peele, 6 Ves. 601.

[4] 3 Deac. 365.

[5] See Shirreff v. Wilks, 1 East, 48.

Rule when one partner is indebted to the firm—Simpson v. Rackham.

SEC. 191. When one partner is indebted to his copartner on a separate account, it may be necessary, either during the partnership or by the deed of dissolution, to make some arrangement by which the debtor partner shall be expressly exempt from an action on that account by his copartner. An arrangement, without some provision to this effect, will not save the debtor partner from the consequences of an action. Thus, in the case of Simpson v. Rackham,[1] the plaintiff and the defendant were partners, and the defendant being indebted to the plaintiff on a separate account, it was agreed between them that the plaintiff should take 2½*l. per cent* interest on his separate account for six months, from March 1st, 1827, and 5*l. per cent* afterward; that the partnership accounts should be made up, and the defendant's share of the proceeds go toward the liquidation of his separate debt; that the plaintiff should receive sums due to the firm, discharge the partnership debts, and apply the balance toward discharging the defendant's separate debt; that the partnership might be dissolved any 1st of January on six months' notice being given, but that, in consequence of the plaintiff's concession as to interest, it was expected there should be no dissolution on the 1st of January next ensuing. It was held that this agreement did not suspend the plaintiff's right to sue the defendant for the separate debt due from him to the plaintiff. In delivering the judgment of the court, Park, J., observed that although by the stipulation of interest at 2½ *per cent* for six months, it seemed probable that it was in the contemplation of the contracting parties to suspend any proceedings at law for *that* period at least, yet it was certainly quite clear that there was no precise stipulation for a suspension; and, therefore, how could the court say to what period that stipulation should extend? He added that the stipulation also that the defendant's share of the partnership assets, when received by the plaintiff, should go in discharge of the *private* debt, was an advantage to the defendant, for it gave him a legal set-off to that extent; whereas, without such stipulation, the plaintiff might have sued for the *whole private debt*, and left the defendant to a suit in equity to recover his share. This seemed another reason for not considering any thing in the agreement as amounting to a suspension.

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[1] 7 Bing. 217; 5 Moore & Payne, 612.

Rule when one partner executes deed of trust for payment of his share of joint or partnership debts.

SEC. 192. Where, by a deed of trust executed by A, one of several partners, the trustees were to stand possessed of that partner's share upon trust, "thereout to pay the just proportion or share of him, the said A, of all such debts as were or should thereafter appear to be owing from him jointly and as a copartner," it was held, that this provision referred not to what, as among the partners, A might be bound to contribute, but to what, with reference to the state of the partnership funds, and the ability of the other partners, he might eventually be called on to contribute to the joint debts, so as they might be fully paid.[1]

It may here be remarked that, although different classes of creditors are specified by a deed of this nature, yet the court always lean in favor of an *equal* payment; and a declaration, that one class, as, for instance, separate and scheduled creditors, are to be paid ratably and in proportion to each other, is not of itself sufficient to prove that they are not also to take ratably and in proportion with the other creditors, as, for instance, the joint creditors.[2]

When deed of dissolution covers past transactions, will sometimes be extended to cover individual matters—Rule in Belcher v. Sikes.

SEC. 193. A deed of dissolution which on the face of it purports to settle all past transactions, and to prevent all future reckonings between the parties, will extend, under certain circumstances, to contracts which were not originally partnership contracts. In Belcher v. Sikes,[3] an indenture of dissolution, after reciting that A and B, in May, 1813, had entered into a contract with the commissioners for victualing the navy, to supply his Majesty's ships with sea-provisions and victualing stores, and that the said A and B, in September, 1813, had mutually agreed to dissolve the copartnership entered into by them as aforesaid, for carrying on the business of the said contract, and all other contracts entered into with the commissioners by B or A, and in which they or *either of them* were in anywise interested, etc., witnessed that A and B, by mutual consent, dissolved the said copartnership so entered into, and then or lately subsisting between them, under or by virtue of the said recited contract, and of all other contracts in which B and A, or *either of them,* had any interest or concern as aforesaid.

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[1] Wadeson v. Richardson, 1 Ves. & B. 103.

[2] Id.; see Pierce v. Slocombe, 3 You. & Col. 84.

[3] 8 B. & C. 185; 9 D. & R. 231.

The deed then contained a mutual release of all actions, accounts, reckonings, etc., for or by reason of the said copartnership or copartnerships so thereby dissolved as aforesaid, or for or by reason of any of the acts, matters, and things whatever in anywise relating to the said recited contract, and all other contracts in which B and A, or either of them, had any interest whatsoever. B then assigned to A all the share and interest of him (B), of and in all the debts and sums of money whatsoever then due and owing to them (A and B), under or by virtue of the same several contracts or otherwise, and all bonds, bills, etc., relating to the said contract, debts, and sums of money, or any part thereof, and all the goods, stock, and effects whatsoever then belonging to them, the said A and B, as such copartners respectively, and all the right, title, and interest of him (B), of, in, to, from, out or in respect of the premises; and a power was then given to A to recover and give discharges for the said debts. At the time when this deed was executed, B and A had been concerned in conducting business together as contractors for the navy. In some contracts, B was solely interested as contractor; in others, A was solely interested as contractor; and in some they were jointly interested as partners and contractors. They had, however, both been concerned in all the contracts; A having been agent in managing those contracts in which B was solely interested, and B having been agent in managing those contracts in which A was solely interested; and there was money due from the commissioners of the navy in respect of each of these classes of contracts. The Court of King's Bench held, that by this deed the contracts in which B had been originally separately interested were constituted, as between A and B, partnership contracts, and, consequently, that A was entitled by the deed to receive all sums due to B, in respect of those contracts, at the time of the execution of the deed.

Provision in deed as to ownership of stock.

SEC. 194. Where upon the dissolution of a partnership, it is agreed that certain specific articles shall become the exclusive and separate property of one of the partners, that agreement is final, and the other partners have no lien upon that property in case of a deficiency of assets. Thus, upon the dissolution of a partnership between A and B, coach-founders, it was agreed that B should have a certain book used in their trade, containing plates of the articles they sold; that until a copy thereof was made for A, the latter should have the use of the original; and that a fund should be appropriated to the payment

of the partnership debts. The partnership was dissolved upon these terms, and B entered into a fresh partnership with the plaintiff. B having become bankrupt, and the fund having proved insufficient, A, who had got the book into his possession, refused to deliver it up until B's estate should have been applied to make up one moiety of the deficiency. Upon a bill filed by B's partner to enforce his right to have a copy of the book made and delivered to him, it was decreed according to the prayer of the bill, with costs.[1] Sir J. Leach, in delivering judgment, observed that if this reference book remained partnership property, it would be unquestionable that the plaintiff could not be entitled to relief without a general arrangement of the partnership concerns; for, until such general arrangement, no partner could claim an exclusive right in any article of the partnership property. But, upon a dissolution, any part of the partnership property might, by contract of the partners, be converted into the separate individual property of either; and it was clear here that, upon the dissolution, the book became the separate property of B, subject to the delivery of the copy to the defendant, and the interim inspection. The plaintiff's claim, therefore, did not refer to any article of partnership property. Where a retiring part-

[1] Lingen v. Simpson, S. 1 & S. 600. By a deed of dissolution of a partnership, the retiring partner agreed to assign to the continuing partner all his share in the partnership property, subject to the payment of the retiring partner's share of the debts, and it was agreed that a deed should be executed by which the continuing partner should covenant to pay the debts, and to indemnify the retiring partner and his estate therefrom. No further deed was executed. The continuing partner, six years afterward, assigned a policy of assurance which had formed part of the partnership property, to a mortgagee for securing money lent, the mortgagee having had notice of the deed of dissolution. The continuing partner became bankrupt, having neglected to pay some of the debts of the partnership, and such debts were recovered against the estate of the retired partner who had died. It was held that the provisions of the deed of dissolution did not create a charge upon the property assigned, in favor of the retired partner. In re Langmead's Trusts, 35 Eng. L. & Eq. 193. Also per Knight Bruce, L. J., that even if it had created a charge, still, as the debt was not scheduled or specified, the receipt of the continuing partner would effectually discharge the mortgagee. Id. So, where one of two partners retires, relinquishing his interest in the partnership property to the other, the latter has the same dominion over it as if it had always been his separate property. Bullitt v. Methodist Episcopal Church, 26 Penn. St. 108. So on the dissolution of a partnership, if the remaining partner, who takes all the goods and partnership effects, covenants to become solely responsible for the outstanding partnership debts, the covenant is not one of indemnity merely, but binds him to discharge the retiring partner, within a reasonable time, from all liability for the debts; and if he dies without complying with his engagement, and his estate is declared insolvent, the retiring partner has a claim against the estate to the amount of the outstanding debts. Peacey v. Peacey, 27 Ala. 683. One partner may well agree, on a voluntary dissolution, that the partnership property shall belong to his copartner, and an agreement so made, in good faith, will transfer to such copartner the property free from any equitable lien in favor of the partnership creditors. Sage v. Chollar, 21 Barb. (N. Y.) 596.

ner takes from the continuing partner a covenant or bond of indemnity against the partnership debts, that bond or covenant may be enforced by a decree for specific performance.[1]

Courts of equity will not relieve where complainant has not first attempted to avail himself of provisions of deed.

SEC. 195. This section may be concluded with the observation that in cases of extensive partnerships acting by means of directors and other officers, and regulated by a deed containing a great variety of laws and stipulations, a court of equity will frequently decline to interfere to relieve those parties who have not, in the first instance, endeavored to avail themselves of the provisions of their deed.[2]

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[1] Warren v. Taylor, 8 Sim. 599.

[2] Ellison v. Bignold, 2 Jac. & W. 503 Waters v. Taylor, 15 Ves. 10.

CHAPTER IX.

OF THE LEGAL AND EQUITABLE REMEDIES BETWEEN PARTNERS.

SEC. 196. Of enforcement of covenants between partners.
SEC. 197. When covenant lies—Marshall v. Colman.
SEC. 198. When specific performance will be decreed.
SEC. 199. Covenants against engaging in other business.
SEC. 200. Relative to arbitration.
SEC. 201. Liquidated damages, covenants relating to.
SEC. 202. When such covenants not applicable.
SEC. 203. Covenants are treated in equity as joint and several.
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SEC. 205. Equity rejects clauses not acted upon.
SEC. 206. All the covenantees must be joined as plaintiffs.
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SEC. 209. Number of plantiffs may be limited by the contract.
SEC. 210. This applies only to actions between the partners themselves.
SEC. 211. Right of action survives to the other covenantees.
SEC. 212. When defect of parties does not appear on face of pleadings. Rule.
SEC. 213. When courts of equity will interfere.
SEC. 214. Will not restrain act approved by majority of partners unless illegal.
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SEC. 216. Will interfere to control factious minority.
SEC. 217. Will not generally interfere where complainant has been guilty of laches.
SEC. 218. Rule in Sherman v. Sherman.
SEC. 219. Effect of laches in certain cases.
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SEC. 221. Applicability of the doctrine to mining companies.
SEC. 222. Advantages of evidence of abandonment.
SEC. 223. Rule in McLure v. Ripley.
SEC. 224. Cases where laches have not been regarded.
SEC. 225. Recognition of a claim overcomes laches.
SEC. 226. Of the rule that all proper parties must be before the court.
SEC. 227. Who ought to be parties.
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SEC. 229. Rule in Turner v. Hill.
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SEC. 231. Suits against executors of deceased partners for fraudulent acts of deceased.

SEC. 232. Where some partners may sue on behalf of themselves and others.
SEC. 233. Exception to the rule that all the partners must be parties to suit for a dissolution.
SEC. 234. Question of parties dependent upon right to be enforced.
SEC. 235. Rule when dissolution is not sought.
SEC. 236. Action to rescind illegal agreements or one illegally entered into.
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SEC. 238. When such suits may be brought on behalf of others without their consent.
SEC. 239. Of suits by and against public officers.
SEC. 240. Rescission of contract.
SEC. 241. Rule in Pulsford v. Richards.
SEC. 242. Rule in Jennings v. Broughton.
SEC. 243. Rule in Robson v. Earl of Devon.
SEC. 244. Equity will rescind contract of partnership for fraud.
SEC. 245. Rule in Rawlins v. Wickham.
SEC. 246. Bill to recover money invested under fraudulent representations of copartner.
SEC. 247. Rule in MacBride v. Lindsay.
SEC. 248. Equitable jurisdiction to rescind agreements generally.
SEC. 249. Executors of deceased partners—power of, in certain cases.
SEC. 250. Specific performance, when decreed.
SEC. 251. Rule in Bell v. Mixborough.

Of the enforcement of covenants between partners.

SEC. 196. One partner may maintain an action against his copartner, whether the contract be to pay any sum or do any act for the purpose of only launching the partnership,[1] or whether it be to perform any of the articles after the partnership has actually commenced.[2] It seems, however, that this proposition must not be extended to the case where the damages to be recovered are, of necessity, payable out of, or, when recovered, payable into the partnership fund; because, in this case, the party bringing the action is liable to contribute to the fund out of which he seeks payment.[3]

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[1] Walker v. Harris, *ante*, p. 136; Ex parte Notley, 1 Mont. & A. 48; Glover v. Tuck, 24 Wend. 153.

[2] Want v. Reece, 1 Bing. 18; Hatcher v. Seaton, 2 M. & W. 47; see, also, Bagley v. Smith, 10 N. Y. 487; Adams v. Tutton, 39 Penn. St. 447.

[3] 1 Bing. N. C. 407. But see *post*, book 5, chap. 1, sect. 3, art. V, 2; and Andrews v. Ellison, 6 B. Moore, 199. Covenant lies for the wrongful dissolution of a partnership, against the provisions of articles under seal. Adams v. Tutton, 39 Penn. St. 447.

Members cannot sue the firm.—There is a familiar principle of the law that a member of a partnership cannot sue the firm, at law or in equity, for it has no legal existence aside from the members composing it. And to permit a suit against a firm by a member of it would be to allow a party to be both plaintiff and defendant in the same suit. Neale

Where covenant lies.

SEC. 197. An action of covenant will lie, although there may be accounts between the parties which require unraveling in equity.[1] And where partnership covenants have not been infringed for any length of time, the action of covenant is the proper remedy, a court of equity in such case not interfering to restrain the breach of covenant, unless the bill pray, and there are just grounds for a dissolution. In the case of Marshal v. Colman,[2] articles of partnership were entered

v. Turton, 4 Bing. 149; DeTastet v. Shaw, 1 B. & Ald. 664; Chadwick v. Clarke, 1 C. B. 700; Estes v. Whipple, 12 Vt. 373; Brocken v. Kenedy, 4 Ill. 558; Banks v. Mitchell, 8 Yerg. (Tenn.) 111; Myrick v Dame, 9 Cush. (Mass.) 284; Homer v. Wood, 11 id. 66; Hall v. Logan, 34 Penn. St. 331; Price v. Spencer, 7 Phil. (Penn.) 179; McFadden v. Hunt, 5 W. & S. (Penn.) 468; Collamer v. Foster, 26 Vt. 754; Lindley on Part. 718. Thus one firm cannot sue another where one or more members are members of both firms. Green v. Chapman, 27 Vt. 236; Haven v. White, 39 Ill. 509; Griffith v. Clew, 8 S. & R. (Penn.) 30; Eastman v. Wright, 6 Pick. (Mass.) 320; Graham v. Harris, 5 Gill & J. (Md.) 489; Burley v. Harris, 8 N. H. 235; Rogers v. Rogers, 5 Ired. (N. C.) Eq. 31; Engles v. Furniss, 4 E. D. S. (N. Y.) 587; Calvin v. Markham, 3 How. (Miss.) 343. See, also, Penock v. Swayne, 6 W. & S. (Penn.) 239. Nor under such circumstances in an action against one of them, can the other be summoned as trustee, for the trustee process is a mode of enforcing a contract between the trustees and the principal debtor for the benefit of the creditor. Denny v. Metcalf, 28 Me. 389. So the assignee of a partner who is the payee of a non-negotiable note made by the partnership, cannot sue upon the note, as he can stand in no better right than his assignor. And as his assignor could not sue the firm upon the note, so he would have no right of action on it. Hill v. McPherson, 15 Mo. 204. So it has been held that where a firm indorses a note, the holder thereof, being a member of the firm, cannot sue a second indorser, as the holder stands in the relation of first indorser as a member of the firm. Decreet v. Burt, 7 Cush. 551. But in such a case the indorsee of the member may recover of the firm on the note, though the member could not if it grew out of partnership transactions. Thayer v. Buffum, 11 Metc. 398; Davis v. Briggs, 39 Me. 304; Fulton v. Williams, 11 Cush. 108; Smith v. Lusher, 5 Cow. 688. Nor would the technical doctrine we have referred to apply where the partnership is made the payee of a note, executed by one of the partners, and indorses the same, in which case the holder may maintain a suit on it against the firm. Parker v. Macomber 18 Pick. (Mass.) 509. See, also, Moore v. Gano, 12 Ohio, 300; Babcock v. Stone, 3 McLean (U.S.), 172; Paine v. Thatcher, 25 Wend. (N. Y.) 450. On this subject, Mr. Lindley observes: "The inability of a firm to sue one of its members, and *vice versa*, arises from the circumstance that in an action by a firm against one of its members, or *vice versa*, the member in question must be both a plaintiff and a defendant. Practically, it is often extremely inconvenient to have recourse to the intervention of a trustee, and to procure agreements to be made by him so as to sue and be sued thereon. But inconvenient as this is it is only through the intervention of a trustee that agreements between partners and the firms to which they belong can be so entered into as to be enforceable by action at law. Lind. on Part. 721; Bedford v. Brutton, 1 Bing. N. C. 199; He further says that "an agreement by each partner with his copartners may indeed be framed so as to enable one to be sued by the others if care be taken to exclude the partner sued from all share in what is sought to be recovered from him, and to exclude the partner suing from all obligation to contribute to his own payment; but an agreement so drawn as to accomplish both these objects is not generally convenient. Where, however, it is adapted to the requirements of the partners, it may be had recourse to, as shown by the decision in the well-known case of Radenhurst v. Bates, 3 Bing. 463; Lindley on Part. 721. It should

[1] Venning v. Leckie, 13 East, 7.

[2] 2 Jac. & Walk. 266; see, also, Dunham v. Gillis, 8 Mass. 462; Capen v. Barrows, 1 Gray, 376.

into between the plaintiff Marshall, and the defendants Colman and others, by which it was agreed (amongst other things), that their business, that of wholesale linendrapers, should be carried on in the

here be observed that in most of the States of the Union the common law forms of action have been abolished and there is no such form of action in many of them as the action of covenant at common law. But an equally complete remedy is furnished by statutory enactments or codes of procedure. So far, therefore, as matters considered in this chapter are made to rest upon the technical form of the action, they have but limited application in these states. The same remedy and general principles are applicable whether the contract is under seal, or merely in writing or by parol. The remedy is equally complete in either case. The only distinction relates to evidence. One partner cannot sue his copartner upon any matter connected with or growing out of the partnership, except upon a settlement and balance struck, and a promise, express or implied, to pay antecedent relief, can only be had in equity. Purvines v. Champion, 67 Ill. 469; Burns v. Nottingham Co., id. 531; Rap v. Cornell, 45 Cal. 135; Lane v. Taylor, 49 Me. 252; Holyoke v. Mayo, 50 id. 350; Andrews v. Allen, 9 S. & R. (Penn.) 241; Niven v. Speakerman, 12 Johns. (N. Y.) 401; Hewes v. Bailey, 20 Pick. (Mass.) 98; Lamatine v. Cass. 1 Wash. (U. S. C. C.) 436; Wright v. Eastman, 44 Me. 232; Harris v. Harris, 39 N. H. 45; Drew v. Fenton, 22 Wis. 654; Smith v. Small, 54 Barb. (N. Y.) 223; Lawle v. Meserve, 38 N. H. 9; Weaver v. Upton, 7 Ired. (N. C.) 458; Simerall v. O'Bannon, 7 B. Mon. (Ky.) 609; Gridley v. Dale, 4 N. Y. 491; Cowles v. Garrett, 30 Ala. 341; Bullard v. Kinney, 10 Cal. 62; Hills v. Bailey, 27 Vt. 550; Kennedy v. McFaddon, 3 H. & J. (Md.) 104; Smith v. Smith, 33 Mo. 557; Thompson v. Steamboat Julius D. Morton, 22 Ohio St. 81; Beach v. Hotchkiss, 2 Conn. 425; Young v. Brick, 3 N. J. L. 663; Chadsey v. Harrison, 11 Ill. 141; Halderman v. Halderman, 1 Hempst. (Tenn.) 559; Hennezin v. Wilcoxson, 13 La. An. 576; Houston v. Brown, 23 Ark. 333; Page v. Thompson, 33 Ind. 137; Griffith v. Buck, 13 Md. 102; Root v. Stevenson, 24 Ind. 115; Calvit v. Markham, 4 Miss. 343; Russell v. Minnesota Outfit, 2 Minn. 162; Smith v. Smith, 33 Mo. 557; and the settlement must be made and the balance struck with the concurrence of *all* the partners, and a balance struck and settlement made with one partner cannot subsequently be adopted by another, without the assent of the persons sought to be charged, so as to uphold an action at law. Thus, in Bishop v. Hotchkiss, 2 Conn. 425; S. C., same vol., p. 597, the plaintiff, the defendants, Gad Peck and Goodrich and Deforest, on the 30th of July, 1813, were the joint owners, in equal proportions, of a quantity of corn meal, and other articles suitable for the West India market, of the value of $3,200. By the consent of all concerned, the whole of this property was put into the hands of the defendants, and was by them, in the month of August, 1813, shipped to St. Bartholomew, consigned to Mr. Winfield, a merchant of that Island, by whom it was received, sold and disposed of, and the proceeds vested in West India produce, which was, immediately afterward, shipped and consigned to the defendants. After being seized on its arrival in the United States, by the officers of the customs, for an alleged breach of the non-intercourse law, it was restored and delivered to the defendants, who proceeded to sell it, and received the avails thereof. The plaintiff claimed that his proportion of the avails amounted to $1,802; and that sum the defendants had actually paid to Gad Peck for his share; all the rest of the avails remaining in the defendant's hands. Upon these facts the plaintiff contended that he was entitled to recover his said share in this action. The defendants contended that this action could not be sustained, but that the plaintiff's only remedy, if he had any, was by action of account, or bill in chancery, and that the court ought so to charge the jury. The court charged the jury that the action was sustainable; and the plaintiff accordingly obtained a verdict. The defendants moved for a new trial on the ground of a misdirection, which motion was granted by the supreme court. Hosmer, J., in delivering the opinion of the court, said: "The parties to this action, with three other persons, were jointly interested in a voyage. In this transaction they were copartners. The avails came into the hands of the defendants, who stated the account, ascertained the balances due to each person concerned, and actually paid one of

name of the firm of Colman, Willet, Oxley & Marshall, and that all contracts and engagements entered into by any one of the parties on account of the said trade, and all checks and drafts drawn by them,

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them his share. The plaintiff has brought an action of *assumpsit* to recover the sum due to him. This suit cannot be maintained. Between copartners, the action must be account, unless there has been a settlement between them and a balance struck, or an express promise to pay. Wetmore v. Baker, 9 Johns. (N. Y.) 307; Ozeas v. Johnson, 1 Binn. (Penn.) 191; Smith v. Barrow, 2 T. R. 477; by Buller, J., Moravia v. Levy, 2 T. R. 483, *in nota;* Hartup v. Wardlove, 2 Show. 308; Dewitt v. Stanford, 1 Root (Conn.), 270; Whitman v. Wadsworth, 2 id. 207; Casey & al. v. Brush & al., 2 Cai. (N.Y.) 293; Niven v. Speakerman, 12 Johns. (N. Y.) 402; Murray v. Bogert, 14 id. 322; Collins v. Phelps, 3 Day (Conn.), 506. It cannot, with any propriety, be argued that the balance in this case has been ascertained and struck between the parties. The payment to Peck of a share, supposed to belong to him, is no evidence of a promise that the defendant would pay the sum he had considered as due to the plaintiff. The settlement, if there was one, must have been obligatory on the plaintiff; but of this there is no pretense. No act has taken place which precludes the defendant from insisting that the statement made by him was founded in mistake, and it is of no effect, because it cannot bind the plaintiff, and therefore obliges neither party. I do not assert there is an absolute necessity that the account should be signed to render it a stated account, but at least there must be something equivalent." Perhaps if the defendant had made out copies of the account as stated by him and having been delivered by the parties, they had long retained them, without manifesting any objection, this might have amounted to a sufficient adjustment. Willis v. Jernegan, 2 Atk. 252; see, also, to same effect, Farrar v. Pearson, 57 Me. 561; 8 Am. Rep. 439. So strictly is this rule enforced that, at common law, a firm having dealings with another firm in which one of its members is also a partner, cannot maintain an action against the firm for a balance due it upon account. Bosanquet v. Wray, 2 Marsh. 324; Banks v. Mitchell, 8 Yerg. (Tenn.) 112. Neither can the assignee of a partner sue, as he acquires no rights the assignor did not possess. Sparrow v. Chisman, 9 B. & C. 242. But see Kipp v. McChesney, 66 Ill. 460, where it was held that the assignee of a note of the firm, purchased by one of the partners and assigned to the plaintiff, could maintain an action thereon, although the assignor could not have done so.

Single transactions—Balance struck—Note—Special promise, etc.—When, however, there is only one transaction in dispute, or rather one item, it is held in some of the States that an action at law may be brought therefor. In Myers v. Winn, 16 Ill. 136, it was held where several persons entered into a limited partnership for the purchase and sale of cattle, and Myers advanced all the capital which was only to be used for this specified purpose, and, if after having been so used, or after having been collected by sale of the cattle, was paid over to another partner for Myers, the capitalist, that the latter had a right to sue at law for the amount. The capital was not the property of the firm, except for making the purchase, and the cattle having been sold, this terminated the adventure. So, in Wright v. Cumpsty, 41 Penn. St. 102, it was held that where parties agree to engage in a single transaction for the purpose of making profits, their agreement does not amount to a partnership in such manner as to compel the partner seeking his share of the profits, or payment for work and materials furnished, in excess of his proportionate share of the venture from the other partner, to resort to an action of account render, but he may recover in assumpsit. Where the partnership, if it existed, was in a single transaction, and there were no debts due by, or in favor of, the firm, the plaintiff, in such a case, may recover in the equitable action of assumpsit, that which will make him equal with his copartner. Buckner v. Ries, 34 Mo. 357; Thouron v. Paul, 6 Whart. (Penn.) 615; Wright v. Cumpsty, 1 Penn. St. 112. But otherwise in New York. Atwater v. Fowler, 1 Hall (N. Y.), 180. But see, holding that an action will lie in such cases, Musier v. Trumpbour, 5 Wend. (N. Y.) 275. So an action lies for a balance agreed upon on settlement. Sikes v. Works, 6 Gray (Mass.), 434; Pope v. Alexander, 13 Ala. 220; Davis v. Briggs, 39 Me. 305; Frink v. Ryan, 5

and all receipts for money paid, on account of the said trade should be in the joint names of the said John Morris Colman, Henry Willet, James Oxley and John Marshall. The bill, filed

Ill. 322; or where there is a special promise to pay, as where a note is given by one to another for a balance due. Stephens v. Thompson, 28 Vt. 80; Copley v. Richardson, 4 La. An. 512; Bonaffe v. Fenner, 6 S. & M. (Miss.) 216; Moore v. Gano, 12 Ohio, 306; or an agreement to account at certain stated periods. Duncan v. Lyon, 3 Johns. Ch. (N. Y.) 360; or for capital agreed to be furnished. Scott v. Campbell, 30 Ala. 729; Grigsby v. Nance, 3 id. 350; Collamer v. Foster, 26 Vt. 767; Currier v. Rowe, 45 N. H. 73; Truitt v. Baird, 12 Kan. 410; or for debts which one partner agreed to pay, but did not, and which the other was compelled to or did pay. Brenner v. Worthington, 10 Allen (Mass.), 330; Leonard v. Robbins, 13 id. 218; or for the amount of a note given by one partner fraudulently, and which the other has been compelled to pay. Cross v. Cheshire, 7 Exch. 411; or for a breach of duty, or of the articles of copartnership. Bond v. Hilton, Busbee's L. (N. C.) 310; or upon private dealings between themselves, having no relation to the partnership. Simpson v. Rackham, 7 Bing. 622; Elder v. Hood, 28 Ill. 538; or upon any transaction, not connected with or proceeding from the partnership. In Stone v. Wendover, 2 Mo. App. Rep. 251, Lewis, J., in delivering the opinion of the court, laid down the rule that one partner may maintain an action at law against his copartner during the existence of the partnership, *when the subject-matter of the action does not proceed from the partnership, or when it proceeds from a transaction which, by the very terms of the partnership, could never be associated with that relation.*" Citing Want v. Reece, 1 Bing. 18; Dunham v. Gillis, 8 Mass. 462. So in Tunis v. Lentz, 1 Mo. App. Rep. 211, it was held that a partner might maintain an action against his copartner, upon any transaction between them occurring *prior* to the partnership. But it was held by the same court in Mulhall v. Cheatham, 1 Mo. App. Rep. 476, that an action at law between partners will not lie, respecting a matter arising out of an unsettled partnership account as upon a note given by one partner for money advanced to him, at his request, to be used in the partnership business. Carter v. Benninger, 45 N. Y. 545. In an action at law a person can only plead such claims as will sustain an action at law, consequently when one partner sues another upon an individual transaction *having no connection with the partnership*, the defendant cannot set off transactions *originating from and connected with a partnership between them.* Wright v. Jacobs, 61 Mo. 19; Fromont v. Coupland, 2 Bing. 170. But although a claim grows out of a partnership transaction, yet if by reason of a special promise made by one partner to another, it becomes an individual transaction, an action will lie upon it, as where one partner promises to pay a portion of the price of certain articles to be furnished for the partnership business, it is held that an action at law will lie for its breach upon the ground that the breach *is a peculiar and special ground of damage* to the other partner, in which neither the partnership nor the other members of it are interested. Witts v. Simmonds, 51 How. Pr. (N. Y.) 48. But in such a case there must be actual damage, that is, the other partner must have been compelled to and must have actually paid the share which such partner agreed to pay, or he must have assumed it so that all right of action in any other person is quieted. Dedman v. Williams, 3 Ill. 154. While a partnership exists or remains unsettled, no action at law can be maintained by one partner against another, except an action of account or assumpsit on a promise to account. Chase v. Garvin, 19 Me. 211; Barley v. Harris, 8 N. H. 233; see Estes v. Whipple, 12 Vt. 373; Graham v. Holt, 3 Ired. (N. C.) 300; Stalhert v. Knox, 5 Mo. 112; Davenport v. Gear, 5 Ill. 495. Nor does it make any difference, in such case, that the suit was brought in the name of the firm by one partner, to whom the defendant, another partner, had assigned the partnership effects. Burley v. Harris, 8 N. H. 233. But after a partnership has been dissolved and its concerns adjusted, and a balance found due from one to the other, and the accounts have been settled, and one has by mistake paid to another more than his due, assumpsit will lie to recover such balance, or correct such mistake. Chase v. Garvin, 19 Me. 211.

The balance so found must be a final balance of all the partnership accounts; balances which are struck preparatory only to a final account are not sufficient to

in July, 1820, alleged that the defendants Colman and Willet had entered into numerous contracts and engagements, and written numerous letters (under some of which goods had been supplied and de-

form the subject-matter of an action. Davenport v. Gear, 5 Ill. 495. Assumpsit will not lie by one partner against his copartner to recover a balance due upon a settlement of their partnership account, without proof of an express promise to pay. Killum v. Preston, 4 W. & S. (Penn.) 14. But one partner may maintain an action against another partner, if there has been a dissolution of the partnership, a settlement, a balance struck, and an express promise to pay. Gulick v. Gulick, 2 Green (Iowa), 578. Where, in a settlement between partners, there is but one item, and that adjusted by an express promise to pay the amount, assumpsit will lie thereupon by one partner against the other. Byrd v. Fox, 8 Mo. 574. After the death of a person who was partner in two firms, the survivors of one may maintain an action against the survivors of the other partnership. Lacy v. Le Bruce, 6 Ala. 904. One partner cannot maintain an action against his copartner, as indorser of a bill of exchange purchased by the company with their own bills, and indorsed to them in blank, the indorsement being filled up payable to one, but it not appearing that the partnership does not own the bill. Tipton v. Nance, 4 Ala. 194. A partner cannot maintain replevin against his copartner for any of the partnership property. Whitesides v. Collier, 7 Dana (Ky.), 283. But, where one partner had in his possession partnership property, which the other took from him, the former sued out a writ of replevin, by the service of which the property was redelivered to him. On the trial, it was found that the property was partnership property, and it was contended that the plaintiff in replevin, having then the possession which he had acquired by the writ, had a right to retain it. Held, that the defendant was entitled notwithstanding to judgment *pro retorno;* for, where one has been deprived of his property by an abuse of the process of the law, the law should restore it, and place the parties in *statu quo.* Whitesides v. Collier, 7 Dana (Ky.), 283. Where a debt against a firm has been collected of one of the partners, he cannot sue the other partner at law for contribution, though the debt was paid out of his separate property. Lawrence v. Clark, 9 Dana (Ky.), 257.

An express promise by one partner, out of his share of the income, to pay another partner for his personal attention to the business of the concern, may be enforced in assumpsit, although the articles of copartnership are under seal and provide for such payment. Paine v. Thatcher, 25 Wend. (N. Y.) 450. So one partner may maintain an action of covenant against his copartner, whether the covenant be to do any thing to launch the partnership, or to perform any of the articles after it has commenced. Glover v. Tuck, 24 Wend. (N. Y.) 153. So, where the interest of one partner in the partnership property has been purchased by the other for a gross sum, which purchase was effected by fraud and deception, the party defrauded may repudiate the contract *in toto* and open the account anew, in which case his remedy is in a court of equity. Chase v. Garvin, 19 Me. 211. In a case where a partner sold to his copartner his interest in the partnership effects, and afterward it was discovered that the inventory and estimate of the effects which the parties had before them at the time of the sale was erroneous, and that the effects were in fact less than appeared from the inventory. The sum paid for the selling partner's interest was, however, considerably less than his share of the amount of the inventory. It was held that, while the sale remained in force, an action could not be maintained to recover the difference between the actual amount of the effects and the amount stated in the inventory. Wood v. Johnson, 13 Vt. 191.

But where it is ascertained by partners, who are about closing their partnership concerns, that a balance will be due to one of them on a final settlement, although the exact amount of such balance cannot be ascertained, yet, if the debtor partner gives the creditor partner a promissory note for a sum not exceeding the amount of the balance which will be due on a final settlement, such note is given on a good and sufficient consideration, and payment thereof may be enforced by action at law, though the balance is not struck between the partners. Rockwell v. Wilder, 4 Met. (Mass.) 556. A partnership between the plaintiff and the defendant *having been dissolved*, the plaintiff agreed to pay all the debts against the company; and

livered) in the name of Colman, Willet & Co., and had refused to add the name of the plaintiff, or to comply with the above-mentioned covenants, thus preventing him from being known as a partner, and

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the defendant agreed, in writing, that a certain sum was the final balance of accounts between them as partners. It was held, that the plaintiff might, before paying the outstanding partnership debts, maintain *assumpsit* against the defendant to recover the sum thus agreed to be the final balance, the defendant, if compelled to pay any such debts, having his remedy on the plaintiff's agreement. Dickinson v. Granger, 18 Pick. (Mass.) 315. The law in relation to partnership transactions is well settled, that one partner cannot bring an action of assumpsit against his late copartner, unless upon the dissolution of the copartnership, the partners account together, and, a balance being stated in favor of one, the other promises payment. *The balance so found must be a final balance of all the partnership accounts; balances which are struck preparatory only to a final account are not sufficient to form the subject-matter of an action.* Davenport v. Gear, 4 Ill. 495; Frink v. Ryan, 5 id. 422; Chadsey v. Harrison, 11 id. 151; Johnson v. Wilson, 54 id. 419. In the case of Frink v. Ryan, *ante*, there had been a dissolution and final settlement, and a note given for the balance ascertained to be due, with a stipulation that the errors and omissions in the settlement might be deducted as payments on the note, the makers were allowed to interpose as a defense in an action at law by the assignee of the note, the omissions made in the settlement of the partnership matters. One member of the partnership cannot sue the firm at law for advances made by him to the joint concern, nor can the firm sue an individual partner for any thing he may have drawn out of the joint stock or proceeds. *The reason is that one man cannot occupy the double position of plaintiff and defendant at the same time.* The aid of a court of chancery is just as necessary to settle the account of such advances as it is to settle accounts arising out of the immediate transactions of the firm business. Bracken v. Kennedy, 5 Ill. 559. To enable one partner to recover against his fellow, there must be a settlement and a balance found to be due. A balance was struck in favor of J, a partner, on the books of the firm, after his death; similar balances were struck in favor of other partners. This was evidence only how J stood with the firm including himself, not how he stood with his partners. It was the right of the survivors to settle the affairs of the company before they could be made liable to the estate of their deceased fellow. Id; Ferguson v. Wright, 61 Penn. St. 168. Where one partner receives goods or property from the firm, which are charged to him, as to other customers, no action will lie at law against him therefor. Thus in Page v. Thompson, 33 Ind. 137, three persons owned a steamboat in equal shares which they run on joint account. It was held that two of them could not maintain an action against the other for liquors supplied to him from the bar of the steamer.

Mr. Lindley in his work upon Partnership, p. 724, *et seq.*, covers the questions involved very fully, and as the rules and doctrines announced by him are expressive of the law as held in this country, and as the English cases upon these questions are more numerous than those to be found in the American reports, I give the substance of his observations. He says: "If a person agrees to become a partner, and breaks his agreement, an action for damages will lie against him, and any premium (bonus) may be recovered of him. Walker v. Harris, Anst. 245; Gale v. Leckie, 2 Stark. 107; Morrow v. Saunders, 1 Brod. & Bing. 318. So if a member of a firm agrees to introduce a stranger, an action lies against him at the suit of the stranger for a breach of the agreement, although it may have been made without the knowledge of the other members of the firm, and they may decline to recognize it. McNeil v. Reid, 9 Bing. 68.

Where a person agrees to become a partner upon the performance of certain conditions precedent, which, without any fault of his, are not performed, he is entitled to recover back, by action at law, any moneys he may have subscribed for the purposes of the partnership when formed. It is upon this principle that, as was seen in a previous chapter, subscribers to an abortive company are held entitled to recover back their subscriptions, if they have not assented to the employment of those subscriptions to any other than the purposes of the company when duly formed. See as to this qualification,

from receiving partnership debts; and that Oxley consented thereto; and it prayed that the two first-named defendants might be restrained, by injunction, for carrying on the trade or entering into any con-

Garwood v. Ede, 1 Ex. 264. Thus it has been held that a subscriber to a scheme for a tontine which is never in fact fairly started, is entitled to recover the whole amount of his subscription, although expenses have been incurred in attempting to start it; Nockels v. Crosby, 3 B. & C. 814; also that a subscriber to a scheme for making a railway is entitled to recover his money back by an action at law if the scheme proves a failure, Walstab v. Spottiswoode, 15 M. & W. 501; and that he is so entitled, although shares may have been allotted to him; Walstab v. Spottiswoode, 15 M. & W. 501; and although he may have signed an agreement authorizing the application of his deposits to preliminary expenses, if he was induced to enter into that agreement by fraud, Wontner v. Shairp, 4 C B. 404; or if notwithstanding that agreement, the return of his deposit has been expressly guaranteed. Mowatt v. Lord Londesborough, 3 E. & B. 307, and 4 id. 1; So it has been held that the subscriber to a cost-book mining company is entitled to recover his money back if it is clear that it cannot be formed as intended when he subscribed to it. Johnson v. Goslett, 18 C. B. 728; 3 C. B. (N. S.) 569. In the case in which this was decided the company had actually begun to work the mine, but the plaintiff had not sanctioned that proceeding, and it was no part of his bargain that he should be considered a partner in a concern, the capital of which was less than that fixed when he agreed to join it. The persons to be sued for the recovery back of deposits paid are those who received such deposits by themselves or their agents. Wells v. Ross, 7 Taunt. 403, as to the receipt of one partner being the receipt of both. A denial by them that they received the money amounts to the general issue, and should not, therefore, be pleaded specially, and the same observation applies to a defense on the ground that the money is, or was, properly applicable to purposes for which it is, or has been wanted, and that, consequently, it is not returnable. See Owen v. Challis, 6 C. B. 115; Coupland v. Challis, 2 Ex. 682. In order that the plaintiff may prove that the consideration for which he paid his money has failed, he must show what that consideration was. In the class of cases to which reference has just been made, it is to be observed that, *ex hypothesi*, no partnership has commenced between the plaintiff and the persons whom he sues for his money. The question, can a subscriber to an abortive scheme recover his money back? is, therefore, totally different from that put by Holroyd, J., in Nockels v. Crosby, 3 B. & C. 819, when he asked whether, if five persons *enter into partnership* and contribute 1,000*l.* each, and they afterward find the concern a losing one, and put an end to it, any one of them can maintain an action against the others for his share? Whilst this latter question must be answered in the negative, see per Pollock, C. B., in Garwood v. Ede, 1 Ex. 267, the former may properly be answered in the affirmative, as, in fact, it has been in the cases already referred to. Where a person has been induced by the false and fraudulent representations of another to enter into partnership with him, an action will clearly lie at the suit of the first person against the second for the recovery of damages in respect of such fraud. See Dobell v. Stevens, 3 B. & C. 623. And it has most righteously been decided that, if false representations are made by means of advertisements issued for the purpose of inducing persons to take shares in a company, any person who is ensnared by those advertisements and takes shares on the faith of them, may maintain an action against the persons who caused them to be published, knowing them to be false. Gerhard v. Bates, 2 E. & B. 476; and see Denton v. The Great Northern Rail. Co., 5 E. & B. 860; Watson v. Charlemont, 12 Q. B. 856, E. C. L. R. 64. See as to an indictment for conspiracy, R. v. Timothy, 1 Fos. & Fin. 39, and for obtaining money under false pretenses, R. v. Watson, 4 Jur. (N. S.) 14. In order to maintain an action for misrepresentation, it is not necessary that there should have been any direct communication between the defendant and the plaintiff. See Clark v. Dickson, 1 Ell. Bl. & Ell. 148; and see Bedford v. Bagshaw, 4 H. & N. 538. Although the promoters of companies are not impliedly liable to each other for services rendered, or money expended by each in the prosecution of their common design, still, if they render

tracts, etc. (pursuing the words of the covenant in the partnership articles), except in the joint names of J. M. Colman, H. Willet, J. Oxley, and the plaintiff. The defendants by their answer admitted

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themselves jointly liable to a third party, and by virtue of that liability some only of them are compelled to pay what ought, as between themselves and the others, to be paid by all, an action for contribution lies at the suit of those who have been so compelled to pay against the others; and it is no objection to such an action that there are unsettled accounts which require to be taken before what is due from each to the other can be properly ascertained. The leading cases on this head are Boulter v. Peplow, and Batard v. Hawes. In Boulter v. Peplow, 9 C. B. 493, three provisional committeemen hired rooms for the purposes of a projected company. The company was ultimately formed, and it paid the rent for some little time. It afterward ceased so to do, and an action was then brought by the landlord against the three committeemen in question, two of whom let judgment go by default. A verdict was obtained against the third, who was compelled to pay the amount of damages and costs. In order to recover contribution he brought an action for one-third of what he had paid against each of his two co-committeemen; and it was held that such action lay, although at the time it was brought the plaintiff and the defendants were members of the company for the use of which the rooms had been hired. In Batard v. Hawes and Batard v. Douglass, 2 E. & B. 287, the promoters of a projected company engaged the services of an engineer, and became liable to him to a considerable amount, to obtain payment of which he sued one of them. This one having been compelled to pay the engineer's demand, brought action against his co-promoters for contribution; and he was held entitled to recover, although it was objected that there were unsettled cross claims between him and the other promoters, and that on that account, no contribution could be obtained at law. This objection was overruled on the ground that the promoters were not partners. See Helme v. Smith, 7 Bing. 709, which shows that the rule alluded to does not apply to co-owners of ships. Edgar v. Knapp, 7 Jur. 583, C. P. It may be observed here that where the promoters of a company retain a solicitor, they are all liable to be sued by him for payment of his bill, and that a delivery by him of his bill, duly signed, to any one of those liable, is a sufficient delivery to all, Mant v. Smith, 4 H. & N. 324; and that any one of them is entitled to tax his bill. Re Stephen, 2 Ph. 562, is another case of the same kind, the person retained having been a solicitor instead of an engineer.

When an action will lie—As regards real property.—In actions of ejectment and of trespass, courts of law pay no attention to any thing except the strict legal rights of the plaintiff and of the defendant to the property in question in the action. All collateral matters are disregarded; and in an action of ejectment a plea on equitable grounds is not allowed. Neave v. Avery, 16 C. B. 328. Hence, if a firm is in the occupation of land, the legal estate in which is in one of the partners only, he can at law eject his copartners; Francis v. Doe, 4 M. & W. 331; and if the firm has been dissolved, no notice to quit need be given, before ejectment, Doe v. Bluck, 8 C. & P. 464, or trespass, Benham v. Gray, 5 C. B. 138, is brought against them. The equitable doctrine that a partnership, although dissolved, subsists for the purpose of winding up its affairs, affords no defense at law for such an action. See the last case. If the legal estate is in all the partners, and one partner actually excludes another from the land legally belonging to both, ejectment will lie; See Peaceable v. Read, 1 East, 568; Doe v. Horn, 3 M. & W. 333, and 5 id. 564; and if one utterly destroys the common property, an action for damages may be sustained. See Cubitt v. Porter, 8 B. & C. 257; Stedman v. Smith, 8 E. & B. 1; but for injuries not amounting to the utter exclusion by one partner of the other, an action, it seems, will not lie. But see Martyn v. Knowllys, 8 T. R. 146; Stedman v. Smith, 8 E. & B. 1.

As regards personal property.—If one of several joint tenants, or tenants in common, is in exclusive possession of the common property, he has a right so to continue if he can, and no action against him will lie at the suit of his co-tenant. See 2 Wms. Saund. 47, o; Foster v. Crabbe, 12 C. B. 136; Holliday v. Camsell, 1 T. R. 658; Fennings v.

the principal facts stated in the bill, but insisted that it was well known to all persons dealing with the partnership, that the plaintiff was a partner. It appeared that at the first application made by the

Grenville, 1 Taunt. 241. But if one tenant in common or joint tenant destroys, Barnardiston v. Chapman, cited in 4 East, 121, and Bull. N. P. 34, 35; 2 Wms Saund. 47 o; or as it seems sells, Mayhew v. Rerrick, 7 C. B. 247; Barton v. Williams, 5 B. & Ald. 395; Williams v. Barton, 3 Bing. 139, the common property, he may be sued at law by his cotenant. In the case of a sale, however, the purchaser cannot be made to restore the property, for he at all events acquires the interest of the vendor and becomes therefore tenant in common with the other owners, and cannot be sued by them at law. Fox v. Hanbury, Cowp. 445, and other cases of that class. If, on a dissolution of partnership, the partnership property has been divided in specie amongst the partners, each may recover what has been allotted to him, for as to that he has become sole owner; see Jackson v. Stopherd, 2 Cr. & M. 361; and Wiles v. Woodward, 5 Ex. 557; and if the dissolution and division of the property are made by deed, each partner will be precluded from denying that any division has in fact been made, or that the previously existing tenancy in common has not been determined, and each, therefore, will be entitled to recover what is in the deed declared to be his. Id.

Test of right to sue.—An action for damages for the breach of an express agreement entered into by one partner with another will lie, if the damages when recovered will belong to the plaintiff alone. Thus where a partner retires, and he covenants with his copartners not to carry on business within certain limits, or they covenant to indemnify him against the debts of the firm, actions for damages occasioned by breaches of these covenants will clearly lie. Leighton v. Wales, 3 M. & W. 545; White v. Andsell, Tyr. & Gr. 785; Barker v. Allan, 8 W. R. 127, is an instance of a successful action by a shareholder against directors who had agreed to indemnify him against calls. So, if a partnership is entered into for a definite time, and one partner is turned out by his copartners before that time has expired, he can sue them for this breach by them of their agreement, and recover damages for the injury he has sustained; see Greenham v. Gray, 4 Ir. Com. Law Rep. 501; and generally an action may be brought for damages sustained by any breach of an express stipulation by one partner with his copartners, if it is so framed as to admit of action by some or one only of the partners against the partner complained of, and the damages will, when recovered, not belong as much to himself as to the plaintiffs, *e. g.*, an action for not rendering accounts and dividing profits; Owston v. Ogle, 13 East, 538; an action for a penalty stipulated to be paid in case of a breach of agreement; Radenhurst v. Bates, 3 Bing 463; an action for rent covenanted to be paid; Bedford v. Brutton, 1 Bing. N. C. 399; an action for not indemnifying the plaintiff against a debt; Want v. Reece, 1 Bing. 18; an action for not putting the plaintiff in funds to enable him to defray expenses as agreed; Brown v. Tapscott, 6 M. & W. 119.

If a person agrees to become a partner with others and to furnish a certain amount of capital, and he makes default, they can sue him at law for damages, although he as well as they were to have had an interest in what he undertook to furnish.

Rule in Venning v. *Leckie.*—A leading authority on this head is Venning v. Leckie, 13 East, 7. There the plaintiff and the defendant agreed to embark in a speculation in flax. The plaintiff had bought the flax, and the defendant promised to furnish him with half its price in time for payment. The plaintiff having paid for the flax, sued the defendant for one-half of the price paid, and he recovered, although it was objected that the defendant was entitled to, and had not received an account of the subsequent sales. It was answered that the purchase of the flax was to launch the partnership, and that no questions of account arose until after the defendant had furnished his share of the price. So, in Gale v. Leckie, 2 Stark. 107, where an agreement was entered into between an author and a publisher to the effect that the former should write a book and the latter publish it, and that the profits arising from its sale should be divided, it was held that an action lay by the publisher against the author for not furnishing the manuscript of the book.

plaintiff to have his name used in the business of the firm was in April, 1820, three months only before the filing of the bill. Lord Eldon refused the motion for an injunction, but without costs. "Al-

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Rule in Hesketh v. *Blanchard.*—The well-known case of Hesketh v. Blanchard, 4 East, 144, affords another illustration of the principle in question. There Robertson, who was captain of a ship about to sail to Africa, having no credit or ready money, requested the plaintiff to go with him to a butcher's and order meat to be taken on the voyage. Robertson promised the plaintiff that, "if any profit should arise from the meat, the plaintiff should have one-half for his trouble." The plaintiff and Robertson went to the butcher's and ordered the meat, and both were debited by the butcher with the price, and the butcher swore that he would not have trusted Robertson alone. The meat was delivered to Robertson, who sailed, and died without having come to any account with the plaintiff. The plaintiff paid the butcher the whole price, and sought to recover the *whole amount so paid* from the defendants, the executors of Robertson. The plaintiff had a verdict for the whole amount, subject to the opinion of the court whether he was entitled to recover the whole, or half, or nothing, and, if nothing, a nonsuit was to be entered. A rule *nisi* for entering a nonsuit was obtained, and discharged generally, so that, in fact, the plaintiff recovered the whole amount paid for the meat.

Instances in which an action will lie.—It follows from the principle on which Venning v. Leckie and Hesketh v. Blanchard were decided that if A and B agree to become partners, and each agrees to furnish a certain amount of capital, and A lends B the amount B is to contribute, this loan constitutes a debt for which an action by A against B will lie, although they may actually have become partners. Elgie v. Webster, 5 M. & W. 518: Ex parte Notley, 1 Mon. & Ayr. 46; and 3 D. & Ch. 367; see Jestons v. Brooke, Cowp. 793 And that if partners agree to contribute capital from time to time to meet expenses, as occasion may require, and one of them is compelled to pay the whole of the expenses for which all are liable, he can sue his copartners for what they ought to have contributed, according to their agreement. Brown v. Tapscott, 6 M. & W. 119. Wadsworth v. Manning, 4 Md. 59; Wright v. Eastman, 44 Me. 220. In Glover v. Tuck, 24 Wend. (N. Y.) 153, it was held that one partner may sue another whether the covenant be any thing to launch the partnership or to perform any of the articles after it is launched. In Brown v. Tapscott several persons agreed to share the profits arising from running a steamer between London and Ramsgate. One of them was to charter and have the management of the boat, and each agreed to pay 10*l.* per cent on the amount of his subscription, and such further installments in proportion to their respective subscriptions, as might be necessary, if the earnings of the boat were not sufficient to defray her expenses — which, in fact, they were not. The partner to whom the management of the boat was intrusted paid all the expenses incurred by running her, and sued one of his copartners for the share which he ought to have contributed toward defraying such expenses. The plaintiff obtained a verdict and the court refused to disturb it, although the court was of opinion that the plaintiff and the defendant were partners, for it considered that an action would clearly lie on the promise by the defendant to contribute to a common fund for defraying the expenses of the boat One partner may sue another at law in respect of a demand which has either nothing to do with the partnership business or, if entangled in it, is only so entangled by reason of the wrongful conduct of the defendant. In Smith v. Barrows, 2 T. R. 476, it was held that one partner who had received money to the use of another might be sued for it, although he had paid it to the credit of the firm, for his business was to hand it over to his copartner. In Cross v. Cheshire, 7 Ex. 43, it was held that a partner who, in fraud of his copartners, had given a note in the name of the firm for a private debt of his own, whereby his copartners had been compelled to pay such note, was liable to them at law for the whole of what they had been compelled to pay. Cross v. Cheshire, 7 Ex. 43; Osborne v. Harper, 5 East, 225. One partner may sue another at law in respect of a matter which, though relating to the partnership business, is separate and distinct from all other matters in question between the part-

though this court," said his Lordship, "will interfere where there is a breach of covenant in articles of partnership, so important in its consequences as to authorize the party complaining to call for a disso-

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ners, and can and ought to be determined without going into the partnership accounts. Thus where a partnership has been dissolved and it has been agreed that one partner shall take all the partnership property at a valuation, and it has been valued, and he has taken it at that valuation, and the values of the shares of the other partners have been ascertained, they may separately sue him at law for the amount payable to them respectively. See Jackson v. Stopherd, 2 Cr. & M. 361. So if partners go through the accounts of the partnership, and a final balance is struck, and the shares of each are ascertained, and the person by whom those shares are to be paid is also ascertained, an action will lie against him in respect of each share to be paid by him. Moravia v. Levy, 2 T. R. 483, note; Foster v. Allanson, 2 T. R. 479; Wray v. Milestone, 5 M. & W. 21; Brierly v. Cripps, 7 C. & P. 709; Preston v. Strutton, 1 Anst. 50; Henley v. Sloper, 8 B. & C. 16; Rackstraw v. Imber, Holt, 368; Wells v. Wells, 1 Ventr. 40. The balance, however, must be a final balance to be carried over to a fresh account in continuation of that just closed. Therefore, where one partner sued another for a debt unconnected with the partnership, the defendant was not allowed to set off a balance found due to him on the partnership account; for it did not appear that the account which had been stated was a final account, or that the plaintiff had ever promised to pay the balance which, on taking the account, was found due to the defendant. Killam v. Preston, 4 W. & S. (Penn.), 14; Holyoke v. Mayo, 50 Me. 385; Fanning v. Chadwick, 3 Pick. (Mass.), 420; Pope v. Randolph, 13 Ala. 214; Wilby v. Phinney, 15 Mass. 116; Beach v. Hotchkiss, 2 Conn. 475. •Fromont v. v. Coupland, 2 Bing. 170; see, too, Lyon v. Haynes, 5 Man. Gr. 504, where the sum ascertained to be payable was subject to contingent claims. In this last case it will be observed that the partnership continued after the balance sued for was struck, but it is apprehended that if a balance is struck, and is to be paid by one partner to the other, it might be sued for, notwithstanding the continuance of the partnership; for *ex hypothesi*, it is isolated and separated from the general account. This point was raised, but not decided, in Carr v. Smith, 5 Q. B. 128, where the action failed, because the account sued on had been made out by a non-partner, and had not been assented to by the partners, and was not stamped as an award. If one partner gives to a copartner a bill or note which is not in such a form as to bind the firm, but is binding on the partner who gives it, he may be sued by his copartner thereon, whatever the state of the accounts between the two may be, and although the bill or note in question had reference to some partnership transaction; for by giving the bill or note, the demand in respect of which it is given is isolated from the general partnership account. See Neale v. Turton, 4 Bing. 151, E. C. L. R. 13; Preston v. Strutton, 1 Anst. 50; Fox. v. Frith, 10 M. & W. 131; and Heywood v. Watson, 4 Bing. 496, E. C. L. R. 13. Compare Tibaldi v. Ellerman, 6 Dowl. & L. 71. An I. O. U. is evidence of an account stated, and may be put in force by one partner against another accordingly. Graves v. Cook, 2 Jur. (N. S.) 475, Ex. Upon precisely the same principle, if a partner leases property to trustees for the firm, and those trustees covenant to pay the rent, he may sue them on that covenant, although he may, as one of the firm, be bound to indemnify the trustees against all losses sustained by them in that character, and the trustees may themselves be members of the firm; for the covenant to pay the rent constitutes a demand distinct from all others. Bedford v. Brutton, 1 Bing. N. C. 399. If one partner receives money for the use of the firm in respect of some transaction separate and distinct from its other business, and the money thus received ought to be divided without reference to other matter, his copartners may, it is conceived, sue him at law for their shares of the money in question. See Graham v. Robertson, 2 T. R. 282. In Ex parte Dodgson, Mon. & Mac. Ar. 445, it was held that one of two sub-partners might prove against the other's estate for half of the profits received by him in respect of his share in the principal firm. Wadley v. Jones, 55 Ga. 329. Compare Bovill v. Hammond, 6 B. & C. 149. So if one partner pays money of his own to his copartner, in order that it may be applied by him for some spe-

lution of the partnership, it is a matter of great consideration whether it will entertain the jurisdiction of pronouncing a decree for a perpetual injunction as to a particular covenant, the partnership not being dis-

cific partnership purpose, and it is received for that purpose and no other, and is misapplied, an action lies for the recovery of such money; for *ex hypothesi*, it never was the money of the firm, and the duty of the partner who received that money was either to apply it as agreed, or to return it intact. See Wright v. Hunter, 1 East, 20. But in Rus v. Hellman, 24 Ohio St. 180, it was held that, where the firm intrusted money to one member to be applied to a specific purpose, and instead, he formed a new partnership with another person, and used the funds for that purpose, and they were lost, that he thereby became liable to account to the members of the old firm, for the money so misapplied by him. So if, in respect of some particular transaction, one partner has expressly agreed to indemnify another, and has not done so, an action may be brought by the latter against the former, inasmuch as the right to be indemnified has, by agreement, been made independent of all other questions between the partners. Coffee v. Brian, 3 Bing. 54; see, too, Wilson v. Cutting, 10 Bing. 436; Brown v. Tapscott, 6 M. & W. 119. Therefore, where one partner in his own name accepted a bill for a partnership debt, on the faith of a promise by one of the other partners that he would provide funds to pay the bill, and the acceptor was nevertheless compelled to pay it, he was held entitled to recover the whole amount from the other partner. Coffee v. Brian, 3 Bing. 54. If some of a number of partners give their promissory note for better securing payment of a debt owing by them and their copartners, and one of the makers of the note is compelled to pay the whole amount of it, he is entitled to sue each of the other makers of the note for his proportion of the sum so paid. For, in the case supposed, the right to contribution arises in respect of a matter not involved in the general account, and does not depend upon the circumstances that the makers of the note are partners. So it is held that, where one partner promises to pay a certain proportion of the price of goods to be purchased by the firm, the other partner, upon his failure to perform, has a right of action against him upon his special promise, for any damage that he may have individually sustained from such breach. Wills v. Simmonds, 51 How. Pr. (N. Y.) 48, following the rule in Venning v. Leckee, 13 East, 7. Currier v. Wester, 45 N. H. 233; Collamer v. Foster, 26 Vt. 757; Grigsby v. Nance, 3 Ala. 350; Scott v. Campbell, 30 id. 729. This This was lately decided by the Court of Exchequer in Sedgwick v. Daniell, 2 H. & N. 319. There three shareholders of a joint-stock mining company gave a joint and several promissory note as a security for a loan to the company. One of the makers of the note was compelled to pay the whole of its amount, and he then brought an action against one of the other makers to recover one-third of the sum so paid, and it was held that he was entitled to recover. The court laid stress upon the circumstances that some only of the partners made the note as showing that the transaction was separate and apart from the ordinary partnership business. These cases naturally suggest the important question whether one partner who has been compelled to pay the whole of a partnership debt is not always entitled to consider his right to be indemnified by his copartners, in respect of that payment, as independent of all other questions, and to sue them at law for contribution accordingly. There is no doubt, as a general proposition, that where one of several joint debtors has been compelled to pay the whole debt, he can sue the others at law for the proportions which they ought to have paid. See Burnell v. Minot, 4 Moo. 340; Boulter v. Peplow, 9 C. B. 493; Batard v. Hawes, 2 E. & B. 287. But not for the debt itself. That is, payment by him quiets the debt paid. His remedy is for contribution for money paid. Tucker v. Peaslee, 36 N. H. 167; Le Page v. McCrea, 1 Wend. (N. Y.) 164, Helme v. Smith, 7 Bing. 709; and there does not seem to be any sufficient reason why this rule should not apply as much to partners as to nonpartners, for there is no more difficulty in regarding the cause of action as distinct from the general partnership accounts than there was in some of the cases above referred to. In Sadler v. Nixon, 5 B. & Ad. 936; see, too, Batard v. Hawes, 2 E. & B. 287; Helme v. Smith, 7 Bing. 713; and Pearson v. Skelton, 1 M. & W. 504; and compare Wooley v.

solved by the court. There is one case which is constantly occurring, that of a partner raising money for his private use on the credit of the partnership firm; and the court interferes then, because there is a

Batte, 2 C. & P. 417; Osborne v. Harper, 1 Smith, 411; however, it was decided, that if one of several partners has been compelled to pay a debt of the firm, he cannot obtain contribution from his copartners by action at law. The facts there were as follows: three partners were indebted to a builder for repairs done to their place of business. He brought an action against all the partners, but took the plaintiff only in execution. The plaintiff, to regain his liberty, paid the whole debt and sued the defendant, who was one of his copartners, for one-third of the amount so paid. The case was tried before Lord Denman, who nonsuited the plaintiff, and the court refused to set aside the nonsuit, inasmuch as with reference to the question of contribution between partners no distinction could be drawn between voluntary and compulsory payments. Crattes v. Figerio, 18 La. An. 283; Portland Bank v. Hyde, 11 Me. 196; Wright v. Eastman, 44 id. 232; Lawrence v. Clark, 9 Dana (Ky.) 259; Calvert v. Munlow, 6 Ala. 338; Wood v. Steamboat Co., 9 Martin (La.) 43; Mead v. Curry, 10 id. 146. A similar doctrine was held in White v. Harlow, 5 Gray (Mass.) 462, the court holding that unless a balance had been struck or the partnership business settled, the only remedy is in equity. See, also, Morin v. Martin, 25 Mo. 360; Tucker v. Peaslee, 36 N. H. 167. By the payment of a note or judgment by one partner, it is a payment as to all, and it cannot be kept on foot and enforced against the firm by the partner paying it, or by his assignee. See Page v. McCrea, 1 Wend. (N. Y.) 164; Tucker v. Peaslee, *ante*. It is difficult to reconcile this case with those in which it has been held that if one of several projectors of a company is compelled to pay a debt owing by them all he can obtain contribution from them by an action at law, although there may be unsettled accounts between him and them. Batard v. Howes, 2 E. & B. 287; Boulter v. Peplow, 9 C. B. 493. It is true that the promoters of a company are not partners, but it is submitted that this is not material, for the objection to an action by one partner against another is not that the parties are partners. See Worrall v. Grayson, 1 M. & W. 166; but that one is suing the other in respect of some matter involving a question of account, or that the defendant is asked to make some payment to himself as well as to the plaintiff. It is also worthy of remark that, before it was settled as it now is, that promoters of companies are not partners, an action by one against the other under the circumstances supposed, was held to lie on the ground that the right to contribution was independent of other matters, and entirely collateral to the partnership. See Boulter v. Peplow, 9 C. B. 493, and Sedgwick v. Daniell, 2 H. & N. 319. This point was not called to the attention of the court in Sadler v. Nixon.

A suit by one partner against his copartner for a fraudulent removal or appropriation of the firm property will not lie. The only remedy is in equity for an injunction and receiver. Cary v. Williams, 1 Duer (N.Y.) 667. In a recent case in Massachusetts, Remington v. Allen, 109 Mass. 47, the plaintiff and defendant being partners, agreed that the plaintiff should assign an undivided third of a patent, of which he and another partner were the owners, and that the defendant should pay the plaintiff a certain sum of money, furnish the means necessary to develop the invention and carry on the business thereunder as long as they should agree, the defendant to have one-third of the profits, the plaintiff brought to the shop machinery and materials that before belonged to him, and were needed and used for developing the patent. After a few months the defendant put an end to the business and took possession of all the property, including such machinery and materials. It was admitted that they were partnership property, and the court held that the plaintiff could not maintain an action for the value of the property. An executor of a deceased partner, who has not been let into possession, cannot be joined with the surviving partner in an action of trespass, or for any injury to the property, Pfeifer v. Steiner, 27 Mich. 537; neither can replevin be maintained. The possession of one partner is in law the possession of all, and neither is entitled to its exclusive possession. Azel v. Betz, 2 E. D. S. (N.Y.) 188.

In New York—as before stated—assumpsit does not lie to recover a balance struck unless there is an express prom-

ground for dissolving the partnership; but then the danger must be such, there must be that abuse of good faith between the members of the partnership, that the court will try the question, whether the

ise to pay, and it is held that receiving and retaining an account for a long time without objection does not import a sufficient promise, Casey v. Brush, 2 Cai. (N. Y.) 293; and this is held to be the rule where the partnership relates only to a single transaction. Halstead v. Schmalzel, 17 Johns. (N. Y.) 80.

As to all matters outside of the partnership business, one partner may have his remedy against a copartner precisely the same as other persons may and against a private claim. A copartnership claim can neither be set off or recouped. Wiggin v. Goodwin, 63 Me. 389; Maloney v. Davis, 48 Penn. St. 512; Mullaney v. Keenan, 10 Iowa, 224; Currier v. Hale, 5 Allen (Mass.), 561; Wright v. Mitchell, 6 Gratt. (Va.) 354. And the same rule prevails as to matters accruing antecedent to the partnership, Currier v. Webster, 45 N. H. 226; Cheny v. Clark, 3 Vt. 431; or at its inception even though referring to partnership matters. Thus, in Hale v. Watson, 112 Mass. 444, the plaintiff brought an action against the defendant for fraud used in inducing him to sign the articles of partnership, and the court held that the action would lie. See, also, as to rule first above stated, Currier v. Rome, 46 N. H. 72; Scott v. Campbell, 3[illegible] Ala. 728; Collamer v. Foster, 26 Vt. 754; Bailey v. Stark, 6 Ark. 191; Paul v. Delaney, 11 Mo. 570. So when a carpenter employed to do work on a building belonging to a firm, who, before the work was completed, became a copartner, and completes the work, it was held that he could maintain an action against his copartners for the work, it not being a partnership transaction. Boyd v. Brown, 2 La. An. 218.

When one partner advances money to another to relieve him from liability upon an execution issued for debts due the firm, *and takes his note therefor*, an action may be brought by him thereon without reference to the partnership. Chamberlain v. Walker, 10 Allen (Mass.), 429. *Quere*—would he not have been entitled to recover for money paid, though no note had been given, if done at his request?

When one partner has made profits by engaging in any other business, contrary to his contract of partnership, the other may bring his action for breach of the contract and recover his proportion of such profits as damages. Moritz v. Pebbles, 4 E. D. S. (N. Y.) 135. So for culpable neglect in the management of partnership business, an action at law may be brought by his copartners, Jessup v. Cook, 6 N. J. L. 484; or for injury done to the individual property of one partner, by his copartner, although used in the business. Haller v. Williamowicz, 23 Ark. 566.

Thus, a note given for advances to launch a partnership or for money borrowed or property bought may be sued by one partner because it is a private or distinct transaction in no wise dependent upon the partnership. Currier v. Rowe, *ante;* Wiggin v. Goodwin, 63 Me. 389; Purvine v. Champion, 67 Ill. 450; Sturges v. Swift, 32 Miss. 239; Bumpass v. Webb. 1 Stew. (Ala.) 19. In Louisiana it is held that, where one partner is to have a salary, distinct and apart from his interest in the profits, he may maintain an action therefor as it does not involve a settlement of partnership transactions. Alexander v. Alexander. 12 La. An. 588; Robinson v. Green, 5 Hare (Del.), 115; Paine v. Thacher, 25 Wend. (N. Y.) 450; but see *contra*, Hills v. Bailey, 27 Vt. 548; Weaver v. Upton, 7 Ired. (N. C.) 458; so it is held that, where a partner purchases property with partnership funds —as a plantation — in his own name, his copartner may sue for the amount before liquidation. Battaile v. Battaile, 6 La. An. 688; Crosby v. McDermott, 7 Cal. 146; so for his interest in a note when there is no other transaction to be settled except the division of the note. Moran v. LeBlanc, 6 La. An. 118; so upon a note made to his copartner for the use of the firm which his copartner discounts. Anderson v. Robertson. 32 Miss. 241; so for a sum withdrawn by one partner in excess of his share, his copartners may jointly sue him for and recover at law. Wiggin v. Cummings, 8 Allen (Mass.), 353. When the partnership business is finally settled and the balance struck an action at law lies to recover it; Young v. Brick, 2 Penn. St. 663; Ozeas v. Johnson, 1 Binn. (Penn.) 191; Lamalere v. Case, 1 Wash. (U. S. C. C.) 435; and in Massachusetts it has been held that an action of assumpsit may be maintained to recover such final balance although there has been no settlement of accounts by the

partnership should not be dissolved in consequence. But it is quite a different thing, and it would be quite a new head of equity for the court to interfere where one party violates a particular covenant, and

partners nor an express promise to pay, and that this extends to all cases in which the judgment will operate an entire termination of the partnership transactions. Brigham v. Edith, 9 Mass. 538; Williams v. Henshaw, 11 Pick. (Mass.) 79. But, generally, it may be said that neither assumpsit nor any other action at law will lie to recover a final balance unless there is an express promise to pay it. In New York, Murray v. Bogart, 14 Johns. (N. Y.) 318; Musier v. Trumpbour, 5 Wend. (N. Y.) 274; Gould v. Gould, 6 id. 263; in Connecticut, Beach v. Hotchkiss, 2 Conn. 426; Gulick v. Gulick, 2 Me. 578; in New Hampshire, Gibson v. Moore, 6 N. H. 547; in Ohio, Austin v. Williams, 1 Ohio, 283; in South Carolina, Course v. Prince, 1 S. C. Const. Rep. 416; or at least a settlement and final balance struck. Atwater v. Fowler, 1 Hall (N. Y.), 180; 2 id. 415. See Lamalere v. Case, 1 Wash. (U. S. C. C.) 435; Jessup v. Cook, 6 N. J. 434; White v. Waide, 1 Miss. 263. In Louisiana no action will lie by a partner against his copartner until a final settlement, and then only for the balance that appears to be due. Dromgoole v. Gardner, 10 Mart. (La.) 135; Ward v. Brant, 11 id. 333; Faurie v. Miller, 16 id. 178; Wood v. Steamboat Adams, 18 id. 82; Bauduc's Syndics v. Laurent, 2 La. 409; Compton v. Matthews, 3 id. 136; Lessips v. Architect Co., 14 id. 415. But where a partnership as to a single transaction exists between two commercial firms, in an action by one firm for settlement as to that transaction, it is not necessary to make all the members of the other firm defendants. Zacharie v. Blandin, 6 La. 202. An action at law lies by one partner against another on a writing ascertaining the amount due from one to the other, on a settlement, though there be no express promise to pay. McCall v. Oliver, 1 Stew. (Ala.) 510. If the connection in a joint adventure terminates by the sale of the property, and one appropriate the proceeds to his own use, and charges himself with the proportion due to his associate, an action on the case will lie by the latter for such proportion. Hourquebie v. Girard, 2 Wash. (U. S. C. C.) 212. In Pennsylvania an action will lie upon an agreed balance, although no express promise is proved. Hamilton v. Hamilton, 18 Penn. St. 20; Killam v. Preston, 4 W. & S. (Penn.) 14; Gill v. Kuhn, 7 S. & R. (Penn.) 333; so in Vermont, Tennant, Spear v. Newell, 13 Vt. 288; in Maryland, Kennedy v. McFaddon, 3 H. & J. 194; North Carolina, Graham v. Holt, 3 Ired. (N. C.) 300; Alabama, Sally v. Copps, 6 Ala. 338; Pope v. Randolph, 13 id. 214; New Hampshire, Burly v. Harris, 8 N. H. 236; Maine, Holyoke v. Mayo, 50 Me. 388; in Connecticut, Beach v. Hotchkiss, 2 Conn. 425. But in all cases the balance must be agreed upon by the parties, and then the law raises an implied promise to pay. Beach v. Hotchkiss, 2 Conn. 425; Bundy v. Harris, 8 N. H. 236; Young v. Brick, 2 Penn. St. 663; Ross v. Cornell, 45 Cal. 133. But where one of two partners, after dissolution, advances money to the other and takes his promissory note therefor, it is no defense to such note, that the money advanced was to be applied, and was applied by the maker, to pay the debts of the late partnership, the assets of the firm being in the hands and under the control of the partner receiving the money. Paying demands against the firm does not give to the partner paying any right of action at law against his copartner on an implied promise, but such rights must be adjusted by an account in equity. Such payment can, therefore, constitute no defense or set-off against the note. Gridley v. Dole, 4 N. Y. 486. See Johnson v. Kelly, 4 T. & C. (N. Y.) 417, where the complaint stated that the plaintiff and defendant entered into partnership for a year, and by the terms of the agreement the plaintiff was to furnish the capital and the parties were to share the profits and losses equally, and that a loss occurred *after* the expiration of the partnership, for one-half of which a money judgment was demanded; and the court held that the complaint set forth a good cause of action. In a recent case in California, Pio Picus v. Cuzos, 47 Cal. 174, the plaintiff, being the owner of the hotel, leased it to the defendant, and subsequently entered into partnership with him in keeping it, under an agreement that the rent should be paid by the firm. It was held that the plaintiff could not maintain an action upon the lease for the rent. Estes v. Whipple, 12 Vt. 375. Where the firm has sustained damage from

the other party does not choose to put an end to the partnership; in that way there may be a separate suit, and a perpetual injunction in respect of each covenant; that is a jurisdiction that we have never decidedly entertained."

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the culpable neglect of one member thereof, the other members may recover of him the damages they have each sustained therefrom. Jessup v. Cook, 6 N. J. 434; Hale v. Wilson, 112 Mass. 444; and it seems that each partner may maintain an action against a third person, in his own name, for the damage he has sustained in a case where a partner gave the firm note in payment of a private debt due such person, and who, knowing the facts, and with a view to defraud the firm, transferred it before maturity to a *bona fide* holder. This was held in Calkins v. Smith, 48 N. Y. 614; 8 Am. Rep. 575; Earl, C., saying, "When Germain indorsed the name of Germain & Co. upon the notes, without the knowledge or consent of his copartners, to pay his private debt, he undoubtedly committed a fraud upon them; and if the defendant aided in this fraud by transferring the notes to a *bona fide* holder, who could enforce them against all members of the firm, he was also guilty of a fraud, and liable to the copartners of Germain for all the damage he occasioned to them. But the fraud was not upon the firm. It was upon the three partners who did not consent to the indorsement. Germain, who made the indorsement, was not defrauded, and the firm could not have sued to recover damages for the fraud. I am inclined to think that the fraud was not a joint fraud for which the three partners could unite in a common-law action. But it was a fraud upon each partner separately, for which he could sue alone to recover the damages which he sustained. The damage sustained by each partner was not the same, but was in proportion to his interest in the partnership. This is a common-law action for fraud, in which the plaintiffs base their right to recover upon a cause of action for fraud assigned to and jointly held by them. Plaintiff's counsel, upon the argument before us, claimed that "plaintiffs took their title to this demand through the assignment from the receiver." But it passes my comprehension how they could get title to the cause of action from that source, as Tifft was appointed receiver only of the assets of the firm. This cause of action was no part of the assets of the firm, was never vested in Tifft, and he could not therefore transfer any title thereto to the plaintiffs. And the plaintiffs did not get any interest in the cause of action by virtue of the assignment to them from Scroggs & Germain, contained in the agreement of January 7, 1863. This is so, aside from any other reason that might be assigned, because they only assigned "all their right, title and interest in and to the property and effects of said firm of Germain & Co., and the choses in action of said firm of every nature and description whatever." This assignment did not cover this cause of action. For the same reason the plaintiff did not get any interest in this cause of action by the assignment to him, because that was an assignment only of the assignee's interest in the assets and property of the firm. The sale of the assets of the firm to the plaintiffs could not, in any way, vest them with this cause of action for the alleged fraud. It is true that the fraud diminished the assets, but it was perpetrated months before the sale. It was not a fraud upon Henry W. Grannis, but upon the three partners of Germain. The plaintiffs took the assets as they were when they bought them. The fact that they had been diminished by a prior fraud, in no way connected with the sale to them, gives them no cause of action. The defendant had nothing to do with the sale of the assets, and the fact that he may have committed a fraud affecting the value of the assets upon the prior clause cannot make him liable to the plaintiffs. Hence it is quite clear that Henry W. Grannis had no title to or interest in the cause of action, and that the plaintiffs have not, therefore, any joint interest in the cause of action which enables them to maintain this action. If the alleged fraud was committed, it gave a cause of action to the plaintiff, Calkins, to the extent of his injury as one of the partners, which he could have prosecuted alone against the defendant, and probably the court had the *power* in this action, if the claim had been made, to have awarded to Calkins his damages in this action, giving judgment against the other plaintiffs under section 274 of the Code. But

When specific performance will be decreed.

SEC. 198. But it seems that the specific performance of a covenant, or an injunction against a breach of covenant, will be enforced be-

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the court was not *bound* to do this, and committed no error in defeating the plaintiffs because they did not establish a cause of action in which both were interested. But the claim that Calkins had a separate cause of action for the fraud upon him was not put forth in the complaint, nor made upon the trial, nor upon the argument before us; and hence, even if we should decide that, upon all the facts appearing in the case, he had a separate cause of action, it would not be proper for us, upon that ground, to reverse the judgment below." In all cases if the partners in reference to the subject-matter of the action stand to each other in any other relation than that of partners, an action will lie, and the same rule applies, as will be seen hereafter, where the partners by agreement have separated the transaction from the partnership so that it is not to go into the general account. Gibson v. Moore, 6 N. H. 547; Collamer v. Foster, 26 Vt. 754; Bonasse v. Fenner, 6 S. & M. (Miss.) 212; Galbraith v. Moore, 2 Watts (Penn.) 86; Noel v. Bowman, 2 Litt. (Ky.) 46; Brigham v. Evelith, 9 Mass. 538: Williams v. Henshaw, 11 Pick. (Mass.) 83; Finlay v. Stewart, 56 Penn. St. 183; Couston v. Burke, 2 H. & G. (Md.) 300; Buell v. Cole, 54 Barb. (N. Y.) 353; Gridley v. Dale, 4 N. Y. 486; Grigsby v. Nance, 3 Ala. 347; Caswell v. Cooper, 18 Ill. 532; Van Ness v. Forrest, 8 Cr. (U. S. C. C.) 30; Buckner v. Ries, 34 Mo. 357; Pool v. Delaney, 11 id. 570; Jenniss v. Walsh, 30 Ind. 167; Jenkins v. Howard, 21 La. An. 597; Byrd v. Fox, 8 Mo. 574; Purvines v. Chapman, 67 Ill. 459; Wells v. Carpenter, 65 id. 447; Wiggin v. Goodwin, 63 Me. 389; Ives v. Miller, 19 Barb. (N. Y.) 196; Adams v. Funk, 53 Ill. 219; Crator v. Binninger, 45 N. Y. 545; Case v. Maxey, 6 Cal. 276; Morrison v. Stockwell, 9 Dana (Ky.), 172. In American, etc., R. R. Co. v. Miles, 52 Ill. 174, it was held that an agreement to divide a claim did not change the rights of the parties as to the remedy. Of course an action for a breach of duty as a partner, or a violation of the articles of copartnership, or for any fraud committed by one partner, may be brought at any time, Capen v. Burrows, 1 Gray (Mass.), 376, Glover v. Tuck, 24 Wend. (N. Y.) 153; Hall v. Stewart, 12 Penn. St. 213; Hale v. Wilson, 112 Mass. 441; Terrill v. Richards, 1 N. & McCord (S. C.), 20; Manning v. Wadsworth, 4 Md. 70; McArthur v. Ladd, 5 Ohio, 514; Hoyes v. Flowers, 25 Miss. 168; Wills v. Simmonds, 51 How. Pr. (N. Y.) 48; or for money paid by mistake. Byrd v. Fox, 8 Mo. 574; or private funds wrongfully carried to partnership account. Smith v. Burrows, 2 T. R. 476; but for a mistake made in the settlement of accounts between the partners it is held that an action at law will not lie. Hands v. Barber, 53 Ill. 292.

When an action will not lie—It is clear from the cases referred to that there is no such rule as that one partner cannot sue another at law, in respect of a debt arising out of a partnership transaction, and that this circumstance alone affords no reason why an action should not be brought by one partner against another. See Worrall v. Grayson, 1 M. & W. 166. Except, however, in an action of account which is almost obsolete, it is a general rule that between partners, whether they are so in general or for a particular transaction only, no account can be taken at law. As for rent of premises owned by one partner and used by the firm, Estes v. Whipple, 12 Vt. 375, for detaining partnership property, Clay v. Grubbs, 1 Litt. (Ky.) 222, nor for personal services agreed to be paid; Weaver v. Upton, 7 Ired. (N.C.) 458; Engliss v. Furniss, 4 E. D. S. (N. Y.) 587; Bovill v. Hammond, 6 B. & C. 151, and see Scott v. McIntosh, 2 Camp. 238; nor (except in an action of account) can a partner sue another at law, unless the cause of action is so distinct from the partnership accounts as not to involve their consideration. Id. This rule prevents the *cestui que trust* of a partner from suing the other partners, see Goddart v. Hodges, 3 Tyr. 209, and 1 Cr. & M. 33; and unless the plaintiff, if he recovers, will be justified in keeping what he may get without afterward having to account to his copartners for any part of it. If the amount received will become his private property the rule is otherwise. Currier v. Rowe, 45 N. H. 226; Chamberlain v. Walker, 10 Allen (Mass.), 429; Terry v. Carter, 25 Miss. 168; Milburn v. Codd, 7 B. & C. 421. Bedford v. Brutton, 1 Bing. N. C. 405; Caldicott v. Griffiths, 8 Ex. 898. Hence one partner cannot sue another at law for work and labor done for the

tween partners by a court of equity, where the breach has been of long continuance and willfully persisted in, although the party seek-

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firm, and therefore on account as well of the plaintiff as of the defendant. Engliss v. Furniss, 4 E. D. S. (N. Y.) 487; Weaver v. Upton, 7 Ired. (N. C.) 458. But if there is an express agreement to pay him a specific sum at stated periods, he may sue for the same like any other creditor. Alexander v. Alexander, 12 La. An. 588; Goddart v. Hodges, 1 Cr. & M. 33; Holmes v. Higgins, 1 B. & C. 74; Milburn v. Codd, 7 B. & C. 419; Lucas v. Beach, 1 Man. & Gr. 417; nor for money had and received for the firm, for it must be properly shared between the parties to the action. Bovill v. Hammond, 6 B. & C. 149; Smith v. Barrow, 2 T. R. 476; Fremont v. Coupland, 2 Bing. 170, see, too, Lewis v. Edwards, 7 M. & W. 300; Thomas v. Thomas, 5 Ex. 28; nor for money paid to the use of the defendant, if the question whether he ought to repay it or not turns on the state of the partnership accounts, Robson v. Curtis, 1 Stark. 78; nor for money lent to the firm of which the plaintiff is himself a member, for the advance only forms an item in the partnership accounts. Thus in Wood v. Steamboat Co., 9 Martin (La.) 43, the plaintiff brought an action against his copartners for money expended in running the boat, and the court held that the action would not lie until a settlement was had. See, also, Drew v. Ferguson, 22 Wis. 654; Kennedy v. McFadden, 3 H. & J. (Md.) 194; Perring v. Hone, 4 Bing. 28; Colley v. Smith, 2 Moo. & Rob. 96; nor on a bill or note drawn, accepted, or indorsed in such a manner as to bind the firm, for not only must the plaintiff, as one of the firm, contribute to payment of the instrument, but he ought also be a defendant to the action. Banks v. Mitchell, 8 Yerg. (Tenn.) 112; White v. Harlow, 15 Gray (Mass.) 467; Hill v. McPherson, 15 Me. 204; De Jarneth v. Mc Queen, 31 Ala. 230. See Neale v. Turton, 4 Bing. 149; Mainwaring v. Newman, 2 Bos. & P. 120; Teague v. Hubbard, 8 B. & C. 345, and 2 Man. & Ry. 369; Tibaldi v. Ellerman, 6 Dowl. & L. 71. For similar reasons, if partners become indebted to a third person who dies, and appoints one of them his executor, this one cannot even as executor sue his copartners for the debt due to the deceased, Moffat v. VanMillingen, cited 2 Bos. & P. 124; and if there are two firms with a partner common to both, one firm cannot sue the other at law. Chadsey v. Harrison, 11 Ill. 156; Banks v. Mitchell, 8 Yerg. (Tenn.) 112; Rogers v. Rogers, 5 Ired. (N. C.) Eq. 31; Calvitt v. Markham, 4 Miss. 343; Perring v. Hone, 2 Car. & P. 401; Mainwaring v. Newman, 2 Bos. & Pul. 120; Bosanquet v. Wray, 6 Taunt. 597; Jacaud v. French, 12 East, 317; neither is there any mode by which at law one partner can sue the *firm* or be sued by it. See in addition to the cases cited in the last note, DeTastet v. Shaw, 1 B. & Ald. 664, and Richardson v. The Bank of England, 4 M. & Cr. 171, 172, per Lord Cottenham. Again, as one tenant in common of personalty cannot sue his cotenant for the recovery of that property, it follows that one partner cannot, by action at law, obtain from his copartner property of the firm wrongfully detained by him. See Fox v. Hanbury, Cowp. 445. In Sharp v. Warren, 6 Price, 131, it was, however, held that the steward of a friendly society was entitled to recover, at law, a box of money belonging to the society, but run off with by one of its members. It does not, however, seem so clear that if one partner wrongfully sells property of the firm, his copartner cannot sue him at law, either for the wrongful conversion or for a share of the produce of the sale. For although the older decisions would seem to be opposed to any such right, Graves v. Sawcer, Sir T. Raym. 15, it was held in Mayhew v. Herrick, 7 C. B. 229; see, too, Buckley v. Barber, 6 Ex. 164; and compare Morgan v. Marquis, 9 Ex. 145, that a sheriff who, under a *fi. fa.* against one partner sold goods of the firm, was answerable at law to the assignees of the other partner for one-half of the proceeds of the sale; and it was previously held, in Barton v. Williams, 5 B. & Ald. 395, affirmed on appeal; Williams v. Barton, 3 Bing. 139; see, too, Farrar v. Beswick, 1 M. & W. 682, that a sale by one tenant in common of the common property gave the other a right to sue him at law for a wrongful conversion. Agreed to by Maule, J., in Mayhew v. Herrick, 7 C. B. 247; and by Wood, V. C., in Fraser v. Kershaw, 2 K. & J. 500; but see per Coltman, J., 7 C. B. 246. The question, therefore, whether, if one partner wrongfully sells the goods of the firm, he can or cannot be sued at law by his copartners, seems to turn on

ing relief against the breach of covenant does not pray for a dissolution of the partnership.[1] Thus, in the above case of Marshall v. Colman, Lord Eldon seemed to be clearly of opinion that the breach of covenant might have been relieved against without a dissolution by the court, had there been "a studied, intentional, prolonged, and continued inattention to the application of one party calling upon the other to observe that contract." And, with reference to the future conduct of the defendants, he said, "these gentlemen will do well (if they mean to protect themselves from the interference of this court) to use all the names in the concern; they must do that, or the court will be under the necessity of awarding an injunction, *or* dissolving the partnership."[2] A court of equity will enforce the specific performance of partnership covenants, in cases where adequate compensation for the breach cannot be had at law. Thus, a court of equity has enforced an agreement made upon a dissolution of partnership, that a particular book used in the trade should become the exclusive property of one of the partners, and that a copy of it should be delivered to the other.[3]

Covenants in relation to other business.

SEC. 199. We have seen that, in partnership articles, there is frequently a covenant not to engage in any business except on account and for the benefit of the copartnership. In case of a breach of this covenant, the aggrieved party may of course bring his action, but he may also file a bill for an account of the profits made in such separate trade, and for payment of a proportion of those profits. Thus, in Somerville v. Mackay,[4] the bill stated that the plaintiff had entered into a treaty with the defendant, who lived in London, for shipping goods and executing orders to Russia upon their joint account, and that upon the treaty it was expressly agreed that neither of them should send any goods upon their separate accounts to A. & Co., or to any other person in Russia. The bill then stated the separate transactions which had taken place between the defendant and A. & Co., and prayed that the plaintiff might be declared entitled to a moiety of the profits of all goods sent by the plaintiff and the defendant, or

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whether their demand in respect of this wrongful sale can or cannot be regarded as independent of any question of account, so as to bring the case within the exception already noticed.

[1] As to bills praying an account without praying a dissolution, see *post*, § 4, art. 1.

[2] And see Musgrave v. Medex, 3 Ves. & B. 167.

[3] Lingen v. Simpson, 1 Sim. & Stu. 600; *ante*, p. 160; Sangar v. Gardiner, C. P. Coop. 119.

[4] 16 Ves. 382; 2 Hov. Supp. 450.

by the defendant separately, to Russia, consigned to A. & Co., or to any other person, and that an account might be taken accordingly of all goods sent upon the joint account, or by the defendant upon his private account, to A. & Co., or his other agents in Russia, and of the produce of the sales. The court entertained no doubt that this bill was maintainable. But when the plaintiff in a case of this nature is decreed to be entitled to a share in the profits of the separate business, he also becomes liable for all losses from the period from which his profits commence.

Covenants to refer disputes to arbitration.

SEC. 200. It is very doubtful whether an action will lie for breach of a covenant to refer partnership disputes to arbitration, by reason, it is said, of the tendency of such actions to oust the jurisdiction of the courts of law,[1] and likewise of the difficulty of directing a jury how to assess damages in such an action, for *non constat* that the plaintiff would have succeeded in the arbitration.[2] The latter objection, at least, is well founded, for it is difficult to conceive an action of this kind where more than nominal damages could be obtained,[3] though, as we shall see presently, the deed may be so framed as to avoid this result. If the breach assigned be a refusal to submit to arbitration a dispute concerning the premium paid by one of the partners, and such premium be expressed to be one of the considerations of the partnership deed, in such case an action on the covenant will not lie, because the covenant itself is, in point of consideration, sustained by the disputed premium.[4]

It has long been settled that a court of equity will not decree a specific performance of a covenant to refer to arbitration.[5] The reasons seem to be, *first*, that if it be not part of the agreement, a court of equity cannot give arbitrators authority to examine upon oath, and the agreement itself cannot authorize any person to administer an oath, and *secondly*, that the court, following the suggestions of courts of law in that respect, will not be accessory to ousting its own jurisdiction. In Lord Eldon's words, "The court has given credit to itself as likely to decide as well as arbitrators, and it requires a strong case to deprive a person of the right to a decision here."[6] And upon

[1] Kill v. Hollister, 1 Wils. 129.

[2] 2 Bos. & Pull. 136. This objection seems equally applicable, whether the arbitrators be named or not. But see 7 Jarm. Conv. 352, n. (i).

[3] 6 Ves. 818; and see Mitchell v. Harris, 2 Ves. 134.

[4] Tattersall v. Groote, 2 Bos. & Pull. 131.

[5] Price v. Williams, cited 6 Ves. 818; and see Street v. Rigby, id.; Wilks v. Davis, 3 Mer. 507

[6] See Street v. Rigby, 6 Ves. 815; Mitchell v. Harris, 2 id. 136.

the same principle it seems clear that an agreement to refer to arbitration is no plea to a bill filed either for discovery only, or for both discovery and relief of matters which, by the deed, would be the subject of arbitration.[1]

It should, however, here be noticed that in one particular case, that of the *Opera House*, where the parties had made special provisions for the reference to arbitration of certain matters peculiarly connected with that concern, Lord Eldon refused to appoint a manager and receiver upon an interlocutory motion, until the parties had endeavored to avail themselves of their agreement for arbitration, holding this course of proceeding the more beneficial to them all.[2]

As generally a court of equity will not assist an arbitration by decreeing a specific performance, so, on the other hand, it will not interfere with the intention of the parties, by tampering with the agreement which they have made. Hence, Sir John Leach decided, not only that a court of equity would not entertain a bill for the specific performance of an agreement to refer to arbitration, but that it would not substitute the master for the arbitrators. "This," said that learned judge, "would be to bind the parties contrary to their agreement."[3]

Liquidated damages.

SEC. 201. From the foregoing observations it appears that a general covenant in partnership articles to refer disputes to arbitration, is but an unprofitable covenant, affording only the shadow of relief at law, and neither substance nor shadow in equity. Yet, covenants of this kind may be made available. "There are," says Lord Eldon, "prudential ways of drawing them; as, for instance, there may be an agreement for *liquidated damages* to enforce a specific performance, if an action cannot produce sufficient damages, or equity will not entertain a bill for a specific performance."[4] It seems advisable, therefore, if parties are particularly anxious for a reference of their disputes to arbitration, to add after the arbitration covenant a clause that if either of the parties shall neglect or refuse to fulfill such covenant, he shall pay to the other a certain sum as liquidated damages, not in the nature of a penalty.

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[1] Wats. Arbit. 6; Wellington v. Mackintosh, 2 Atk. 569; *contra*, Halfhide v. Fenning, 2 Bro. 336, overruled by Lord Loughborough and Lord Eldon.

[2] Waters v. Taylor, 15 Ves. 10; 2 Hov. Supp. 389. See Gourlay v. Duke of Somerset, 19 Ves. 431.

[3] Agar v. Macklew, 2 Sim. & Stu. 418.

[4] 6 Ves. 818; and see Astley v. Weldon, 2 Bos. & Pull. 346.

When clause as to liquidated damages does not apply.

SEC. 202. This leads us to a more general consideration of clauses of this nature.

There are many covenants to which such clauses may be added with effect, but there are others, the breach of which does not admit of compensation by liquidated damages, and to which, therefore, they cannot be properly applied. Thus, on the one hand, if the covenant be such that the breach of it must of necessity be uncertain in its nature and amount, then, if liquidated damages be reserved, they will be deemed the real damages, and a verdict in an action on the covenant will be found for the amount of the liquidated damages.[1] On the other hand, if the breach of covenant be attended with *certain* damage, as, for instance, if it consist in the omission to pay a certain sum of money, in such case, although liquidated damages be reserved *eo nomine*, they will be considered by a jury only in the nature of a *penalty*, and the real damages will be measured by the sum omitted to be paid.[2]

In a late case, even where the real damage was uncertain, yet, as it was evidently far less than the amount of the liquidated damages, the Court of Common Pleas, although the language in which the liquidated damages were agreed to be paid was the strongest that could be employed, referred it to the prothonotary, to ascertain what damages, if any, the plaintiff had sustained, and how much, if any thing, ought to be paid to the plaintiff.[3]

Mr. Jarman, in commenting upon this case, observes that, upon the reasoning there adopted by the court, it is obvious that a covenant to pay a sum of money as liquidated damages, on the breach of any one of a series of stipulations, must in all cases be nugatory, as the covenant necessarily embraces acts of various degrees of importance, all which cannot with equal justice be compensated for by the payment of the same sum; if it were sufficient in regard to some, it must be excessive as to others, the consequence is that, in order to give an

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[1] Lowe v. Peers, 4 Burr. 2225; Farrant v. Olmius, 3 B. & Ald. 692; Leighton v. Wales, 3 M. & W. 545. And where liquidated damages are legally due, courts of equity will not relieve against them. East India Company v. Blake, Finch, 117; Small v. Lord Fitzwilliam, Prec. Cha. 102; Rolfe v. Peterson, 2 Bro.P.C. 436. And hence they will not restrain the covenantor, under such circumstances, from violating his covenant. Woodward v. Gyles, 2 Vern. 119.

[2] Kemble v. Farren, 6 Bing. 141; 3 Moore & Payne, 425.

[3] Charrington v. Laing, 6 Bing. 242; 3 Moore & Payne, 587. In Randall v. Everest, 1 Mood. & Malk. 41, Lord Tenterden seemed to consider that liquidated damages are out of the question in *all* cases where the agreement is not under seal. But see 7 Jarm. Conv. 85; Crisdee v. Bolton, 3 Carr. & Payne, 243.

effectual remedy for the recovery of a sum of money as stipulated damages in such a case, a distinct and separate amount should be assessed as the measure of compensation on the breach of each several contract.[1]

Covenants joint and several in equity.

SEC. 203. Where joint covenants are entered into amongst partners, for purposes concurrent with their original rights and duties as partners, it seems clear that a court of equity would construe such covenants several as well as joint. But, where joint covenants are entered into for the purpose of waiving those original rights, the court will not interfere to alter the nature of such covenants, unless under circumstances of fraud or mistake.

Illustration.

SEC. 204. For instance, when a partner in a firm retires or dies, it is the primary duty of the parties interested to wind up the concern, and divide what remains after satisfying all claims upon it. Where, therefore, upon the death of a partner, the usual accounts were not

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[1] Jarm. Conv. p. 87. And see D. Bayley, J., Davies v. Penton, 6 Barn. & Cres. 216.

Liquidated damages, doctrine relating to.—Mr. Field, in his treatise on the law of Damages, p.138, expresses the law on the subject of liquidated damages as follows: "Where a large sum is mentioned in an instrument as a forfeiture on failure of payment of a small amount, or where in a contract for the performance of divers things of very different degrees of importance and value, a certain sum is fixed as 'liquidated damages,' for a failure to perform, the amount fixed has been held to import a penalty and not to be liquidated damages." On the other hand, p. 188, he observes: "Where there is uncertainty as to the extent of the injury, and the stipulated sum seems reasonable and proper under all the circumstances of the case, and especially where it is expressed to be the liquidated damages to be paid on a breach of the whole contract, or on a breach of any certain provision of the contract, then it will be regarded as liquidated damages." As to where the sum designated in the contract has been treated as a penalty in England, Astley v. Weldon, 2 B. & P. 346; Kemble v. Farren, 6 Bing. 141; Davis v. Penton, 6 B. & C. 216; Horner v. Flintoff, 9 M. & W. 679; Belts v. Burch, 4 H. & N. 506; 28 Exch. 267. Cases in the English courts where the sum designated was treated as liquidated damages: Green v. Price, 13 M. & W. 695; 14 L. J. Exch. 225; S. C., 16 M. & W. 346, 16 L. J. Exch. 108; 9 Jur. 880; Sainter v. Ferguson, 62 E. C. L. (7 C. B.) 716; Rawlinson v. Clark, 14 M. & W. 187; Crisde v. Bolton, 3 Carr. & P. 240; Atkins v. Krinner, 4 Exch. 776; Leighton v. Wales, 3 M. & W. 545. In the latter case, by a written agreement, the plaintiff and defendant agreed to become partners in the business of stage-coach proprietors, for the purpose of running a coach daily, at certain hours, between London and Croydon. The agreement contained various stipulations as to the conduct of the business, and a provision that it should be lawful for either party to determine the partnership by giving four weeks' notice in writing. It contained also the following articles: 12th, that in the event of such dissolution of partnership, and so long as the plaintiff should continue to carry on the trade of a coach proprietor at Croydon, the defendant should not, either on his own account or on that of any other person or persons, or jointly with any other, run or use for hire any stage-coach, omnibus, or other carriage, or otherwise ply for hire on any part of the road over which the coach was appointed to run, at any

taken, but his executors, for a certain consideration, released all claim on the partnership estate,[1] and the surviving partners entered into a *joint* covenant to indemnify him against all demands upon the partnership, it was held, that no other effect could be given to such a covenant in equity than at law; and, therefore, that the estate of a deceased covenantor was not bound by it. Sir William Grant: "Where a joint bond has, in equity, been considered as several, there has been a credit previously given to the different persons who have entered into the obligation. It was not the bond that created the liability to pay. But in this case, the covenant is purely a matter of arbitrary convention, growing out of no antecedent liability in all or any of the covenantors to do what they have thereby undertaken. Instead of winding up the partnership concern, and dividing what might remain after satisfying all claims upon it, the parties make an arrangement, by which the plaintiff was immediately to receive what was estimated to be his testator's share of the joint estate, he releasing to the

time within one hour before or after certain specified hours of the day, under the penalty of 40*l.*, to be recovered by the plaintiff as liquidated damages; and the last article also provided, that without prejudice to the right of the parties under the preceding article, they bound themselves for the true and faithful performance of the agreement in every respect, under the penalty of 100*l.*, to be recovered as aforesaid: It was held, first, that the agreement of the plaintiff to enter into the partnership was of itself a sufficient consideration for the partial restraint of trade imposed on the defendant by the 12th article, and therefore that an action was maintainable for a breach of it, in running an omnibus on the road within the prohibited hours, after dissolution of the partnership by notice from the plaintiff; second, that the 40*l.* must be construed as liquidated damages, and not as a penalty. American cases where the sum designated was treated as a penalty: Foley v. McKegan, 4 Iowa, 1; Lord v. Gaddis, 9 id. 265; Carpenter v. Lockhart, 1 Ind. 483; Baird v. Tolliver, 6 Humph. (Tenn.) 186; Jamison v. Grey, 29 Iowa, 577; Hise v. Foster, 17 id. 23; Richertson v. Richardson, 19 Cal. 330; Hammer v. Bridenbach, 31 Mo. 49. American cases where the sum was held to be liquidated damages: Williams v. Green, 14 Ark. 315; Tingley v. Cutler, 7 Conn. 295; Smith v. Whitaker, 23 Ill. 367; Dwinell v. Brown, 54 Me. 468; Cushing v. Drew, 97 Mass. 445; Bayley v. Peddie, 16 N. Y. 469; Mott v. Mott, 11 Barb. (N.Y.) 127.

Mr. Field makes the following deductions and summary:

The sum expressed should be treated as a penalty.

1. Where a small sum of money is secured by a large one.

2. Where it is expressed to secure a certain sum of money, or a sum with interest exceeding the legal rate.

3. Where it is doubtful whether the parties intended the specified sum as a 'penalty,' or liquidated damages.

4. Where the agreement contains stipulations or covenants for the performance of several things of varying degrees of importance, and a sum is specified in general terms to be paid on a breach of the contract; and even though it be designated as 'damages,' or 'a fixed amount,' or 'specified damages,' or 'liquidated damages.' The sum expressed will be treated as liquidated damages.

1. Where the agreement is in the alternative to do some particular thing or pay a particular sum of money, unless it shall appear unconscionable.

2. Where the actual damages will be difficult or impossible of ascertainment, especially, where the sum is not so unreasonably large as to induce the presumption that the parties did not contemplate its payment." Field on Dam. 153.

[1] Sumner v. Powell, 2 Mer. 30. See Rawstone v. Parr, 3 Russ. 539.

other partners all interest in the residue. Why was the testator's share of the partnership estate to remain unaffected by any claims by which that estate might afterward be diminished? There was no equity that entitled him to demand from the other partners an engagement to that effect. But they are contented to give him a covenant of indemnity. As it is only a joint covenant that is given, how can I say that it is any more than a joint covenant that was meant to be given? It is not attempted to be shown that there was any mistake in drawing the deed, or that there was any agreement for a covenant of a different sort. There is nothing but the covenant itself, by which its intended extent can be ascertained. There is no ground, therefore, on which a court of equity can give any other than its legal operation and effect."

Equity rejects clauses in contracts not acted upon.

SEC. 205. We have seen that partnership articles are read in a court of equity as not containing the clauses on which the parties have not acted.[1] Now, the not acting on articles of a different nature will be good evidence of an intention to abandon them; and, upon this evidence of abandonment, the court will refuse to enforce them. In the case of Jackson v. Sedgwick[2] A, B and C entered into partnership articles as ship agents, ship brokers, and insurance brokers. By the articles it was agreed that there should be annual rests in the partnership account, and that, on the death of any of the partners, the amount of his capital, calculated by reference to the last annual rest, should be repaid by the survivors by installments, and that a bond should be executed by the survivors for securing the amount with interest. A died. For some years previous to his death, the partnership had engaged in business unconnected with that specified in the partnership articles, namely, by shipment of goods, and otherwise. Adventures of this nature were depending at A's death, and the result of profit unascertained; and since his death, a loss in respect of such adventure had occurred. Moreover, the partnership had for several years omitted to settle annual accounts in pursuance of the articles. Upon the death of A, the surviving partners executed a bond to the executors of A, conditioned to be void upon payment of the installments. They also paid to the executors on account of this bond sums amounting to 3,400*l.* The executors having afterward commenced an action on the bond, a bill was filed by the surviving partners and their co-obligor, insisting that the balance of profit and loss up to the last annual rest pre-

[1] *Ante*, pp. 281-284.

[2] 1 Swanst. 460; 1 J. Wils. 297.

ceding A's death ought to be ascertained by consulting the result of all engagements in which the firm was then embarked, and for which it was responsible; that the loss sustained in consequence of such engagements should be brought into the account between them and the executors; and alleging that, after the just reduction in respect of such losses, A's share in the business would not exceed 3,000*l.*, being less than the sum already paid by the plaintiffs on account of the bond. The bill prayed that the share of A, at his death, might be ascertained; an account of all sums paid by the plaintiffs in respect of his share; that the defendants might repay what should appear to have been overpaid to them, and might deliver the bond, upon being paid what, if any thing, remained due; and, in the meantime, be restrained from proceeding at law.

Lord Eldon granted the injunction. "The articles of partnership," he said, "seem to refer only to the trade of ship agents and brokers; and it is difficult to apply them to trade of another description. The question will be, whether the proceeding *de anno in annum* without settling the accounts, and the engaging in business not contemplated by the articles, are not evidence of the intention of the parties to waive the agreement? There would be no difficulty in applying the articles to the particular business with reference to which they were framed; but if the parties engaged in business in which their application would work injustice, as in importation or exportation, where the returns could not be ascertained at the period limited, then, I say, that these articles, though they contain a general reference to other business, are not such as would have been prepared with relation to that specific business; and that engaging in that business affords a reason for not performing the stipulations."

Action must be brought by all the covenantees.

SEC. 206. It is a general rule, that though a covenant be joint and several in the terms of it, yet if the interest and cause of action be joint, the action must be brought by all the covenantees.[1] It follows from this doctrine that, although the covenants in the partnership articles be several as well as joint, which indeed is usually the case, yet the interest of the partners in the concern being joint, all the covenantees must join in an action against the covenantor for a breach of his covenant. In Eccleston v. Clipsham,[2] it appeared by an indenture entered into between certain partners, that "each of them respect-

[1] 1 Saund. 153. See Lane v. Drinkwater, 1 C., M. & R. 599.

[2] 1 Saund. 153.

ively for himself, his executors and administrators, and for his own proper act or acts, for so much as belonged to his own proper duty, but not for the act or duty of the other, covenanted and agreed to and with the other and others of them respectively, and his and their respective executors, administrators and assigns, by the same indenture, in manner and form following : that is to say,—then followed a string of covenants regulating the partnership concern and the duties of the partners. One of the partners having committed a breach of these covenants, it was held that the rest ought to have sued him jointly.

When the covenant will be treated as several.

SEC. 207. Nevertheless, by making the operative words of the covenants several as well as joint, they may include matters in which a several action may be maintainable. Thus, in the foregoing case, in which an action was brought by the executors of a deceased partner against one of the surviving partners, one of the covenants was that there should be given to the executor of any deceased partner an account of the partnership goods and debts due from them, within twenty days ; and one of the breaches assigned was that the defendant had not given any account to the executors of the deceased partner within twenty days after his death. It was held that the plaintiffs had a several interest in this matter, and that the action upon it was maintainable by them alone, without joining the other surviving partner as a co-plaintiff.

Illustration.

SEC. 208. In a case of partnership of a ship, where the part-owners agreed "each and every of them with the others and each and every of them," that the ship should be under the management of one of them as husband, who was to make a full account, etc., the Court of King's Bench was of opinion that the interest of each part-owner was several, and consequently, that each might bring his several action on the covenant against the ship's husband for not making out an account.[1]

Number of plaintiffs may be limited by the contract.

SEC. 209. But, although the general rule regarding the joinder of covenantees as plaintiffs is as above stated, yet persons entering into partnership may by agreement limit the number of plaintiffs in actions to be brought *inter se* in the course of the partnership transactions.

[1] Owston v. Ogle, 13 East, 533. See Servante v. James, 10 B. & C. 410.

Therefore, where by the terms of the partnership agreement a penalty was inflicted for default in performance of any of the rules, and it was agreed that one only of the partners should sue the defaulter for such penalty, it was held, that the party so appointed might sue alone, and that the others need not join in the action. "Such an agreement," said Best, C. J., "is in effect an undertaking on the part of the defendant, not to object on account of all who ought otherwise to have been joined in the action not being joined."[1]

This applies only to actions between the partners.

SEC. 210. It is obvious that this power of limiting the number of plaintiffs only applies to actions between the partners themselves.

If any of the covenantees have not sealed the deed, they may nevertheless join in the action.[2] If they have refused to seal the deed, it seems doubtful whether a declaration by those who have sealed, with an averment that the others have *refused* to seal, would be sufficient; but such a declaration, with a mere averment that the others have not sealed, is insufficient,[3] for, as Holroyd, J., observed, "if a covenant be made with three persons, although two of them do not seal the deed, yet it is not in law converted into a covenant with one."

Right of action survives to the other covenantees.

SEC. 211. When one of several partners, covenantees, dies, his right of action survives to his co-covenantees, although the covenant may have been made with each of the covenantees respectively, and their respective executors, administrators, and assigns.[4]

If there be other covenantees, obligees, or parties to the contract, who ought to be, but are not joined as plaintiffs in the action, advantage may be taken of this defect on demurrer, motion in arrest of judgment, or writ of error, and it will be fatal to the suit.[5]

When the defect does not appear on face of pleadings — Rule.

SEC. 212. If the defect of plaintiffs does not appear upon the face of the pleadings, which may be the case where the deed is not set out *in hæc verba*, or if there be any omission or variance in the deed as stated in the declaration, the defendant may crave *oyer*, and set out the

[1] Radenhurst v. Bates, 3 Bing. 463; 11 Moore, 421. See Davies v. Hawkins, 3 M. & S. 488.

[2] Clement v. Henley, 2 Roll. Abr. Fait (F), pl. 2.

[3] Petrie v. Bury, 3 Barn. & Cres. 353; 4 Dowl. & Ryl. 152.

[4] Eccleston v. Clipsham, 1 Saund. 153.

[5] Anderson v. Martindale, 1 East, 497; Scott v. Godwin, 1 B. & P. 67; Eccleston v. Clipsham, 1 Saund. 153; Slingsby's case, 5 Rep. 18 b. And see 1 Chit. Plead. 7; Saund., Jr., Plead. 389.

deed, and demur[1] or plead specially in bar of the action. Hence, if an action be brought on a legal covenant, contained in a deed creating an illegal partnership, the defendant having craved *oyer* of the whole deed, may plead the illegality of the contract in bar of the action.[2]

The plea of *non est factum* operates, since the Rules of Hilary Term, 1834, only as a denial of the execution of the deed in point of fact. All other defenses, including those which make the deed absolutely void, as well as those which make it voidable, must be specially pleaded. But it has been said that under this plea the defendant may show an alteration in the deed in a material respect.[3]

Where covenants between partners are *several* as well as joint, the circumstance of the seal of one of them being erased, will not prevent an action being maintained between the others.[4]

When courts of equity will interfere.

SEC. 213. Courts of equity will not, except in very exceptional instances, interfere with the concerns of a partnership unless a dissolution is sought. But, while as to mere matters of disagreement between partners, or as to matters resulting from a difference of views as to the management of the business, the court will not interfere,[5] yet when one partner, or a majority of them, is doing or are about to do an illegal act, or one in plain violation of the articles of partnership, the court will sometimes interfere by injunction even when a dissolution is not sought.[6]

The fact that the act complained of is acceptable to a majority of the partners will not defeat equitable jurisdiction, if it is in fact one that is inequitable as to the complainant, and not warranted by the contract. Thus, Mr. Lindley, in his work on Partnership, p. 758, says: "The minority, complaining of the managing body, should, before applying to the Court of Chancery, endeavor to bring the matter of their grievances before their fellow shareholders, and ascertain what the views of the majority are.[7]

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[1] Com. Dig. Pleader (2 V.) 3, 4.

[2] Morse v. Wilson, 4 T. R. 353; Lees v. Smith, 7 T. R. 338.

[3] Per Gurney, B., 2 C., M. & R. 291. Per Parke, B., 1 Archb. Pr. 192.

[4] Matthewson v. Lydiate, Cro. Eliz. 408; Collins v. Prosser, 1 Barn. & Cres. 682.

[5] Anderson v. Anderson, 25 Beav. 190; Marshall v. Colman, 2 J. & W. 266; Wander v. Stitwell, 3 Jur. (N. S.) 9; Smith v. Joyes, 4 Beav. 503; Kent v. Jackson, 14 id. 367; Edwards v. R. R. Co., 2 DeG. & S M. 537; Lawson v. Morgan, 1 Price, 307; Stevens v. South Devon, etc., & R. R. Co., 9 Ha. 313; Mozley v. Alston, 1 Ph. 790; Carlin v. Drury, 1 V. & B. 154; Waters v. Taylor, 15 Ves. 10; Foss v. Harbottle, 2 Ha. 461.

[6] Gratz v. Bayard, 11 S. & R. (Penn.) 41; Miles v. Thomas, 9 Sim. 607.

[7] Exeter & Crediton R. R. Co. v. Buller, 5 Rail. Ca. 211.

Will not restrain act approved by majority of partners unless illegal.

SEC. 214. If the majority agree with and sanction the course adopted or proposed to be adopted by the managing body, *and if that course is not illegal if approved by the majority*, the court clearly cannot interfere. But if that course will be illegal, although sanctioned by the majority of shareholders, then, even if it is approved by all of them except one, the court will interfere at the suit of that single dissentient shareholder, and protect him and his interests. But even in this case he must, before applying to the court, endeavor to avail himself of such extrajudicial remedies as may be open to him.[1]

As an illustration of the first of these propositions, reference may be made to the case of Lord v. The Governor and Company of Copper Miners in England,[2] where a shareholder in an incorporated mining company filed a bill to restrain the governing body from vesting the property of the company in trustees for the benefit of its creditors. Lord Cottenham (reversing the decision of V. C. Knight Bruce) allowed a demurrer to the bill, on the ground that it was competent for a majority of shareholders to sanction such a proceeding, and that it appeared that in fact they had sanctioned it.

Illegal acts will be restrained.

SEC. 215. The important principle that one out of any number of shareholders or partners is entitled to the protection of the court against the *illegal* acts of the others[3] although he stands alone, was emphatically declared and strictly carried out by Lord Eldon in Natusch v. Irving[4] and Const v. Harris,[5] both of which have been referred to in a former part of this work at considerable length.[6] In those cases Lord Eldon was dealing with partnerships and unincorporated companies, but precisely the same principle applies to all companies, whether incorporated by act of Parliament, charter, letters patent, or registration. Thus, in Adley v. The Whitstable Company,[7] Lord Eldon restored a member of a company incorporated by Act of Parliament to rights from which he had been unlawfully excluded under color of a by-law of the company. In Preston v. The

[1] Bailey v. Birkenhead Rail. Co., 12 Beav. 433; Edwards v. Shrewsbury, etc., Rail. Co., 2 DeG. & S. 537.

[2] 2 Ph. 740. See, too, Kent v. Jackson, 14 Beav. 367, and 2 DeG. Mac. & G. 49; the Exeter and Crediton Railway Co. v. Buller, 5 Rail. Ca. 219; Inderwich v. Snell, 2 Mac. & G. 216, where directors complained that they had been wrongfully removed.

[3] *I. e.*, illegal although sanctioned by a majority.

[4] Gow on Part., App. 398.

[5] T. & R. 518, 519.

[6] Chapple v. Cadell, Jac. 537.

[7] 17 Ves. 315, and 19 id. 304, and 1 Mer. 107, where a decree for an account of profits was made.

Grand Collier Dock Company,[1] the Vice-Chancellor of England overruled a demurrer to a bill, the object of which was to compel certain shareholders to pay calls, although it had been in effect unanimously resolved at a special general meeting of the company that no calls should be made upon them. So, in Beman v. Rufford,[2] the court, at the suit of a small minority of shareholders in a railway company, restrained what in effect would have been a transfer of the business of that company to another company, although the great majority of shareholders in the former were desirous that such transfer should be made. So, in Henry v. The Great Northern Railway Company,[3] the court interfered to protect the preference shareholders in a company against the directors and other shareholders, who intended to make an illegal apportionment of dividends.[4] And upon the same principle, the court has over and over again interfered, at the instance of a minority of shareholders, to prevent an application of the funds of companies, to purposes foreign to those, to attain which alone such companies were formed.[5]

Will interfere to control factious minority.

SEC. 216. The court will interfere to control factious minority which impedes the execution of the lawful resolutions of the majority.[6] Nor can Mozley v. Alston [7] be considered as inconsistent with this proposition; for, although in that case the court certainly did refuse to interfere, it was not called upon to do so in a suit properly framed; and it is tolerably clear from the judgment that, if the majority had chosen to institute a suit in the name of the corporation, the court would have acted very differently.[8]

[1] 11 Sim. 327.

[2] 1 Sim. (N. S.) 550. See, too, Winch v. The Birkenhead, etc., Rail. Co., 5 DeG. & Sm. 562; Salomons v. Laing, 12 Beav. 377.

[3] 4 K. & J. 1, and 1 DeG. & J. 606. See, too, Carlisle v. The South Eastern Rail. Co., 1 Mac. & G. 689.

[4] Other cases will be found under the head Injunction, *infra*.

[5] See, for examples, as to making part only of a railway, Cohen v. Wilkinson, 12 Beav. 125, and 1 Mac. & G. 481; Hodgson v. Powis, 12 Beav. 392, 529, and 1 DeG. Mac. & G. 6; Logan v. Courtown, 13 Beav. 22. As to embarking in a totally new kind of business. Natusch v. Irving, Colman v. The Eastern Counties Rail. Co., 10 Beav. 1; Bagshaw v. The Eastern Un. Rail. Co., 7 Ha. 114, and 2 Mac. & G. 380; Salomons v. Laing, 12 Beav. 339. As to applying to Parliament to change the constitution of the company, Munt v. The Shrewsbury and Chester Rail. Co., 13 Beav. 1; Simson v. Denison, 10 Ha. 51; Vance v. The East. Lanc. Rail. Co., 3 K. & J. 50, and the cases there referred to.

[6] See The Exeter and Crediton Rail. Co. v. Buller, 5 Rail. Ca. 211, in which the court did so interfere.

[7] 1 Ph. 790

[8] In Miles v. Thomas, 9 Sim. 606, V. C. Shadwell declined to restrain the sailing of a ship, although it would seem that the majority of the shareholders of the company to which the ship belonged were opposed to her sailing on the voyage on which she was about to be sent. The report of this case is however obscure, not only as to the facts, but also as to the reasons for the judgment.

Of the rule not to interfere at the instance of persons who have been guilty of laches.

SEC. 217. Independently of the Statute of Limitations, a plaintiff may be precluded by his own laches and inconsistency of conduct from obtaining relief in a court of equity. Laches presupposes not only lapse of time, but also the existence of circumstances which render negligence imputable; and unless reasonable vigilance is shown in the prosecution of a claim, a court of equity, acting on the maxim, *vigilantibus non dormientibus subveniunt leges,* will decline to interfere, and will leave the plaintiff to such remedy, if any, as he may have at law.

Rule in Sherman v. Sherman.

SEC. 218. In the early case of Sherman v. Sherman,[1] two persons had dealings as merchants; one of them died; his widow filed a bill for an account, but, although the Statute of Limitations did not apply, the bill was dismissed on the ground that many years had elapsed since the dealings in question had taken place, and the deceased had allowed any claims he might have had to slumber.[2] Again, where an account has been rendered, and has been long acquiesced in, unless fraud be proved, a court of equity will not re-open it, although the account may be shown to be erroneous, and although no final settlement was ever come to.[3] The same principle is acted on in taking accounts; for charges long improperly made and acquiesced in, or long omitted to be made, are regarded, in the absence of fraud, as having been made or omitted by agreement, and the question of mistake will not be gone into.[4]

Effect of laches in some cases.

SEC. 219. In suits by shareholders against companies and their directors the laches of the plaintiff frequently prove fatal to his case. In Graham v. The Birkenhead, etc., Railway Company,[5] a suit was instituted by a shareholder in a company to restrain the completion of part only of the company's works. There had been several suits for the same purpose instituted by other shareholders, but for reasons, to which it is not material to advert, those suits were never effectually prosecuted. It had been known for a considerable time that it was not intended by the directors to complete the company's works as originally contemplated, and that in fact there were not suffi-

[1] 2 Vern. 276.
[2] See, too, Stuart v. Mellish, 2 Atk. 610.
[3] Scott v. Milne, 5 Beav. 215, and on appeal, 7 Jur. 709. See, too, Williams v. Page, 24 Beav. 654; Stupart v. Arrowsmith, 3 Sm. & G. 176.
[4] Thornton v. Proctor, 1 Anst. 94.
[5] 2 Mac. & G. 146.

cient funds for that purpose. It was also well known that the directors had for some time been completing part of the works. It was held that those who disapproved of the application of the company's funds to that limited extent, ought to have taken proceedings to stop it at once; and that having regard to the laches of the plaintiff he was not entitled to relief.

Again, in Stupart v. Arrowsmith,[1] a suit was instituted by a shareholder in a company against its directors and others for the purpose of compelling them to restore funds of the company alleged to hav been illegally applied in buying up shares,[2] and for a general account. It appeared, however, that the alleged illegal purchase of shares had not taken place, that the directors had laid accounts before the shareholders showing the amount of the company's receipts and expenditure, and the balance to be divided; that these accounts had been adopted at a general meeting, and that payments had been made to some of the shareholders upon the footing of these accounts. The suit was not instituted until three years after the adoption of the accounts, at the meeting referred to, and it was held that under these circumstances, and no fraud having been proved, the plaintiff was not entitled to the interference of the court.

A shareholder is precluded from complaining of laches when.

SEC. 220. It seems that a person who acquires a share from a former shareholder is precluded from complaining of what his predecessor could not complain himself.[3] The cases in which the doctrine of laches is perhaps of the greatest importance, is where persons have agreed to become partners, and one of them has unfairly left the other to do all the work, and then, there being a profit, comes forward and claims a share of it. In such cases as these, the plaintiff's conduct lays him open to the remark that nothing would have been heard of him had the joint venture ended in loss instead of gain; and a court of equity will not aid those who can be shown to have remained quiet in the hope of being able to evade responsibility in case of loss, but of being able to claim a share of gain in case of ultimate success. Thus, in Cowell v. Watts[4] the plaintiff and the defendant had agreed to take land for the purpose of improving it and letting it upon building leases. A long lease was accordingly obtained, and was taken in the

[1] 3 Sm. & G. 176. See, too, Kent v. Jackson, 14 Beav. 367, and 2 De G. Mac. & G. 49.

[2] See as to this, Evans v. Coventry, 2 Jur. (N. S.) 557.

[3] Ffooks v. South Western Rail. Co., 1 Sm. & G. 142.

[4] 2 H. & Tw. 224.

name of the defendant. The plaintiff then applied to the defendant to enter into a written agreement upon the subject of their joint adventure, but this the defendant declined. He also assumed to act as sole owner of the land obtained; he removed the plaintiff's cattle from it, and borrowed money on a mortgage of the land, and expended such money in building upon it. The plaintiff all this time did nothing, although he was aware of what was going on. After a lapse of eighteen months the plaintiff, by his solicitor, called upon the defendant to perform the original agreement; and the defendant declining, a suit for specific performance was instituted. The bill, however, was dismissed with costs, on the ground that the plaintiff had by his conduct induced the defendant to suppose that the plaintiff had abandoned the speculation, and that the defendant had the sole right to the land.

Applicability of doctrine to mining companies.

SEC. 221. The doctrine now under discussion is especially applicable to mining partnerships. Mining operations are so extremely doubtful as to their ultimate success, that it is of the highest importance that those engaged in them should know on whom they can confidently rely for aid; if, therefore, a person engages in a mining adventure, in partnership with others, and disputes arise between them, and he is denied a partner's rights, he should be careful to assert his claims while the dispute is fresh; for if he lies by until the mine has been rendered prosperous by his copartners, and he then comes forward insisting on his rights as a partner, and seeks the assistance of a court of equity, he will be refused its aid on the ground that he has applied for it too late. On this principle, in Senhouse v. Christian,[1] where several persons were lessees of a colliery, and the lease being about to expire, one of them obtained a renewal of it in his own name, Lord Rosslyn dismissed with costs a bill filed by the others claiming the benefit of the renewed lease. The plaintiffs had allowed the defendant to work the colliery single-handed at a great expense; and although they were aware of all the facts when the original lease expired, they did not take any proceedings to enforce their rights until four years afterward. This case was referred to with approbation by Lord Eldon, in the case of Norway v. Rowe,[2] in which he refused a motion for a receiver made on behalf of a person claiming to be a partner, but

[1] Cited 19 Ves. 157, and reported in a note to 19 Beav. 356.

[2] 19 Ves. 144. There were more grounds than one for this decision, but the case is always regarded as an authority in support of the doctrine acted on by Lord Rosslyn in Senhouse v. Christian.

whose rights had been long denied. Again, in Prendergast v. Turton,[1] where the capital subscribed for working a mine was spent, and the plaintiffs refused to contribute more, but the other partners did contribute more, and ultimately, after a lapse of some years, succeeded in making the mine profitable, and then the plaintiffs came forward claiming their shares in the concern, their bill was dismissed by the Vice-Chancellor Knight Bruce, and his decision was affirmed on appeal. The same doctrine was applied in the recent case of Clegg v. Edmonson,[2] the facts of which were similar to those of Senhouse v. Christian, already referred to. In one respect, Clegg v. Edmonson goes further than the other cases, for although the plaintiffs had not asserted their claims by any legal proceedings until it was too late, they had constantly insisted on their right to participate in the profits obtained by the defendants under the renewed lease. Upon this point, however, it was observed by the Lord Justice Turner that he could not agree to a doctrine so dangerous as that a mere assertion of a claim, unaccompanied by any act to give effect to it, can avail to keep alive a right which would otherwise be precluded.[3]

Advantages of evidence of abandonment.

SEC. 222. In the cases already referred to it will be observed that there was no positive evidence that the plaintiff had ever abandoned his rights,[4] and in Clegg v. Edmonson there was evidence to show that no abandonment had ever been contemplated. It need, however, scarcely to be observed, that positive evidence of abandonment, in addition to the negative evidence derived from mere lapse of time during which nothing has been done by the plaintiff, greatly improves the position of his opponent. There are several cases illustrating this. In Jekyl v. Gilbert,[5] two artificers agreed to do work for their joint benefit; after the work was done, the person for whom it was done refused to pay; the defendant requested the plaintiff to join in legal proceedings to compel payment, but the plaintiff declined. Thereupon the defendant brought an action for payment of

[1] 1 Y. & C. C. 98, and on appeal, 13 L. J. Ch. 238.

[2] 3 Jur. (N. S.) 299.

[3] This general proposition must of course be taken with reference to the case before the court. It cannot be laid down as universally true that protests are useless. They exclude inferences which, in their absense, might fairly be drawn from the conduct of the party protesting, and are conclusive to show that no abandonment of right was intended.

[4] In Prendergast v. Turton perhaps there was, and it is on the ground that there was, that Lord Chelsford distinguished that case from Hart v. Clarke, which will be noticed hereafter. See 6 H. L. Ca. 657-659.

[5] M'Naghten's Select Cases in Chancery. 29.

the work done by him, and obtained a verdict. The plaintiff then claimed half the amount recovered, but the court held that he was not entitled to any share of it. So if a part-owner of a ship disapproves of a proposed voyage, and arrests the ship until the other part-owners give him security for his share, he is not entitled to any portion of the profits arising from such voyage.[1] Again, where two persons agreed to take land on lease for a building speculation, and one of them afterward abandoned the speculation and died, it was held that the equitable estate and the legal estate were in the same person, viz., the survivor, and that he was not a trustee as to any portion of it for the executors of the deceased.[2]

Rule in McLure v. Ripley.

SEC. 223. McLure v. Ripley[3] may be referred to as illustrating the same principle. There the plaintiff and the defendant entered into an agreement for the joint purchase of goods to be sent to China for sale, and for the investment of the proceeds in the purchase of tea on the joint account. The money necessary for the purchase of the goods was to be supplied by the plaintiff and by the defendant jointly. It was, however, agreed that the defendant should, in the first instance, give bills for the whole amount of the purchase-money, and that when the bills fell due the plaintiff should provide his share of their amount for the purpose of enabling the defendant to pay them. In pursuance of this agreement goods were bought and sent to China, and bills were given by the defendant. Before any of the bills became payable it appeared likely that the adventure would result in a loss, and this was known to both parties. Shortly before the time when the first of the bills became due, the defendant applied to the plaintiff for his share of the amount of the bill. The plaintiff was not prepared to supply it, and the defendant thereupon gave the plaintiff the option of withdrawing from the speculation altogether. This offer was accepted, and the plaintiff formally resigned all share in the adventure. Shortly afterward a new agreement was come to for the purchase by the plaintiff of part of the return cargo, in which, by the preceding arrangement, the defendant alone had become interested. The cargo arrived, and it was then found that the original speculation resulted in considerable profit. The plaintiff sought to avoid his agreement to withdraw, and his subsequent agreement for purchase, on the ground that after he had been applied to for money,

[1] Davis v. Johnstone, 4 Sim. 539.
[2] Reilly v. Walsh, 11 Ir. Eq. 22.
[3] 2 Mac. & G. 275.

and before he agreed to withdraw, the defendant had received two letters from his correspondents in China which he had concealed from the plaintiff. These two letters, however, contained nothing calculated to lead to the supposition that the adventure would be more profitable than was previously imagined, and it was clearly shown that the defendant had not been guilty of any misrepresentation. It was accordingly held that the plaintiff had no right to be relieved from his contract, merely because those letters had not been communicated to him. In delivering judgment, the Lord Chancellor proceeded upon the grounds that although at first both parties were entitled to all the information relating to their joint adventure, the plaintiff, by not advancing his share of the funds when required, ceased any longer to have the rights of a partner, and that, after having agreed to embark in the speculation for better and for worse, the plaintiff had no right whatever to say to the defendant, "Give me all your information, and I will decide whether I will be a partner or not."

Cases where laches have not been regarded.

SEC. 224. It is now necessary to advert to one or two cases apparently at variance with the foregoing, and in which persons claiming the rights of partners have succeeded in obtaining the assistance of a court of equity, although their demands have been stale, and although the success of the joint adventure has been due to the exertions of those against whom those demands were made. The case of Lake v. Craddock is sometimes referred to as one of the class now in question. But this case, in truth, only decided that if one of several partners chooses to claim the benefit of partnership dealings, after having for some time ceased to take any part in the affairs of the partnership, he must contribute his share of the outlays made by the other partners, with interest. It was not decided in Lake v. Craddock that a partner could, on the above terms, claim the benefit of what had been done by the others; and although the decree gave a partner who had long abandoned the concern the option of either claiming a share on proper terms, or of being excluded altogether, the other partners do not appear to have raised any objection to this option being given.

The cases which are most at variance with those referred to in the

[1] 3 P. W. 158. The bill in effect was filed by the plaintiff against four persons, his copartners, for an account. One of the defendants had long ceased to take any part in the partnership affairs. An account was decreed and liberty was given to this defendant to come in on terms, or to be excluded. He appealed, being discontented with the terms proposed.

preceding pages, are the recent cases of Hart v. Clarke and Clements v. Hall. In Hart v. Clarke[1] the facts were shortly as follows: A mining company was formed on the cost-book principle, and there was no express agreement authorizing the forfeiture of shares on the non-payment of calls. The plaintiff and the defendants were lessees of the mine, and the only shareholders therein. Money being required for carrying on the mine, and the plaintiff not furnishing his proportion of the sum required, was, on more than one occasion, informed that on continued non-payment his shares would be forfeited, and ultimately they were declared forfeited. The plaintiff, who had all along denied the power of his coadventurers to forfeit his shares and had suggested modes of obtaining money which they had not approved, gave them notice that, in the event of the mine proving successful, he should expect his share of the profits, and should, if necessary, take legal proceedings to enforce his claim. A year and a half then elapsed, and at the end of that time he asserted his claim, and the defendants refusing to recognize it, a bill was filed for an account. The master of the rolls held it to be clear that no number of partners could exclude another partner and forfeit his share, but that the plaintiff was not entitled to be considered as still a partner: 1, because the notice to forfeit his share might be regarded as a notice to dissolve the partnership; and, 2, because, for nearly two years, he had taken no step whatever to assert his rights, but had allowed other people to work the mine, and had only come forward when he found it had proved a profitable speculation. On appeal it was also held that the supposed right to forfeit had no existence; but it was further held, 1, that the notice of forfeiture could not operate as a dissolution, inasmuch as that was not the object with which the notice had been given; and, 2, that under the peculiar circumstances of the case, the plaintiff could not be held to have shown any intention to abandon the undertaking, and that the nature of mining speculations was such as to render it inequitable to lay down as a general rule that no adventurer should be entitled to relief in equity when the adventure becomes productive, unless he had paid up his calls whilst it remained unproductive.

The ground of the decision in the above case, and that which distinguishes it from Senhouse v. Christian, and other cases alluded to above, is this, viz.: that the plaintiff in Hart v. Clarke had, as one of the lessees of the mine, a legal interest therein, which nothing had

[1] Clarke v. Hart, 6 H. L. Ca. 633, affirming Hart v. Clarke, 6 DeG. Mac. & G. 232, and reversing S. C., 19 Beav. 349.

displaced. The court, therefore, was in this position: it was compelled either to make a decree in favor of the plaintiff, or to declare him a trustee of his share in the mine for the defendants; and there not being sufficient grounds for justifying the latter alternative, the former was necessarily adopted. Upon no other ground can the case, it is submitted, be distinguished from Clegg v. Edmondson and the other cases alluded to above; for, although reliance was placed in the judgment in Hart v. Clarke, on the distinct notice given by the plaintiff that he did not acquiesce in the defendant's conduct, and should insist on his rights, it was decided in Clegg v. Edmondson[1] that a protest did not enlarge the time within which redress must be sought in a court of equity.

Clements v. Hall[2] is another case in which, notwithstanding the lapse of a considerable time, it was held that relief ought to be given to a person claiming an interest in a mine; but the facts in that case were very peculiar, and four judges were equally divided, Lord Cranworth and Lord Justice Turner holding that the plaintiff was entitled to relief, whilst Lord Justice Knight Bruce and Sir John Romilly were of a contrary opinion. The facts were in substance as follows: A and B were lessees of a mine which they worked as partners. The lease expired, but the lessees continued in possession as tenants from year to year, and worked the mine as before. In 1847, A died, leaving C his executor, and bequeathing an interest in the mine to D. B, after the death of A, worked the mine alone, claiming it as his own entirely, and refusing to give any account to C, who, however, constantly pressed for one. In 1850 B negotiated for, and obtained from, the landlord a new lease, but on more onerous terms than before. Of this, C had no notice. After the new lease, B, who since the death of A had only kept the mine going, began to work it in earnest and at a profit; and in 1851 D filed a bill against B and C to establish his interest in the mine. C admitted D's title, but B put in no answer and the suit was not prosecuted. In 1853 B died and C became his representative. In 1854 the plaintiff, who was the assignee of D's interest, filed a bill in the nature of a supplemental bill to D's former bill, and sought to have D's interest in the mine secured for his, the plaintiff's, benefit. C, who as the representative of A, had admitted D's right in his suit, now, as representative of B, opposed the plaintiff's claim, and insisted on lapse of time as a defense to the suit. But it was held, 1, that

[1] 3 Jur. (N. S.) 269.

[2] 2 De G. & J. 173, and 24 Beav. 333.

on A's death, his interest in the mine did not determine; 2, that his estate was entitled to share the benefit of the renewed lease; 3, that A's representative was not precluded in 1853 from asserting this right against B, inasmuch as B had kept A's representative in ignorance of the real state of the concern; and, 4, that there had been no laches on the part of the plaintiff or of D, through whom he claimed, inasmuch as, since 1851, there had been a bill on the file to secure their interest.

Recognition of a claim overcomes laches.

SEC. 225. Lastly, on the subject of laches it may be observed that, as positive evidence of abandonment materially strengthens the case of those resisting a stale demand, so, on the other hand, positive evidence of recognition affords an answer to a defense grounded on laches and lapse of time. Thus, where a shareholder in a company became bankrupt, but his shares were carried in the books of the company to a separate account, and he was regularly credited with the dividends which became payable in respect of those shares, his assignees were held entitled to the shares and accumulated dividends, although twenty years had elapsed since any claim had been made to them.[1]

Notwithstanding Hart v. Clarke and Clements v. Hall, it is submitted that the doctrine laid down and acted upon in Norway v. Rowe, Senhouse v. Christian, Prendergast v. Turton, and Clegg v. Edmondson may still be safely relied on in all cases except those in which the court can be driven, as it was in Hart v. Clarke, to the alternative of holding either that the plaintiff is entitled to relief, or that he has abandoned and lost his former *legal* status.

Laches, as a defense to a suit in equity, cannot be taken advantage of by demurrer, if it can only be made out inferentially from the statements in the bill; if the laches relied upon does not appear plainly and distinctly from these statements a demurrer will not lie.[2]

Of the rule not to interfere unless all proper parties are before the court.

SEC. 226. In considering the rules relating to parties to partnership suits it is proposed to allude, 1, to the question who ought to be parties where the number of partners is such that there is no difficulty in bringing them all before the court; 2, to the question whether, where the number of partners is so great that they all cannot be made

[1] Penny v. Pickwick, 16 Beav. 246. See, too, the recognition of title in Clements v. Hall, 22 Beav. 333.

[2] See Deloraine v. Browne, 3 Bro. C. C. 633; Mitf. Pl. 212; Turner v. Borlase, 11 Sim. 17.

parties, it is sufficient to have a few of them on behalf of themselves and the rest; and 3, to the extent of which public officers represent shareholders.

Who ought to be parties where the number of partners is not large.

SEC. 227. Where there is no difficulty arising from number, it is a rule in equity that no account will be decreed unless all persons interested in taking the account are, by themselves or by their trustees, parties to the suit in which the account is sought. A strong illustration of this is afforded by the case of Hills v. Nash,[1] where a bill was filed by one partner against the executors of a deceased partner, to obtain the proportion of loss due from the estate of the deceased, the whole of that loss having been paid by the plaintiff, and all the other partners having settled with him. It was objected and held, that the other parties ought, nevertheless, to have been parties to the suit, for no settlement had been come to which was binding as between them and the defendants; no decree in the suit as framed would be binding on the absent partners; and they, notwithstanding the decree and their settlement with the plaintiff, would have a right to institute another suit against the defendants to settle the proportion of their respective contributions.

Upon a similar principle, where a creditor of a firm seeks payment of his debt out of the estate of a deceased partner, the surviving partners must be made co-defendants with the executors of the deceased.[2]

It follows from the same principle that to a suit for a dissolution and winding up of an ordinary partnership, all the partners must be parties;[3] and that the representatives of deceased partners must be parties also if they have any interest in the partnership accounts.[4]

But where the account which is sought is one in which the partnership is not concerned, it is not necessary or proper to make all the partners parties. If, therefore, a partner has agreed to share his profits with a stranger, and the latter seeks an account of those profits, he must file his bill against that one partner alone, and not make the others parties.[5]

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[1] Ph. 594.

[2] Wilkenson v. Henderson, 1 M. & K. 582.

[3] Evans v. Stokes, 1 Keen, 24; Richardson v. Hastings, 7 Beav. 301; Harvey v. Bignold, 8 id. 343; Deeks v. Stanhope, 14 Sim. 57; Wheeler v. Van Wart, 9 id. 193; Long v. Yonge, 2 id. 369; Moffat v. Farquharson, 2 Bro. C. C. 338; Ireton v. Lewis, Finch, 96.

[4] See Baboo Janoky Doss v. Bindabun Doss, 3 Moo. In. App. 175, and Cawthorne v. Chalie, 2 Sim. & Stu. 127, where it appears that a surviving partner will, if necessary, be constituted the legal personal representative of the deceased.

[5] Brown v. De Tastet, Jac. 284; Raymond's case, cited by Lord Eldon in Ex parte Barrow, 2 Rose, 255; Bray v. Fromont, 6 Madd. 5; and see Killock v. Grey, 4 Russ. 285.

Again, if a person has been induced by fraud to purchase shares, he is entitled to file a bill for a return of the purchase-money, and for an indemnity, and the only necessary party to such a bill is the person who sold the shares. Thus, in Stainbank v. Fernley,[1] the directors of a joint-stock company, in order to sell their shares to advantage, represented in their reports and by their agents that the affairs of the company were in a very prosperous state, and declared large dividends at a time when the affairs of the company were greatly embarrassed. A person who had been induced by those means to purchase shares of one of the directers, filed a bill against that director, praying to be repaid his purchase-money, and to be indemnified, and offering to re-transfer the shares. A demurrer for want of equity, and because all the other partners ought to have been made parties, was overruled on the ground that the question in the suit was one with which no person was concerned except the plaintiff and the defendant.

Rule in Mare v. Malachi.

SEC. 228. Another illustration of the same principle is afforded by the case of Mare v. Malachi.[2] There a mining company was formed by the two defendants, who had obtained a lease of the mine proposed to be worked. The plaintiff had $\frac{3}{100}$ths shares. Some time after the mine had been worked, and, as the plaintiff alleged, at a profit, the defendant sold the mine in order that it might be carried on by a larger company. This sale was concurred in by all the old shareholders except the plaintiff. He contended that he was entitled to adopt or reject the sale; and if he adopted it to be paid $\frac{3}{100}$ths of the consideration for the sale; and if he rejected it to have transferred to him by the defendants such a number of shares as would be equal to $\frac{3}{100}$ths shares in the original company. The bill was demurred to for want of parties, but the demurrer was overruled by Cottenham, L. C., who held, first, that the new trustees in whom the mine was vested were not necessary parties, inasmuch as the object was to have it decided to whom certain shares belonged; secondly, that the original adventurers were not necessary parties, inasmuch as they had consented to the sale of their interests, and had no further concern with the mine; and, thirdly, that the new adventurers were not necessary parties, because it appeared that the sale was made to the purchasers without notice of the plaintiff's title, and that the defendants possessed in their own right, and unaffected by the claims of others, the subject-matter

[1] 9 Sim. 556.

[2] 1 M. & Cr. 559.

to which the plaintiff asserted his title. The Lord Chancellor held that, as the plaintiff's claim was not made against the corpus of the property, but against that only which, in the shape of money or shares, had come to the hands of the defendants, the objection for want of parties could not prevail. As observed by his Lordship, the plaintiff's case against the defendants came to this—"If; as between you and me the transaction is advantageous, I have a right to claim a corresponding share of the profits and purchase-money which you have received in respect of it. If not, you had no right to convert my shares into money, and I am entitled to have out of the shares in the mine now vested in you a transfer of such a number as will be equivalent to the amount of my interest."

Turner v. Hill.

SEC. 229. The same principle was acted on in the cases of Turner v. Hill, Turner v. Tyacke, and Turner v. Borlase,[1] in each of which the assignee of a bankrupt shareholder in a cost-book mine filed a bill against one of several persons who had fraudulently purchased the bankrupt's shares, praying for an account of the profits received by such purchaser in respect of the shares he had purchased. Demurrers to these bills for want of parties were overruled on the ground that the only persons really interested in the matters in question in each suit were the plaintiff and the defendant against whom the relief was sought. These cases go even further than Mare v. Malachi, inasmuch as the defendant there was the vendor of the plaintiff's shares, whereas the defendant in each of the other cases was one of several purchasers; but the purchasers were not joint purchasers, and the case against each was distinct from that against the others. Moreover, in Turner v. Hill the bill prayed a receiver of the profits of the mine, but the context showed that the only receiver sought was a receiver of the profits of the shares in question.

Persons induced to enter companies by fraud.

SEC. 230. Again, where persons have been induced by fraud to subscribe to a bubble company, each one may institute a suit on his own behalf against those who have fraudulently obtained his money, for a return thereof; and in such a case it is not necessary that the other persons defrauded should be parties to the suit, or be represented therein,[2] unless, perhaps, the fraud was the same in each case, *e. g.*, by a representation to the public, by which all were alike deceived.[3]

[1] 11 Sim. 1, 16, 17.

[2] Colt v. Woollaston, 2 P. W. 154; Green v. Barrett, 1 Sim. 45; Cridland v. DeMauley, 1 De G. & S. 459.

[3] See Macbride v. Lindsay, 9 Ha. 574. Compare this case with those cited in the last note.

Suits against executors of deceased partners for fraudulent acts of deceased.

SEC. 231. Whether in a suit against the executor of a partner to make him account for profits made by wrongfully employing the assets of the deceased in the business of a firm of which the executor is a member, it is necessary to make the other members of the firm parties, seems to be open to some doubt; for, whilst in one recent case it was intimated that to such a suit they were necessary parties, in another recent case it was held that they were not, and the two cases seem undistinguishable with reference to this point.[1] The latter, however, the writer submits to be correct. But although a person may have no interest in the account to be taken, and would, therefore, be an improper party to a mere bill for such account, yet, if an injunction is sought to be obtained against him specially, he must be made a party. For this reason, sheriffs are often made parties to suits in which they have no real interest.[2]

Where some partners may sue on behalf of themselves and others.

SEC. 232. It has been held in many cases that to a bill praying for a dissolution of a partnership all the partners, however numerous, are necessary parties, and that consequently a bill filed by some on behalf of themselves and others, and praying for a dissolution, is bad on demurrer.[3] This rule is supposed to admit of no exception, and it has, though with expressions of regret, been held to apply to modern companies as well as to ordinary partnerships.[4] The reason given for the rule is that the affairs of a partnership cannot be finally wound up and settled without deciding all questions arising between all the partners, which cannot be done in the absence of any one of them.[5] Even if a partnership is empowered to sue and be sued by a public officer, his presence is not, in a suit for a dissolution, equivalent to the presence of all the parties.[6]

Exceptions to the rule that all the partners must be parties to suit for dissolution.

SEC. 233. But notwithstanding these numerous authorities, it may be permitted to doubt whether it can be considered as a rule admit-

[1] Compare Simpson v. Chapman, 4 De G. Mac. & G. 154, and M'Donald v. Richardson, 1 Giff. 81.

[2] See, for example, Vulliamy v. Noble, 3 Mer. 593; Bevan v. Lewis, 1 Sim. 376.

[3] Evans v. Stokes, 1 Keen, 24; Richardson v. Hastings, 7 Beav. 301; Harvey v. Bignold, 8 id. 343; Deeks v. Stanhope, 14 Sim. 57; Wheeler v. Van Wart, 9 Sim. 193; Long v. Yonge, 2 Sim. 369; Ireton v. Lewis, Finch, 96; Moffat v. Farquharson, 2 Bro. C. C. 338.

[4] Van Sandau v. Moore, 1 Russ. 441; and Davis v. Fisk, in Farren on Life Assurances, and cited by counsel in Younge's Reports, p. 425.

[5] See Richardson v. Hastings, 7 Beav. 307.

[6] See Van Sandau v. Moore, 1 Russ. 441; Davis v. Fisk, cited in Yon. 425; Abraham v. Hannay, 13 Sim. 581; Seddon v. Connell, 10 Sim. 58.

ting of no exception whatsoever, that to every bill, praying for a dissolution, all the partners must individually be parties. All that can on principle be requisite is that every conflicting interest shall be substantially represented by some person before the court. If, which is possible, the interest of each partner conflicts with that of all the others, then all must undoubtedly be parties. But if the partners are numerous, and it can be shown that they are divisible into classes, and that all the individuals in each class have a common interest, then, although the interest of each class conflicts with that of every other class, there seems to be no reason why, if each class is represented by one or two individuals composing it, a decree for a dissolution should not be made conformably with the ordinary doctrines of the court of equity.[1] There is not, however, so far as the writer is aware, any case in which a decree for a dissolution has actually been made in the absence of any of the partners. There is, it is true, one case in which a bill by some on behalf of themselves and others, praying expressly for a dissolution, was upheld; but the point now in question was not discussed. The case referred to is Cockburn v. Thompson.[2] There a company had proved abortive, and a resolution to dissolve had been made. A bill was filed by several proprietors on behalf of themselves and all the other proprietors against the solicitor and the bankers of the company, and it prayed, *inter alia*, that the institution might be declared dissolved, that an account might be taken of the moneys received by the defendants on behalf of the proprietors, and that the rights and interests of the plaintiffs and other proprietors might be declared and established. An objection was taken for want of parties, but was disallowed by Lord Eldon. In this case, however, the real object was to make the defendants account for the money they had received; it does not appear from the report that the defendants were proprietors in the concern, and it is clear that the question as to want of parties was not raised with reference to that part of the prayer of the bill which sought a dissolution. The case cannot, therefore, be considered either as opposed to the numerous authorities already cited,[3] or to be an illustration of the principle that some may represent others in a suit for a dissolution.

The question of parties dependent upon rights sought to be enforced.

SEC. 234. In a suit not praying for a dissolution the question of

[1] See Richardson v. Larpent, 2 Y. & C. C. 514, and the observations of Lord Cottenham in Walworth v. Holt, 4 M. & Cr. 635.

[2] 16 Ves. 321.

[3] See in Long v. Young, 2 Sim. 380, per V. C. Shadwell.

parties turns entirely on the nature of the right sought to be enforced. If an account is required and it is one in which the interest of *each* partner is distinct from and in conflict with that of *all* the others, then all the partners, however numerous, must be parties, and their representation by others or by a public officer or secretary will not be sufficient.[1] On the other hand, if there are no such conflicting interests as above supposed, it will be sufficient if each distinct interest is represented by a party to the record. It was held in Walworth v. Holt[2] that, where partners are too numerous to be brought before the court, and they are divisible into classes, and all the individuals in one class have a common interest, a suit instituted by a few individuals of that class on behalf of themselves, and all the other individuals of the same class against the other members of the company, is sustainable. Since this decision there have been many suits by some shareholders on behalf of themselves and others, praying for very general accounts (but studiously avoiding a prayer for a dissolution), and such suits have been successful whenever the interest of the absent partners has been the same as that of the plaintiffs on the record. For example, it was held in Apperley v. Page,[3] that a bill might be filed by some of the shareholders of a provisionally registered railway company, on behalf of themselves and all the other shareholders, except the defendants, against the directors, although the bill prayed not only for the collection of the joint property and its application in discharge of the joint liabilities, but also for the distribution of the surplus amongst the shareholders.[4] So, in the case of bubble companies, any one of the deceived shareholders may file a bill on behalf of himself and the others, in order to obtain repayment of the deposits or subscriptions which they have been induced to make.[5]

When dissolution is not sought.

SEC. 235. When no dissolution is prayed, and no winding up of

[1] See Van Sandau v. Moore, 1 Russ. 441; Seddon v. Connell, 10 Sim. 58; Abraham v. Hannay, 13 id. 581; McMahon v. Upton, 2 id. 473; Sibley v. Minton, 27 L. J. Ch. 53, V. C. Kindersley.

[2] 4 M. & Cr. 619; Cockburn v. Thompson, 16 Ves. 321, is an earlier decision on this point. See, too, Good v. Blewitt, 13 Ves. 397. See as to some on behalf, etc., in cases of voluntary societies assuming to be corporations, Lloyd v. Loaring, 6 Ves. 773.

[3] 1 Ph. 779; Compare Sibson v. Edgworth, 2 De G. & Sm. 73.

[4] See, for other instances, Wilson v. Stanhope, 2 Coll. 629; Harvey v. Collett, 15 Sim. 332; Cooper v. Webb, id. 454; Clements v. Bowes, 17 Sim. 167, and 1 Drew. 684; Richardson v. Hastings, 7 Beav. 323; Butt v. Monteaux, 1 K. & J. 98; Sheppard v. Oxenford, id. 491; Sibson v. Edgworth, 2 De G. & S. 73. Compare Williams v. Salmond, 2 K. & J. 463.

[5] Blain v. Agar, 2 Sim. 289; Beeching v. Lloyd, 3 Drew. 227; Bryson v. The Warwick, etc., Canal Co., 4 De G. Mac. & G. 711. See, too, Macbride v. Lindsay, 9 Ha. 574; Cridland v. De Mauley, 1 De G. & S. 459; Bell v. Mexborough, 5 Ra. Ca. 149, and 12 Jur. 65.

the partnership is sought, a suit may be properly instituted by some of a number of numerous partners, on behalf of themselves and all others whose interest is identical with their own; and this form of suit is constantly adopted where numerous partners seek to make their managers account for secret benefits and advantages obtained by them in breach of the good faith owing to those whose affairs they conduct;[1] or to rescind contracts into which the partnership has been induced to enter by false and fraudulent representations.[2]

Action to rescind an illegal agreement, or one illegally entered into.

SEC. 236. Again, for the purpose of rescinding an agreement illegally entered into by the directors of an unincorporated company, or for the purpose of restraining them from doing that which is illegal, a suit may be instituted by one shareholder on behalf of himself and all the others, except the defendants, against those directors. Thus, in Gray v. Chaplin [3] it was held that one of the shareholders of a company was entitled to file a bill on behalf of himself and other shareholders, to set aside an agreement entered into by the managers, contrary to the company's act of Parliament, because whatever benefits might be reserved to the shareholders by the agreement, they were all to be considered as interested in having the directions of the act complied with. Upon the same principle, it has been held in more modern cases that bills by some shareholders in incorporated companies, on behalf of themselves and other shareholders, against the companies, of which they are members, and the directors of these companies, for the purpose of preventing or annulling illegal acts, contemplated or performed by the directors, are proper in point of form. In suits so constituted, courts of equity have declared resolutions fraudulent and void;[4] restrained the application of the funds of a company to unauthorized purposes;[5] restrained the construction of part of a railway instead of the whole of it;[6] restrained the improper payment of dividends;[7] restrained the transfer of the business of one company to another company;[8] restrained loans to directors.

[1] Chancey v. May, Prec. in Ch. 592; Hichens v. Congreve, 4 Russ. 562; Taylor v. Salmon, 4 M. & Cr. 134; Beck v. Kantorowicz, 3 K. & J. 237.

[2] See Small v. Atwood, You. 407.

[3] 2 Sim. & Stu. 267.

[4] Preston v. Grand Collier Dock Co., 11 Sim. 327.

[5] Colman v. Eastern Counties Rail Co., 10 Beav. 1; Salomons v. Laing, 12 id. 339 and 377; Munt v. Shrewsbury & Chester Rail. Co., 13 Beav. 1; Bagshaw v. Eastern Un. Rail. Co., 7 Ha. 114, and 2 Mac. & G. 389; Simpson v. Denison, 10 Ha. 51; Vance v. East Lanc. Rail. Co., 3 K. & J. 50.

[6] Cohen v. Wilkinson, 12 Beav. 125, and 1 Mac. & G. 481; Hodgson v. Powis, 12 Beav. 392 and 529, and 1 De G. Mac. & G. 6.

[7] Dumville v. Birkenhead, etc., Rail. Co., 12 Beav. 144; Carlisle v. South Eastern Rail. Co., 1 Mac. & G. 689; Henry v. Great Northern Rail. Co., 4 K. & J. 1, and 1 De G. & J. 606.

[8] Beman v. Rufford, 1 Sim. (N. S.) 550; Charlton v. Newcastle & Carlisle Rail. Co., 5 Jur. (N. S.) 1096.

[9] Bluck v. Malalue, 5 Jur. (N. S.) 1018.

In such cases as these the company, as such, is a proper party, because it is the company as such which is sought to be affected by the decree of the court;[1] and the directors individually are proper parties, because they are the persons to be affected in the first instance, and some decree against them personally is also usually necessary. If, however, a decree against the company is all that is required, there is no necessity to make the directors parties individually. Thus, where a suit was instituted for the purpose of preventing a company from delegating its powers and, in fact, transferring its business to another company, a bill by one of the shareholders in the first company, on behalf of himself and all the other shareholders therein against both companies, was held proper in point of form, although none of the directors of either company were parties in person.[2]

The cases above referred to show that it is competent for one shareholder to institute a suit on behalf of himself and coshareholders, for the purpose of obtaining relief in respect of illegal acts done or contemplated by directors; but courts of equity will not interfere in suits so constituted, if the relief sought is in respect of acts, the legality or illegality of which depends on the voice of a majority of the shareholders.[3] If such last-mentioned acts are sanctioned by the majority, the court cannot interfere at all, and if they are not so sanctioned, the majority should themselves apply to the court, and institute proceedings in the name of the company.[4] If it is thought necessary to institute a suit before the views of the majority are known, or if the majority are too indifferent to take any proceedings to enforce obedience to their own resolutions, the proper course to be taken by those who determine to appeal to the court is to take upon themselves the responsibility of filing a bill in the name of the company. Such a bill will not be taken off the file unless it appears that the majority disapprove of it.[5]

What must be alleged in bill filed by shareholders on behalf of themselves and others.

SEC. 237. When a bill is filed by some shareholders on behalf of

[1] See Bagshaw v. The Eastern Union Rail. Co., 7 Ha. 114.

[2] Winch v. The Birkenhead, Lanc. & Chesh. Rail. Co., 5 De G. & Sm. 562.

[3] Foss v. Harbottle, 2 Ha. 461; Mozley v. Alston, 1 Ph. 790; Lord v. The Gov. and Co. of Copper Miners, 2 id. 740; Bailey v. The Birkenhead, Lanc. & Chesh. Junc. Rail. Co., 12 Beav. 433; Browne v. The Monmouthshire Rail. & Canal Co., 13 id. 32; Kent v. Jackson, 14 id. 367, and 2 De G. Mac. & G. 49; Inderwick v. Snell, 2 Mack. & G. 216; Edwards v. The Shrewsbury & Birm. Rail. Co., 2 De G. & Sm. 537; Yetts v. The Norfolk Rail. Co., 3 id. 293; Stevens v. The South Devon Rail. Co., 9 Ha. 313.

[4] Mozley v. Alston, 1 Ph. 790.

[5] The Exeter & Crediton Rail. Co. v. Buller, 5 Ra. Ca. 211.

themselves and others, it must appear in the bill, 1, that the plaintiffs are shareholders;[1] and, 2, that they are suing on behalf of themselves and others. If this last does not appear, the suit will be treated as that of the ostensible plaintiffs alone, and be dismissed if others ought to be parties, either actually or by representation.[2] Moreover, if there are conflicting interests, care must be taken to have each separate interest substantially represented by some person who is a party to the suit. Therefore, where there is a dispute about a call which some shareholders have paid and others have not, those who have not paid cannot sustain a bill on behalf of themselves and those who have paid, against the directors, trustees, and secretary of the company, praying for a general account of the partnership debts and assets, and to have the property of the concern applied in discharge of its liabilities. To a suit with such objects, some at least of the class of shareholders who have paid the call ought to be made parties.[3]

When suits may be instituted by one on behalf of himself and others without their consent.

SEC. 238. A suit by one or more persons on behalf of themselves and others may be instituted without the consent of such others. But a suit by one or more on behalf, etc., is the suit of those who are named on the record as plaintiffs, and whatever is a defense as against them, is a defense to the suit, whatever might have been the case if other persons had been plaintiffs on the record.[4] Moreover, as may be gathered from the cases already alluded to, in a suit by one or more on behalf of themselves and others, the interests of the plaintiffs on the record, and of those others whom they assume to represent, must be, in a judicial point of view, identical, and must be proved so to be by the plaintiffs.[5] Consequently, a shareholder in a company who has transferred his shares, and has no longer any interest in the company, cannot sustain a suit on behalf of himself and the other share-

[1] Banks v. Parker, 16 Sim. 176; Walburn v. Ingilby, 1 M. & K. 61.

[2] Baldwin v. Lawrence, 2 Sim. & Stu. 18; Cooper v. Powis, 3 De G. & S. 688.

[3] See Richardson v. Larpent, 2 Y. & C. C. 507; Lovell v. Andrew, 15 Sim. 581; Sharpe v. Day, 1 Ph. 771; Lund v. Blanshard, 4 Ha. 9; and see Seddon v. Connell, 10 Sim 58, and Abraham v. Hannay, 13 id. 580, as to the insufficiency of the public officer in such cases.

[4] Burt v. British Nation Ins. Co., 5 Jur. (N.S.) 9, 555, V.C. Stuart affirmed on appeal, id. 612; Williams v. Salmond, 2 K & J. 463. Compare Lund v. Blanshard, 4 Ha. 299.

[5] Burt v. British Nation Ins. Co., *ubi supra*, where the plaintiff was held barred by his own acquiescence in the matters complained of. See, too, Scarth v. Chadwick, 14 Jur. 300, V. C. E. where the defendants got rid of the suit by paying the plaintiff all that *he* was entitled to.

[6] Clay v. Rufford, 8 Ha. 281; Williams v. Salmond, 2 K. & J. 463; Sibson v. Edgworth, 2 DeG. & S. 73, in which case the defendant pleaded that the interests of the plaintiff, and those he assumed to represent, were not identical. See, too, Doyle v. Muntz, 5 Ha. 509.

holders for an account of the dealings and transactions of the company or of its directors, and to have its assets applied in discharge of its liabilities. For, whether he is or is not still under liabilities from which he is entitled to be freed, he has no right, having sold all his interest in the company, to assume to represent those with whom he has no longer any thing to do.[1] Upon the same principle it has been said, that a shareholder who is a mere trustee, having no beneficial interest in the company, is not a proper person to file a bill on behalf of himself and other shareholders.[2] It seems that unless there are twenty persons at least whose interests are the same, one or more of them will not be allowed to represent the others.[3]

Of suits by and against public officers.

SEC. 239. Upon the ground that a public officer of a company only represents the shareholders as a collective whole, and not any one or more of them as against the others, it was twice held by Lord Eldon, that a suit for the dissolution of the company, empowered to sue and be sued by its secretary, was defective for want of parties, although the suit was instituted by one shareholder on behalf of himself and others, against the secretary and the directors of the company.[4] In tracing the history of joint-stock companies in the celebrated case of Van Sandau v. Moore, Lord Eldon prominently alluded to the inability of a public officer to represent the company in suits between its members,[5] and this doctrine was carried out to its full extent in the three following cases decided by the late Vice Chancellor Shadwell.

In McMahon v. Upton,[6] the public officer of a mining company sued a person, who was both a member of the company and its agent for selling shares, for an account of what he had received as agent; and a demurrer to the bill was allowed on the ground that the actions and suits in which the officer was to be regarded as the representative of the company were actions and suits between the company and persons not members of it. In the still later case of Abraham v. Hannay,[7] a suit instituted by a member of a banking company against its public officer and directors, and seeking in effect a dissolution and winding up of the company, was held defective for want of parties upon the same principle. But, notwithstanding the above cases, and the

[1] Doyle v. Muntz, 5 Ha. 509.
[2] Id., *sed quære.*
[3] See Harrison v. Stewardson, 2 Ha. 530.
[4] Davis v. Fisk, cited in You. 425; and Van Sandau v. Moore, 1 Russ. 441.
[5] See 1 Russ. 460 and 472, and Hitchens v. Congreve, 4 Russ. 562.
[6] 2 Sim. 473. Compare Harrison v. Brown, 5 DeG. & Sm. 728.
[7] 13 Sim. 581.

observations of Lord Eldon, a suit may be instituted by the public officer of a company against some of its members, if the question in dispute is one between the company as a collective whole, on the one side, and those individual members on the other; and it has accordingly been held that it is competent for a public officer of a company, governed by that act, to sue the directors of the company for the purpose of making them account for breaches of trust and mismanagement; and that in such a suit none of the shareholders need be parties, although the company had ceased to carry on business, except for the purpose of winding up its affairs.[1]

Rescission of contract.

SEC. 240. A partnership which a person has been induced to enter into by the fraud and misrepresentation of his copartners will be dissolved at his instance; and those who inveigled him into joining them will be decreed to repay him whatever he may have paid them, with interest, and to indemnify him against all claims and demands to which he may have become subject by reason of his having entered into partnership with them, he on the other hand accounting to them for what he may have received since his entry into the concern.[2] The partner defrauded may, at his option, insist upon the rescission of the contract into which he has been inveigled, or he may adopt that contract and enforce it as if it were untainted by fraud.[3]

But it is by no means every misstatement made to a person entering into a contract and referring to its subject-matter which confers upon him a right to rescind it. If the misrepresentation is made by a stranger to the contract, no right to rescind arises, and the person defrauded must seek redress against him of whose fraud he complains. If the misrepresentation is made by a party to the contract, still, in order to render the contract invalid, the representation must be, and be clearly proved to be,[4] one which has occasioned the contract; or in

[1] Harrison v. Brown, 5 De G. & Sm. 728.

[2] See Pillans v. Harkness, Colles' Parl. Ca. 442; Ex parte Broome, 1 Rose, 71, and 1 Coll. 598, note; Hamil v. Stokes, Dan. 20, and 4 Price, 161; Stainbank v. Fernley, 9 Sim. 556; Jauncey v. Knowles, 8 W. R. 69. Clifford v. Brooks, 13 Ves. 131, was not a case of this class; the plaintiff there sought to recover money which he had paid, not for the admission of himself but for the admission of his brother into partnership with the defendants. The plaintiff's remedy under these circumstances was held to be by an action at law.

[3] Small v. Atwood, You. 507; Pulsford v. Richards, 17 Beav. 87; Cruikshank v. M'Vicar, 8 Beav. 106; and see Beck v. Kantorowicz, 3 K. & J. 230.

[4] A transaction will not be set aside on the ground of fraud, unless the fraud be clearly proved. Robson v. Devon, 3 Jur. (N. S.) 576, and 4 id. 245, noticed *infra*. See, also, on this subject, Conybeare v. New Brunswick, etc., Co., 1 Giff. 339, where the alleged misrepresentation consisted in a statement of the effect of a colonial statute which the plaintiff himself examined. The bill was dismissed without costs, but an appeal is pending.

other words, one on which the person seeking to rescind the contract relied when he entered into it, and in the absence of which it is reasonable to infer that he would not have entered into it at all. If the representation is not of this nature, the remedy of the person aggrieved is to have the misstatement made good, but not to avoid his own act, unless indeed compensation cannot be obtained. This is well illustrated by the following cases: Pulsford v. Richards, Jennings v. Broughton, and Robson v. the Earl of Devon.

Rule in Pulsford v. Richards.

SEC. 241. In Pulsford v. Richards,[1] the projectors of a Belgian railway issued a prospectus for the formation of a company, stating that they transferred to the company the concession obtained from the Belgian government, and all the benefits arising from it, subject to certain specified reservations in favor of the promoters for reimbursement of preliminary expenses. The plaintiff, acting on the faith of this prospectus, applied for and accepted shares in the company, but afterward filed a bill against the projectors for a return of all moneys paid by him in respect of such shares with interest, offering to return the shares and all dividends received on account of them. The grounds on which the plaintiff sought to rescind his contract were substantially — 1, that an arrangement had been made by the promoters, with an engineer, highly beneficial to him and detrimental to the company, and that this arrangement was in no way alluded to in the prospectus; and, 2, that the promoters had appropriated to themselves 20,000 shares in the company, in addition to the benefits expressly reserved to them in the prospectus. The court, however, held that there was no such fraud as was sufficient to enable the plaintiff to rescind the contract into which he had entered, and his bill was dismissed with costs. As regards the shares, the court was of opinion that the directors took the shares *bona fide*, and that the number of shares allotted by them to themselves and the engineer was not a fact so material, that the knowledge of it was a matter which the directors were bound to communicate to the public, in order to enable them to come to a sound conclusion as to the probable success of the undertaking in which they were invited to take a part. As to the concealed arrangement with the engineer, the court came to the conclusion that the services performed, and to be performed by him, must have been performed by some one; that he was pecu-

[1] 17 Beav. 87.

liarly well fitted to perform them; that supposing the remuneration agreed upon to have been excessive, still that would only entitle the shareholders to have the amount of excess paid by the directors themselves, and that the non-disclosure to the public of the agreement made with the engineer was not the suppression of a fact which affected the intrinsic value of the undertaking, or consequently afforded a sufficient ground for a rescission by the plaintiff of his contract to take shares in the company.

Rule in Jennings v. Broughton.

SEC. 242. In Jennings v. Broughton,[1] the plaintiff, who had taken shares in a mining company formed by the defendants, sought to rescind the contract on the ground that he had been induced so to do by their misrepresentations. The misrepresentations consisted of exaggerated statements as to the value and prospects of the mine, contained in the report of an engineer employed by the defendants, and which report was submitted by them to the plaintiff. The plaintiff, however, did not altogether rely on this report, but went and examined the mine himself more than once before he purchased the shares in it. The mine had undoubtedly been described in too glowing colors, and it by no means came up to the expectations formed of it; but the court was of opinion, upon the evidence, that the plaintiff had not relied on what was represented to be actually existing, that he not only had had the same means as the defendants of ascertaining the truth, but that he had availed himself of those means, and that his deception was as much owing to his own error of judgment as to any thing else. His bill, therefore, was dismissed, and with costs, and an appeal by him was also dismissed.

Rule in Robson v. Earl of Devon.

SEC. 243. In Robson v. The Earl of Devon,[2] the plaintiff, a stockbroker, was induced by the secretary of a company, first to advance him 500*l.* on the security of 1,000 1*l.* shares, on each of which 1*l.* was certified to have been paid up; and secondly, to purchase 1,200 other shares. On the failure of the company, the plaintiff sought to have both transactions declared void, and to obtain back from the

[1] 17 Beav. 234, and 5 De G. Mac. & G. 126. See, also, Charlesworth v. Jennings, 34 Beav. 96, where a sale of a share in a company of worsted spinners was set aside because the balance sheet upon which the parties relied turned out to be incorrect and false. See, also, Slaughter v. Huling, 4 Dana (Ky.), 426; Chase v. Garvin, 19 Me. 212, and Buck v. Kantowies, 3 Kay & J. 330, in which sales of interests in partnerships were set aside for fraud on the part of the vendor.

[2] 3 Jur. (N. S.) 567, and 4 id. 245.

company his 500*l.*, and the money paid for the purchased shares. The plaintiff rested his case against the company upon the following, amongst other grounds, viz.: First, that the company's prospectus showed that no shares ought to have been issued before a certain amount of capital had been subscribed; and, secondly, that nothing had ever been paid in respect of the shares on which the 500*l.* had been advanced. But it was held that the plaintiff was entitled to no relief on either of these grounds. For, first, it was by no means clear that the capital, required by the prospectus to be subscribed, had not in fact been subscribed; secondly, the plaintiff had not parted with his money on the faith of the prospectus, so that it was immaterial to consider what was there stated; and, thirdly, the shares on the security of which he lent his money were, as between the holder and the company, to be taken as paid-up shares, and therefore it was of no consequence to the plaintiff, whether any thing had actually been paid upon them or not.

Equity will rescind contract of partnership for fraud.

SEC. 244. Where a person is inveigled by the false representations of others to become partner with them, a court of equity will clearly rescind the contract of partnership at his instance.[1] The case of Pillans v. Harkness[2] affords a good example of this. In the spring of 1709, four persons, Pillans, Harkness, Stewart and Denn, agreed by deed to become partner in the fishing trade, and to share the profits and losses equally, confining their fishing to the west coasts of North Britain. It was subsequently agreed to extend the fishing operations and to increase the capital, and another deed was executed which, it appears, stated that the capital originally agreed to be subscribed had been duly paid by all the partners. Harkness was to take no active part in the partnership business, but Pillans was to have the exclusive management of it in the north, at a salary, and Stewart and Denn were to have the exclusive management of it in London. Pillans was to transmit accounts to London, all proper accounts were to be kept by Stewart and Denn, and Harkness was to have free access to the accounts of the concern. Harkness, from time to time, paid various sums toward carrying on the business of the firm, but it does

[1] Chase v. Garvin, 19 Me. 212; Slaughter v. Huling, 4 Dana (Ky.), 426, where one partner having knowledge of facts that enhance the value of the business, by concealing the facts from another partner, buys his interest at a sum much less than its real value, a court of equity will set aside the sale for fraud. Nicholson v. Janeway, 16 N. J. 288.

[2] Colles, 442 (called Harkness v. Steward, and Steward v. Harkness, in the table of cases to the Dublin edit. of 1789.)

not appear that any thing was ever divided in the shape of real or pretended profits. In the summer of 1711 Harkness discovered that Pillans, Stewart and Denn, instead of being engaged in the fishing business for the benefit of the firm, were engaged in private speculations of their own in the wine trade. He also discovered that Pillans and Stewart had not contributed their shares of the capital of the firm, and that Pillans who had been represented as a person acquainted with, and skilled in fishing, was in truth wholly ignorant of fishing, and of every thing relating to the fishing trade. Harkness alleged that he confided in the management of Pillans and Stewart without suspicion until July, 1711, when he pressed Stewart to let him see the partnership accounts; that after many frivolous excuses he was shown many fine books, neatly bound, which he was told were the partnership books; that not being versed in accounts he took an accountant with him to examine them; but that to his surprise the books, when opened, were found to consist entirely of blank paper without a word or figure written in them. Harkness thereupon, finding that he had been fraudulently drawn in and imposed upon by Pillans and Stewart, filed a bill against Pillans, Stewart and Denn for a discovery of their transactions under the partnership, and for the recovery of his money.[1] The chancellor decreed Stewart and Pillans to account for all moneys paid by the plaintiff to them or either of them, and to pay what should appear due to him with interest, the plaintiff to be absolutely discharged from the articles, agreements and partnerships, Stewart and Pillans to indemnify him from all costs and damages whatsoever touching the articles, or any partnership in respect thereof, and to pay the costs of the suit. This decree was affirmed on appeal to the house of lords.

Rule in Rawlins v. Wickham.

SEC. 245. A more recent case of the same description is Rawlins v. Wickham.[2] There the plaintiff was induced by the misrepresentations of two persons, A and B, to enter into partnership with them as bankers, and he and they, after carrying on their business for four years, transferred it to other parties. Shortly after this transfer, the plain-

[1] The defendants relied on the lapse of time and laches and acquiescence on the part of the plaintiff; and particularly on the fact that he had entered into another agreement with them to the effect that the defendants should become partners in another fishing concern, and share their profits in that with the plaintiff, and that such partnership had been entered into. The evidence, however, failed to show that the plaintiff had any knowledge of this alleged other partnership, or that he was aware of what had been going on, until shortly before he filed his bill.

[2] 4 Jur. (N. S.) 990, and 5 id. 278; now also reported in 1 Giff. 355.

tiff for the first time became aware of the falsity of the statement by which he had been induced to become a partner. He brought an action against A and B for their misrepresentations; pending the proceedings at law A died, but the action was continued against B, and a verdict against him for damages was obtained. After the verdict B became insolvent, and thereupon the plaintiff filed a bill against B and the executors of A, praying that the partnership into which he had entered might be declared void, that the partnership articles might be canceled, that the defendants might be decreed to repay him the sum paid by him on entering into the partnership, with interest, and to execute a sufficient indemnity against the outstanding debts and liabilities which the plaintiff had or might become subject to in respect of the dealings and transactions of the partnership, and for an account of such debts and liabilities, and of the moneys already paid by the plaintiff on account of the partnership debts, and for repayment of such moneys with interest. A decree was made in the plaintiff's favor and an appeal by A's executors was dismissed. In this case the deceased partner had clearly been a party to the misrepresentation, and although it was proved that he was ignorant of the real truth, and had not stated that to be true which he knew to be false, still it was held that he ought not to have stated what he did not know to be true, and that he was legally answerable for the falsity of his own assertions. It was also held that the plaintiff was entitled to assume that the statements made to him were true until he had reason to suppose that they were not, and that it was no answer to his case that if he had examined the partnership books he would have discovered the true state of affairs.[1]

Bill in equity lies to recover back money invested in partnership induced by fraudulent representations of copartner.

SEC. 246. It was decided more than a century ago that persons who had been induced by fraud on the part of the promoters of a bubble company to subscribe for shares in it, might obtain their money back by a bill in equity, although an action at law might have been brought for the same purpose with success,[2] and this doctrine has ever since been recognized as correct, and it has frequently been acted upon of late.[3]

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[1] Compare Jennings v. Broughton, where the plaintiff did not rely on the defendant's statements.

[2] Colt v. Woollaston, 2 P. W. 154: Chase v. Garvin, 19 Me. 212; Slaughter v. Huling, 4 Dana (Ky.) 426.

[3] Green v. Barrett, 1 Sim. 45; Blain v. Agar, 2 id. 289; Cridland v. De Mauley, 1 De G. & S. 459; Stainbank v. Fernley, 9 id. 556; Beeching v. Lloyd, 3 Drew. 227. Compare Bell v. Mexborough, 5 Ra. Ca. 149.

If a director of a company is applied to for unallotted shares and he transfers to the applicant shares already allotted to himself, he thereby commits a fraud which will enable the transferee to set aside the transfer and to recover back what he may have paid for the shares.[1]

In the simple case where two parties only are concerned, viz., the partner defrauded and the partner defrauding, the right of the former to rescind the contract of partnership cannot for a moment be doubted. But where third persons are concerned to whom no fraud is legally or morally imputable, considerable difficulty is experienced in giving effect to this right of the party defrauded, and to the conflicting rights of those who have acted on the faith of his being a partner, and who insist therefore that as between him and them he cannot be heard to say that he is not one.[2] This difficulty is particularly felt when a creditor of a company seeks to levy execution against a person who is a shareholder therein, but who has been induced to become so by fraud, and it is still more felt when the question arises whether such shareholder ought to be put on the list of contributories on the winding up of the company. As regards the creditors, it is clear that their rights in no way depend upon whether a *de facto* shareholder has been induced to become a shareholder by fraud, or not,[3] and as regards the liability of such a shareholder to be put on the list of contributories, it seems now settled that he must be on the list unless the fraud practiced upon him is imputable to the company, and is not to be regarded as the fraud of some one or more of its members only.[4]

When a person has been induced by the fraud of some particular shareholder to purchase shares of him, the right of the person defrauded is to rescind the contract of sale, and to throw the shares back on the person from whom he took them, and to be indemnified by him against all losses sustained in consequence of having taken the shares.[5] This is apparently the limit of the right of the person defrauded in the case supposed.[6]

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[1] Blake v. Mowatt, 21 Beav. 603.

[2] See Ex parte Broom, 1 Rose, 69; Jeffreys v. Smith, 3 Russ. 158; Macbride v. Lindsay, 9 Ha. 574.

[3] Henderson v. The Royal British Bank, 7 E. & B. 356, E. C. L. R. 90; Daniel v. The R. B. Bank, 1 H. & N. 681; Powis v. Harding, 1 C. B. (N. S.) 533; E. C. L. R. 87; Howard v. Shaw, 9 Ir. Law Rep. 335.

[4] See Jeffreys v. Smith, 3 Russ. 158, and compare Bell's Case, 22 Beav. 35, and Brockwell's Case, 4 Drew. 205, with Holt's Case, 22 Beav. 48; Gibson's Case, 2 De G. & J. 275.

[5] See Stainbank v. Fernley, 9 Sim. 556, and Seddon v. Connell, 10 id. 58 and 79.

[6] An action for damages might be brought in such a case, but this is not so complete a remedy.

Rule in Macbride v. Lindsay.

SEC. 247. Upon the question of the rescission of a contract of partnership for fraud, the case of Macbride v. Lindsay[1] is of considerable importance. There the plaintiff had been induced by the fraudulent representations of the directors of a chartered company to become a member of the company, and he filed a bill against the company and its directors, praying for, amongst other things, a return of all moneys paid by him to the company, with interest, and for an injunction to restrain the making of further calls upon him, and for an indemnity against any liability in respect of the engagements of the company. A demurrer to this bill was allowed on the ground that the fraud of which the plaintiff complained gave him no right to rescind his contract, except a right common to himself and others who were not represented in the suit.[2] It was also held in this case that the plaintiff was entitled to no relief on the ground that the charter had been obtained by a fraud on the crown, for although the crown might repeal the charter if it thought fit, a shareholder could not dispute its validity in such a suit as that before the court.

Equitable jurisdiction to rescind agreements generally.

SEC. 248. Besides being called upon to rescind agreements for the formation of a partnership, courts of equity are frequently applied to by partners, or those claiming under them, to rescind agreements of other descriptions, and especially agreements come to on or after a dissolution. Supposing every member of a firm to be *sui juris*, any one may retire upon any terms to which he and his copartners may choose to assent; and if there is no fraud or concealment on either side, all will be bound by any agreement into which he and they may enter, although it might ultimately turn out that a bad bargain has been made.

For example, in Knight v. Marjoribanks[3] certain persons were partners in a speculation in Australia. The speculation was not at first successful, and it was necessary for the partners frequently to contribute large sums of money for the purpose of carrying it on. The plaintiff, who was one of the partners, was greatly pressed for money, and was unable to contribute his proportion of the required capital. A sum of upwards of 5,000*l.* was alleged to be due from him to the concern; he never questioned the accuracy of this statement, but

[1] 9 Ha. 574.

[2] Seddon v. Connell, 10 Sim. 58, is another instance of an attempt to rescind failing for want of parties.

[3] 11 Beav. 322; and 2 Mac. & G. 10.

assented to its correctness, and never examined or sought to examine any books or accounts; and in consideration of the sum so alleged to be due, and of 250*l.* cash, he assigned all his interest in the concern to his copartners, and released them from all demands. The speculation afterward proving profitable, he sought to set aside this transaction on the ground of fraud and inadequacy of consideration. But as no fraud was proved, as the plaintiff knew very well what he was about, as he was content that no accounts should be taken, and that no person should act as his adviser, and as, although he was undoubtedly in distress, and his copartners knew it, yet they had taken no unfair advantage of that circumstance, it was held both by Lord Langdale, and by Lord Cottenham on appeal, that the transaction was binding and could not be impeached.[1]

Any arrangement which, on the principle here adverted to, is binding on the partners themselves, will also, as a general rule, be binding as between the assignees or executors of the retiring partners on the one hand, and the continuing partners and their assignees or executors on the other.[2] But as regards assignees, it must not be forgotten that they can set aside arrangements entered into in fraud of creditors, although such arrangements may be binding as between the parties to them and their respective executors.[3]

Notwithstanding the inability of a retiring partner, and of those claiming under him, to avoid an agreement fairly come to between him and his copartners, the good faith and open dealing which one partner has a right to expect from another, never require to be more scrupulously observed than when one of them is retiring upon terms agreed to upon the strength of representations as to the state of the partnership accounts; and an agreement entered into on a dissolution will be set aside by courts of equity if it can be shown to have been based upon error, or to have been tainted by fraud, whether in the shape of positive misrepresentation or of concealment of the truth. Thus, in Chandler v. Dorsett,[4] the plaintiff and the defendant dissolved partnership; an account was drawn up by the defendant, who made it appear that there was a balance against the plaintiff. The plaintiff gave his note for the amount of this balance, and afterward having discovered mistakes in the account, filed a bill for a new

[1] See, also, Ramsbottom v. Parker, 6 Madd. 5; M'Clure v. Ripley, 2 Mac. & G. 274; Cockle v. Whiting, Taml. 55.

[2] Ramsbottom v. Parker, 6 Madd. 5; Luckie v. Forsyth, 3 Jo. & Lat. 388.

[3] See Anderson v. Maltby, 2 Ves. Jr. 255; Billiter v. Young, 6 E. & B. 40; E. C. L. R. 88; Warden v. Jones, 23 Beav. 497.

[4] Finch, 431. See, too, Maddeford v. Austwick, 1 Sim. 89.

account. The defendant pleaded an account stated, but the court decreed that the defendant should come to a new account, and that what should appear to be due on taking it should be paid with interest. So, in Spittal v. Smith[1] where the plaintiff was entitled to a share of the produce of a whaling voyage, and the defendant paid him a sum of money as his share, for which the plaintiff gave a receipt, it was held that, as there had been concealment on the part of the defendant, the plaintiff was entitled to an inquiry as to whether certain deductions which had been made were proper.

The principles illustrated by the foregoing decisions apply most strongly to the case of a partner who is expelled by the others. Powers of expulsion are always construed strictly, and unless they are exercised with perfect good faith, the expulsion will be declared void by a court of equity, and the partner wrongfully expelled will be restored to his position, and will not be held bound by accounts which may have been signed by him in ignorance of material facts.[2]

Hitherto the arrangement entered into, and afterward called in question, has been supposed to have been made between the partners themselves. But more difficulty arises where an arrangement is entered into between the representatives of a deceased partner on the one hand, and the continuing partners on the other. Two cases have here to be considered, according as the representative of the deceased is or is not himself a partner in the firm.

Executors of deceased partner—Powers of, in certain cases.

SEC. 249. If an executor of a deceased partner is not a member of the firm, it is competent for him and the surviving partners to agree that the share of the deceased shall be ascertained in a particular way, or be taken at a certain value. And although it has been said that the creditors, or other persons interested in the estate of the deceased, may impeach such an agreement by instituting a suit against the surviving partners and the executors of the deceased,[3] still agreements of the kind in question cannot be successfully impeached, unless there has been some fraud or collusion between them and the executors. In Davies v. Davies[4] Lord Langdale observed, "It has been said in the course of the argument that, in a suit constituted as this is against the executor and

[1] Taml. 45.

[2] See Blissett v. Daniel, 10 Ha. 538.

[3] See Bowsher v. Watkins, 1 R. & M. 277; E. C. L. R. 21; Gedge v. Traill, id. 281; Mechanics' Bank v. Hildreth, 9 Cush. (Mass.) 356; Harper v. Lamping, 33 Cal. 649; McDougal v. Banks, 13 Ga. 452; Roys v. Vilas, 18 Wis. 174; Tomlinson v. Ward, 2 Paine (U. S. C. C.) 11; Martin v. Kirksey, 23 Ga. 164. But unless an agreement is come to, the business must be sold. Dickinson v. Dickinson, 29 Conn. 607.

[4] 2 Keen, 534.

surviving partner of the testator, for an account of the partnership transactions, it was not necessary to prove the fraud and collusion which are charged in the bill, and the case of Bowsher v. Watkins was cited in support of that proposition. I well recollect that there were special circumstances which induced Sir John Leach to come to the conclusion he did in that case, and that the decision was far from establishing the general proposition that in every case a bill might be filed against an executor and surviving partner of the testator without charging and proving fraud and collusion. In this case there are no special circumstances. It is a bill filed by persons beneficially interested in the testator's estate against the executor and the surviving partner, and it seeks to have the partnership accounts now. The defendant, the surviving partner, by his plea avers that an account was settled with the executor on the 31st of December, 1832, and that, if unimpeached, is a sufficient defense to the bill." Later cases are in conformity with this decision.[1]

If there has been fraud or collusion between the surviving partners and the executors of the deceased partner, the case naturally assumes a different aspect, and any arrangement between them will be liable to be set aside at the suit of the persons interested in the estate of the deceased.[2] And, even although there be no fraud or collusion, still, if the executor has obtained less than the true value of the deceased's share in the partnership estate, the executor may be liable as for a *devastavit*, although the surviving partner may be protected against all demands. But if, in a case of difficulty, the executor has acted with a *bona fide* view to do his best for the estate he represents, a court of equity will not be willing to make him account for what, without his willful default, he might have received from the surviving partners.[3]

If a partner dies and leaves his copartner his executor, much greater difficulty is met with than in the case last supposed. By the present hypothesis the executor is invested with two characters, and his interest as surviving partner is often in conflict with his duty as the representative of the deceased. This conflict of duty and of interest renders it almost impossible for the executor to enter into any

[1] Chambers v. Howell, 11 Beav. 6; Stainton v. The Carron Co., 18 Beav. 146; and as to accounts settled by one of several executors, Smith v. Everett, 5 Jur. (N. S.) 1332.

[2] As in Cook v. Collingridge, Jac. 607; Rice v. Gordon, 11 Beav. 265. Less than fraud or collusion will justify a suit against an executor of a deceased partner and the surviving partners, Travis v. Milne, 9 Ha. 141, but will not, it is apprehended, invalidate arrangements into which they may have entered for payment of the shares of the deceased.

[3] See Rowley v. Adams, 7 Beav. 395.

arrangement with respect to the share of the deceased in the partnership estate which those interested in that share may not afterward succeed in setting aside.[1]

In Wedderburn v. Wedderburn,[2] a leading case on this subject, an account of a deceased partner's estate was directed after a lapse of thirty years, and repeated changes in the firm and after several deeds and a release had been executed by the parties beneficially interested. The surviving partners were the executors of the deceased, and were guardians of the persons beneficially entitled to his share, and the settlements and releases were executed in ignorance of the true state of the partnership accounts. So in Millar v. Craig,[3] where one partner died, leaving four executors, of whom two were members of the firm, an account was settled between the executors and the residuary legatees, and releases were executed; but errors having been proved in the accounts, the releases were set aside, and the accounts were reopened. Again, in Stoken v. Dawson,[4] a partner by his will authorized a sale of his share to his copartner, whom he appointed one of his executors. The surviving partner purchased the share of the deceased at a valuation, but the purchase was set aside at a suit of the son of the deceased, after a lapse of seven years. So in Rice v. Gordon,[5] where a partner died, some of his copartners obtained administration to his estate, and sold part of the assets of the deceased to another of the partners, but at an under value; the sale was set aside at the suit of a creditor.

In all these cases there was some ground for setting aside the arrangement made by the executors, in addition to the mere fact that they were also surviving partners. But, as observed by Lord Eldon in Cook v. Collingridge,[6] "one of the most established rules is, that persons dealing as trustees and executors must put their own interest entirely out of the question, and this is so difficult to do in a transaction in which they are dealing with themselves that the court will not inquire whether it has been done or not, but at once says such a transaction cannot stand."[7]

Of specific performance.

SEC. 250. If two persons have agreed to enter into partnership, and

[1] See Cook v. Collingridge, Jac. 607.
[2] 2 Keen, 722, and 4 M. & Cr. 41.
[3] 6 Beav. 433; in this case no question was raised as against the partners who were not executors.
[4] 9 Beav. 239.
[5] 11 Beav. 265.
[6] Jac. 621.
[7] The position of the executors of a deceased partner will be examined at length hereafter, and the subject above noticed will be again adverted to on that occasion.

one of them refuses to abide by the agreement, the remedy for the other is an action for damages, and not, excepting in the cases to be presently noticed, a suit for specific performance. To compel an unwilling person to become a partner with another would not be conducive to the welfare of the latter, any more than to compel a man to marry a woman he did not like would be for the benefit of the lady. Moreover, to decree specific performance of an agreement for a partnership at will would be nugatory, inasmuch as it might be dissolved the moment after the decree was made. As a rule, therefore, courts of equity will not decree specific performance of an agreement for a partnership.[1] One of the best considered cases on this subject is Stooker v. Wedderburn;[2] there the plaintiff had obtained a patent, and it was agreed between him and the defendants, that a company should be formed by them for the purpose of working the patent; that the plaintiff should assign the patent to the company, give his whole services to it for two years, do his best to improve his invention, and give the company the full benefit of all improvements. Owing to a doubt respecting the validity of the patent, the defendants refused to abide by the agreement, and thereupon the plaintiff filed a bill for specific performance, praying, amongst other things, that the defendants might be decreed to take such steps as might be necessary for the registration and incorporation of the company. To this bill the defendants demurred, and the demurrer was allowed with costs, on the ground that the agreement was one and entire, and that, if a decree were made in the plaintiff's favor, the court could neither compel him to perform his part nor restore the defendants to their original position in case he did not.

However, if the parties have agreed to execute some formal instrument which would have the effect of altering their position at law, and of conferring rights which do not exist so long as the agreement is not carried out, in such a case, and for the purpose of putting the parties into a legal position agreed upon, the execution of that formal instrument may be decreed, although the partnership thereby formed might be immediately dissolved.[3] The principle upon which a court of equity proceeds in a case of this description is the same as that which induces it to decree execution of a lease under seal, notwith-

[1] Hercy v. Birch, 9 Ves. 357; Sheffield Gas, etc., Co. v. Harrison, 17 Beav. 294; Downs v. Collins, 6 Ha. 418; Maxwell v. The Port Tenant Co., 24 Beav. 495, where, however, there was fraud.

[2] 3 K. & J. 393.

[3] Buxton v. Lister, 3 Atk. 385, and see 1 Swanst. 518, note, and Stocker v. Wedderburn, 3 K. & J. 393, per V. C. Wood, p. 403.

standing the term for which the lease was to continue has already expired.[1]

In England v. Curling,[2] the plaintiff and two of the defendants agreed to become partners as ship agents for seven, fourteen, or twenty-one years, and they signed with their initials an agreement to that effect. A deed was prepared to carry out the agreement; the deed, however, was never executed, and it differed somewhat from the agreement. The parties carried on business as partners under the agreement for eleven years, and then they began to quarrel. The defendant Curling, who appears to have been in the wrong from the beginning, gave notice to dissolve in three months; he retired from the partnership and entered in partnership with other persons, and carried on business with them on the premises, and in the name of the old firm. The new firm opened the letters addressed to the old one, and gave notice of its dissolution to its correspondents. The plaintiff then filed a bill for specific performance and an injunction, and he obtained a decree.[3]

The only other class of cases in which any thing like specific performance of an agreement for a partnership will be decreed, is where a person who has agreed with another to share the profits of some joint adventure seeks to obtain that share after the adventure has come to an end. Although the decree giving him the relief he asks may be prefaced by a declaration that the agreement relied upon ought to be specifically performed, this has not the effect of creating a partnership to be carried on by the litigants, but merely serves as a foundation for the decree for an account, which is the substantial part of what is sought and given. An instance of this class of cases is afforded by Dale v. Hamilton.[4] There, in substance, three persons

[1] See Wilkinson v. Torkington, 2 Y. & C. Ex. 726. and the cases there cited.

[2] 8 Beav. 129.

[3] The following was the minute of the decree: "The court doth declare that the agreement for a copartnership dated, etc., is a binding agreement between the parties thereto, and ought to be specifically performed and carried into execution, and doth order and decree the same accordingly. Refer it to the master to inquire whether any and what variations have been made in the said agreement by and with the assent of the several parties thereto since the date thereof. Let the master settle and approve of a proper deed of copartnership between the said parties in pursuance of the said agreement, having regard to any variations which he may find to have been made in the said agreement as hereinbefore directed, and let the parties execute it. Continue the injunction against the defendant Curling."

[4] 5 Ha. 369, and 2 Ph. 266. In Birchett v. Bolling, 5 Munf. (Va.) 435 a number of persons agreed to build a hotel; a written agreement was entered into and signed by all. The partner who sold the lot on which the hotel was to be erected, having complied with the contract on his part, brought a bill for a specific performance on the part of the others, and it was held that he was entitled to the relief. See, also, Whit-

had agreed to purchase land, to build on it and improve it, and then to sell it for their common benefit. Land was accordingly obtained, built upon and improved, and subsequently the right of one of the three persons to any share in the adventure was denied by the other two. He thereupon filed a bill for a sale of the land, for an account of the joint speculation, and for a proper distribution of the moneys arising from the sale; and the court held him entitled to this relief.

Another instance of the same kind is afforded by Webster v. Bray.[1] In that case the plaintiff and the defendant had been jointly retained as solicitors to a company. They were not in partnership as solicitors generally, but the plaintiff insisted that they were partners as regarded the business done for the company, and that the payments made by the company to each ought to be shared by both. The defendant insisted that there was no partnership, and that each was to be paid for the work done by himself, and to retain for his own benefit

worth v. Harris, 40 Miss. 484; Cooper v. Frederick, 4 Iowa, 403. But a contract of this character will not be specifically enforced, if it appears that the business will be unprofitable. Thus, in Wadsworth v. Manning, 4 Miller (Md.) 70, the plaintiff agreed with a firm to furnish them a large quantity of zinc ore each year for three years, and the firm was to furnish buildings and machinery and convert the ore into paint, and divide the profits. The cost of the buildings and machinery, after a specified time, was to be paid out of the profits. The defendants refused to proceed with the business, upon the ground that it could only be followed by financial ruin to all the parties, and the court, being satisfied that this would be the result, refused to decree the specific performance of the agreement. So, in Sims v. McEwen, 27 Ala. 187, one McEwen purchased a lot for seven thousand dollars, to be paid for by installments, and afterward verbally agreed complainants should superintend the erection of a building on the lot, repay the money advanced by him on the purchase and other expenses incident to it, take charge of the house as a hotel, and have one-half of the rents and profits thereof, which were to be applied to the payment of said debt. The contract was denied; plaintiff was alleged to be insolvent; the statute of frauds was relied upon as a bar, and a demurrer was filed to the bill for want of equity. Held, that as the complainant was insolvent and could not pay his portion unless out of the profits of the contemplated hotel, which was doubtful and uncertain, and as the death of McEwen dissolved the copartnership, there being no agreement to continue it after his death, the court could not decree a specific performance, and could not decree compensation for services in erecting the building, as such compensation could be had at law. The contract was void by the statute of frauds and perjuries. Nor will specific performance be decreed against the heirs of a deceased partner in favor of a surviving partner, until an account of profits is taken. Thus, in Fish v. Lightner, 44 Mo. 269, Lightner, a partner owning real estate with improvements, agreed in articles of copartnership with Fish, that when the latter should have paid him three thousand seven hundred and fifty dollars, with interest, and one-half the expenses, and pay for one-half the stock and provender necessary for a livery stable business, then Lightner should convey to Fish one-half of the whole property. Lightner died, and Fish filed a petition for specific performance against the heirs and representatives of the deceased. Held, before the court would act on such a petition, an account of profit and loss of the partnership business must be taken.

[1] 7 Ha. 159.

all payments in respect of such work. The plaintiff having resigned, filed a bill for an account, and the court made a decree in his favor, declaring that the plaintiff and the defendant were jointly and equally interested in the profits and loss of the business transacted by them, or either of them, as solicitors to the company.[1]

Relief in the shape of specific performance may be required for other purposes besides the carrying into execution of agreements to form partnerships. The assistance of a court of equity is often requisite to compel those engaged in a going concern to act conformably to the articles of partnership; and also to compel those who have dissolved partnership to observe the stipulations into which they have entered. The principles on which the courts act in granting or withholding assistance when sought for the former purpose, will be considered hereafter; and with respect to the specific performance, after a dissolution of partnership, of agreements entered into by the partners previously to, or at the time of dissolution, it need only be observed that relief will be granted or refused upon the principles by which the court is ordinarily guided in questions of specific performance, and that nothing turns on the circumstance of the litigants having been partners. It would, therefore, be foreign to the objects of the present treatise to prosecute this subject further; but for purposes of reference, it may be useful to mention that the court has enforced the following agreements entered into upon or with a view to a dissolution, namely:

Agreements not to carry on business within a certain distance or for a certain space of time.[2]

Agreements as to the custody of partnership books and the furnishing of copies thereof.[3]

Agreements that a third party and he only shall get in debts.[4]

Agreements that the value of the share of an outgoing or a deceased partner, shall be ascertained in a specified way and taken accordingly.[5]

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[1] Robinson v. Anderson, 20 Beav. 98, and 7 De G. Mac. & G. 239, is a similar case.

[2] Whittaker v. Howe, 3 Beav., 383; and see Coates v. Coates, 6 Madd. 287, and Williams v. Williams, 1 Wis. Ch. 473, note.

[3] Lingen v. Simpson, 1 Sim. & Stu. 600; and see Whittaker v. Howe, 3 Beav. 383.

[4] Davis v. Amer, 3 Drew. 64.

[5] Morris v. Kearsley, 2 Y. & C. Ex. 139; Essex v. Essex, 20 Beav. 442; King v. Chuck. 17 id. 325; and see Featherstonhaugh v. Turner, 25 id. 382, and Gibson v. Goldsmid, 5 De G. Mac & G. 757, reversing S. C., 18 Beav. 584. Compare Downs v. Collins, 6 Ha. 418, where to have enforced the agreement would have been to decree specific performance of a contract for a partnership; and Cooper v. Hood, 7 W. R. 83, where a decree was refused on the ground that the agreement sought to be enforced was too vague in its terms.

Agreements to grant an annuity to a retiring partner and his widow.[1]

Agreements not to divulge or make use of a trade secret.

The question whether a court of equity will decree the specific performance of an agreement to allot and accept shares in a company must be considered as still open. An ordinary contract for the sale of shares is one which the court will decree to be specifically performed; and it is immaterial whether the vendor has or has not other shares which he does not sell, or, in other words, whether he and the purchaser will or will not become coshareholders. But a contract for the sale of shares by one individual to another is distinguishable in many respects from a contract for the allotment and acceptance of shares in a company to be formed, and authority is not wanting to show that specific performance of a contract of this last description will not be decreed.[2] It is not, however, easy to understand the objection to a decree for specific performance in such a case; for although the shareholder might sell and transfer his shares as soon as the decree was made, the decree would not be inoperative. If the shareholder were the plaintiff, he could not be got rid of; whilst if he were the defendant, he could only retire from the company by transferring his shares to somebody else. The reason, therefore, which induces the court to decline to decree specific performance of an agreement for an ordinary partnership at will, is scarcely applicable to such an agreement as that now under consideration.[3] Moreover, nothing is more common than for the promoters of a company to agree to sell property to the company in consideration of a certain number of paid-up shares, and it is certainly difficult to see why such a contract should not be enforced; indeed, there is good authority for saying that a decree for its specific performance might be obtained.[4] Again, persons who have agreed to take shares in a company are every day made contributors for the purpose of winding up; and they are so upon the ground that, although they are not actually shareholders, they have entered into an agreement to take shares which is binding upon them. Many of these cases are only intelligible upon the assumption that a contract for the allotment and acceptance of shares is one which a court of equity ought to enforce.

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[1] Aubin v. Holt, 2 K. & J. 66.

[2] Morison v. Moat, 9 Ha. 241.

[3] Sheffield Gas, etc., Co. v. Harrison, 17 Beav. 294; Columbine v. Chichester, 2 Ph. 27. In this last case, there were circumstances to show that specific performance was impossible.

[4] See Fyfe v. Swabey, 16 Jur. 49, M. R. 662.

Rule in Bell v. Mexborough.

SEC. 251. In Bell v. Lord Mexborough,[1] an unsuccessful attempt was made by the subscribers to an abortive railway company to compel two members of the provisional committee to perform an agreement to take shares, alleged to have been entered into between them and the managing committee, and to pay up the deposits on the shares so agreed to be taken. The bill alleged that the two members in question had, by appearing as provisional committee-men, induced the plaintiffs to take shares; that the same two members had accepted shares in the company from the managing committee, but had never paid the deposits upon them, and that the managing committee refused to take proceedings to compel payment of such deposits. The bill also complained of various acts of misconduct on the part of the managing committee, and stated that unless all the deposits on the shares taken were paid up, the company would be insolvent, and the plaintiffs would be liable to be sued by its creditors. The bill then prayed for an account of the dealings and transactions of the company and an account of its assets, including the amounts due from the two members in respect of the shares they had agreed to take, and for the application of the assets in discharge of the liabilities of the company. A demurrer to this bill by the two members complained of was allowed on the ground that the plaintiffs had not made out any case for relief against them, and that the plaintiffs' remedy was against the committee of management only. The plaintiffs were, in fact, endeavoring to force a contract not made with themselves, and they did not seek, on the ground of misrepresentation, any relief to which they would not have been entitled, had no such misrepresentation been made. It moreover appeared from the plaintiffs' own showing, that the demurring defendants had never signed the subscribers' agreement or parliamentary contract, or done more than express their willingness to take such shares as might be allotted to them.

If directors of a company enter into an agreement to be performed by the company, and the agreement is one by which the company is not bound, a decree cannot be made for its specific performance by the directors personally.[2]

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[1] 10 Jur. 893, V. C. E., and 12 id. 64, on appeal; also in 5 Ra. Ca. 149.

[2] See Ellis v. Coleman, 25 Beav. 662.

CHAPTER X.

OF THE ENFORCEMENT OF SIMPLE CONTRACTS BETWEEN PARTNERS.

SEC. 252. Of enforcement of contracts between partners.
SEC. 253. When cause of action accrued before commencement of partnership.
SEC. 254. When the cause of action accrued after dissolution.
SEC. 255. When only one item is disputed.
SEC. 256. Items due one partner wrongly carried to.
SEC. 257. In case of dependent transaction.
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SEC. 260. Illustrations—Wilson v. Cutting; Sharp v. Warren.
SEC. 261. Accounting—settlement.
SEC. 262. In case of complete balances.
SEC. 263. Settlement between parties—debt lies for agreed balance.
SEC. 264. Awards.
SEC. 265. Balance found due, when assumpsit lies for—Rackstraw v. Rackstraw.
SEC. 266. Illustrations—Jackson v. Stoppard; Wray v. Milestone.
SEC. 267. Contribution, when and how may be had.
SEC. 268. Rule in Wooley v. Batte.
SEC. 269. Cannot be had at law—Sadler v. Nixon.
SEC. 270. Insulated transactions.
SEC. 271. One partner paying entire debt may sue the others for contribution.
SEC. 272. May proceed in equity.
SEC. 273. Rule when partnership is dissolved.
SEC. 274. Summary.

Labor performed or money expended on account of the partnership.

SEC. 252. Where money has been lent by one partner to another, for the purpose of launching the partnership, the sum so lent is recoverable by action, if it be not introduced into the partnership accounts, and it does not depend on the taking the accounts whether the sum be due or not.[1] But where money is due from one partner to another by simple contract, on the partnership account, payment, except in a few special cases, can only be enforced by application to a court of equity, upon a bill filed for an account and a dissolution of the partnership. Courts of law will not entertain suits of this nature, because it would be useless for one partner to recover what, upon tak-

[1] Ex parte Notley, 1 Mon. & Ayr. 46; Elgie v. Webster, 5 M. & W. 518.

ing a general account amongst all the partners, he might be liable to refund: *frustrà peteret quod mox restiturus esset.* It has been accordingly laid down by a high authority as a perfectly clear maxim, "that one partner cannot maintain an action against his copartner for work and labor performed, or money expended on account of the partnership."[1]

Where the cause of action accrued before the commencement of the partnership.

SEC. 253. Attempts, however, have been made, by means of nice distinctions, to break in upon this broad general rule. Thus, in Holmes v. Higgins[2] it was contended, that the cause of action between

[1] Per Lord Tenterden, 1 B. & C. 76. And see Harvey v. Crickett, 5 M. & S. 336. "Partners cannot sue each other by the law. If two men have a wood jointly, and the one selleth the wood and keepeth all the money wholly to himself, in this case his fellow shall have no remedy against him by the common law; for as they, when they took the wood jointly, put each other in trust, and were contented to occupy and deal together, so the law suffereth them to order the profits thereof." Malyne, Lex Mercat. p. 310.

[2] 1 Barn. & Cres. 74; 2 Dowl. & Ryl. 196. In this case, the plaintiff and defendant were *active* shareholders; otherwise it may be doubted, whether this decision could now be supported, on the ground of their being partners. See Fox v. Clifton, 6 Bing. 776; Howell v. Brodie, 6 Bing. N. C. 44.

A partner cannot recover for services.—The general principle is that a partner cannot recover for his personal services in and about the business of the firm, without there is a special agreement to that effect. Drew v. Ferson, 22 Wis. 651; Zimmerman v. Huber, 29 Ala. 379; Levi v. Karrick, 13 Iowa, 344; Bevans v. Sullivan, 4 Gill. (Md.) 383; Bennett v. Russell, 34 Mo. 524; Bradford v. Kimberly, 3 Johns. Ch. (N. Y.) 431; Dougherty v. Nan Nostrand, 1 Hoff. (N. Y.) 68; Buford v. Neeley, 2 Dev. (N. C.) Eq. 148; Reybold v. Dodd, 1 Harr. (Del.) 401; Cooper v. Reid, 2 Hill's (S. C.) Ch. 549; Cuntif v. Duersville Man. Co., 7 R. I. 325. And it has been held that an attorney could not charge for his services in collecting accounts for a firm of which he was a member, in the absence of an agreement to that effect. Van Dwyer v. McMillan, 37 Ga. 299. But an agreement to allow for services has sometimes been inferred from the course of dealing among the partners, Caldwell v. Leiber, 7 Paige (N. Y.), 483; Lewis v. Moffit, 11 Ill. 392; Pratt v. McHattan, 11 La. An. 260; and he has been permitted to recover for personal services in the business of the firm where he has been appointed a special agent for some particular purpose; Phillips v. Turner, 2 Dev. & B. (N. C.) Eq. 123; See, also, Hite v. Hite, 1 B. Monr. (Ky.) 177, and for expenses incurred by a surviving partner in closing up a partnership business that was continued for some time; O'Reilly v. Brady, 28 Ala. 530; see, also, King v. Hamilton, 16 Ill. 190; Roach v. Perry, id. 37; and in Griggs v. Clark, 23 Cal. 430, the survivor was allowed compensation for services in taking care of stock, a part of the partnership property. We find the same diversity of decisions on this question that we do on the question of allowing interest on accounting between partners. See Survivor's Rights and Powers, *post*. It is evident that no general rule should be laid down on the subject of compensation to the surviving partner who continues the business for the purpose of closing it up. It should depend upon the circumstances of each particular case. The business might be such as to require personal attention and services for a long time, and the incurring of great expense. And the general principle of the law, that in the absence of a special agreement refusing to allow a partner to charge for personal services during their lives, and the continuance of the partnership, would seem to have no application to the survivor, as there would be no presumptions of understanding

the parties accrued before the *commencement* of the partnership, and therefore, that, under the circumstances of that case, an action would lie by one partner against his copartner. It appeared that a joint-stock company was in contemplation. The plaintiff was a shareholder, and was likewise agent for and assistant to the solicitor of the company. The defendant was also a shareholder, and chairman of the meetings. Meetings were held, subscriptions raised, and other steps were taken to obtain a bill in furtherance of the designs of the company; but the bill was ultimately withdrawn, and the scheme failed. An action was then brought by the plaintiff against the defendant, to recover a sum of money for business done and money paid by the plaintiff as agent to the company; and it was contended for the plaintiff that the parties were not partners until a bill was obtained; that the action was not brought for work done in the course of the partnership, but previously to its commencement; and, therefore, that it was maintainable. But the Court of King's Bench held that the members of this association were partners, and that the action could not be supported, either against the defendant as chairman, or against the body of subscribers at large.

Where the cause of action accrued after dissolution.

SEC. 254. Again, in Milburn v. Codd[1] it was contended, that the cause of action accrued after the *determination* of the partnership, and, therefore, that, under the circumstances of that case, the action was maintainable. The plaintiff and defendants had been members of a company which was dissolved. After the dissolution, the defendants were sued by several of the creditors of the company, and they employed the plaintiff, who was an attorney, to defend the actions. The plaintiff then brought his action against the defendants, to recover the amount of his bill of costs. But it was held that such an action could not be supported, for, that the plaintiff, as a partner with the defendants, was bound to contribute to the expenses of the actions against them, and, in the event of his succeeding in this action, he would have to refund a part of the damages, for the purposes of such contribution.[2]

to perform such without compensation. The tendency of modern decisions seems to sustain this view. See Schenkle v. Dana, 118 Mass. 236; S. P. Ambler v. Boulton, 41 L. J. 783; Beachan v. Eckford, 2 Sandf. Ch. 116; Gyger's Appeal, 62 Penn. St. 73; 1 Am. R. 382 n.

[1] 7 Barn & Cres. 419; 1 Mann. & Ryl. 238. See, also, Russell v. Grimes, 46 Mo. 410.

[2] Where there was a sale by one partner of his interest in the firm to another, the latter agreeing to pay therefor the amount of capital which the former had put into it, it was held that an action at law was maintainable therefor. Wells v. Carpenter, 65 Ill. 447. See, also, Wheeler v. Arnold, 30 Mich. 304.

Where only one item is disputed.

SEC. 255. Another case[1] may be mentioned, which, it was contended, was not within the general rule, because there was no necessity for an account, and one item only in the whole transaction was disputed by any of the parties. An action was brought by the assignees of certain bankrupts against Hammond, to recover the sum of 30*l.* under the following circumstances: The bankrupts, before their bankruptcy, and Hammond, undertook to procure a full cargo for a vessel, for certain commission to be paid to them, of which the bankrupts were to receive one moiety, and the defendant the other. The owners of the vessel acceded to the proposal, and the cargo was procured. The defendant made all disbursements, and received all the moneys that were paid, for the use of the owners. The vessel sailed in May, 1820, and the defendant afterward rendered an account to the owners, containing a statement of his disbursements, and a claim of 65*l.* for commission. The owners admitted that the account of disbursements was correct, but refused to settle the account, because they said the defendant had claimed 5*l.* too much for commission. The defendant had received and retained in his hands sufficient to pay all the disbursements made by him, and the 65*l.* claimed for commission. It was contended for the plaintiffs, that this did not fall within the general rule as to partnership transactions, and that they were entitled to recover a moiety of the undisputed part of the commission, namely 30*l.* But the contrary was held by two judges of the Court of King's Bench against Bayley, J. "It is a general rule," said Abbott, C. J., "that, between partners, whether they are so in general or for a particular transaction only, no account can be taken at law. These parties have never settled any account between themselves; and the only ground on which this case is distinguishable from former decisions is that all moneys have been received and paid by one partner. That certainly makes an account between them less necessary; but if we, therefore, held this action to be maintainable, I think we should be breaking down a general rule, and introducing nice distinctions, which it is much better to avoid." And Littledale, J., observed that neither the bankrupts nor the assignees ever assented to the account rendered by the defendant to the owners of the

[1] Bovill v. Hammond, 6 Barn. & Cres. 149. And where there is a partnership as to a single transaction, one partner may maintain an action at law against the other, and need not go into equity for an accounting. Galbraith v. Moore, 2 Watts, 86; Meason v. Kaine, 63 Penn. St. 335; Finlay v. Stewart, 56 id. 183; Wright v. Cumpstrey, 41 id. 102; Cleveland v. Farrar, 4 Brewst. (Penn.) 27.

ship, nor was it finally settled even by them. It appeared to him, therefore, that the case fell within the general rule.

One partner may recover debt due to him wrongfully carried to partnership account. Rule in Smith v. Barrow.

SEC. 256. The two positions, first, that a partner cannot, in an action against his copartner, recover a sum of money due to him on the partnership account; and, second, that he can recover a sum due to him on his own account, but carried wrongfully to that of the partnership, are well illustrated by the case of Smith v. Barrow.[1] The plaintiff, and Robert Smith, his father, had been in partnership together; during which time one Keate became indebted to them in 531*l.* Robert Smith died, leaving the plaintiff his sole executor. After the death of his father, the plaintiff took the defendant into partnership, and Keate became indebted to these two in the further sum of 30*l.* Keate afterward becoming much involved, his effects were transferred to certain trustees, for the benefit of his creditors, and two payments were made in the course of distribution, at different times. The first which was made to these parties (the plaintiff and defendant) was divided between them according to their several proportions; that is, a proportion of the former debt of 531*l.* was allotted to the plaintiff's separate use, and a proportion of the 30*l.* in moieties between them. After this the trustees transmitted a bill of exchange to the plaintiff and defendant, in their joint names, and the defendant alone received the money, under the title of Smith & Barrow. The plaintiff's proportion of this second dividend, so far as related to his original debt, was 79*l.* 14*s.* 6*d.*, for which this action for money had and received was brought. The question was, whether the plaintiff could recover this sum from the defendant in an action for money had and received to the use of the plaintiff, it being contended, on behalf of the defendant, that it was money received on account of a partnership transaction, and, therefore, that the action would not lie. The Court of King's Bench held that the action was maintainable. Ashurst, J.—"The two sums, belonging respectively to the plaintiff and to the partnership account, were consolidated merely for the convenience of the party making the remittance; but the sum now claimed by the plaintiff did not belong to the partnership account; and as the defendant has received a sum of money belonging to the plaintiff alone, which he had wrongfully carried to the partnership account, he is liable to refund it in this action." Buller,

[1] 2 T. R. 476.

J.—"I am of opinion that the action is properly brought. The former dividend was received and divided according to the proportions of the respective debts of the plaintiff, and of the plaintiff and defendant as partners; then on the receipt of the second dividend by the defendant, it should have been divided into two parts, bearing the same proportion to each other as the separate demand of the plaintiff on Keate's estate, and the joint demand of the plaintiff and defendant. The plaintiff would have been solely entitled to the first part, and must have shared the other part with the defendant, as due to the partnership account; so that the first part of this sum was money specifically received by the defendant to the plaintiff's use. With regard to the sum of 30*l.* due to this partnership, I agree that this action cannot be maintained. One partner cannot recover a sum of money received by the other, unless, on a balance struck, that sum be found due to him alone. But this objection does not apply to the larger sum in this case, which is the one in dispute."[1]

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[1] *Remedy at law against partners.*—The liability to a suit at law of one or several members of a firm to another, depends upon the following facts. If the action can be tried and determined irrespective of the state of the partnership accounts between the parties, and if the sum sought to be recovered will not belong to the firm but exclusively to the plaintiff, then, as a general rule, the action is maintainable. Thus, if a firm negotiates its own paper to one of its members, he may maintain an action thereon against the other member. Baring v. Lyman, 1 Story, 396. So one partner may sue another, at law, on a note given by the latter to the former, for the payment of a part of the capital stock. Scott v. Campbell, 30 Ala. 728; see, also, Anderson v. Robertson, 32 Miss. 241. And in Georgia it has been held that the rights of partners, *inter se*, can be settled at law as well as in equity. Wallace v. Hull, 28 Ga. 68. And the fact that one partner sells his individual property to one partner does not make the property or its proceeds joint funds, or prevent the vendor from recovering of the partner the consideration therefor. Elder v. Hood, 38 Ill. 533. So it has been held that if one partner agrees to furnish a certain amount of money to carry on a certain partnership business, and fails so to do, he may be sued for such breach of contract by the partner with whom he contracted. Ellison v. Chapman, 7 Blackf. (Ind.) 224. So one partner may sue others, on a contract made by them as partners before the copartnership was formed between them and him. Mullany v. Keenan, 10 Iowa, 224; see, also, Currier v. Webster, 45 N. H. 226; Currier v. Rowe, 46 id. 72. So, one partner may sue his copartner for money advanced by him in the purchase of a plantation by the latter, where it is not shown that it was purchased on partnership account, and without a liquidation of the partnership affairs. Battaille v. Battaille, 6 La. An. 682. So, where there is a partnership in a particular transaction, a clerk in another business may sue his partner for his compensation in such other capacity, without an accounting in reference to the partnership transactions. Alexander v. Alexander, 12 id. 588. And where a partner's property used in the partnership business has been injured by another partner, it has been held in Arkansas that the remedy of the former therefor is by action at law. Hallver v. Williamowicz, 23 Ark. 566. And in California it has been held that where one partner fraudulently converts to his own use the property supplied by another for the partnership use, this is not only good ground for a dissolution, but that the latter might maintain an action at law therefor. Crosby v. McDermitt, 7 Cal. 146. And one partner may maintain replevin against his copartner, of which he is entitled to the exclusive possession by express contract between them. Kahle v. Sneed, 59 Penn. St. 388; see

In case of independent transactions.

SEC. 257. It is not, however, to be denied, that there are some particular cases in which one partner may, even in an action at law, recover money due to him from his copartner, for a matter connected with the partnership. Thus, if one partner give the other his promissory note, or his separate acceptance for value received on the partnership account, an action will lie on such note or bill.[1] So, if one partner draw upon all the others by name, and they individually accept, he may recover against them; because, by such an acceptance, a separate right is acknowledged to exist.[2] And in some cases which will be noticed presently, an action has been held to be maintainable

also, Bartley v. Williams, 66 id. 329. And if only a single item of account between partners remains unadjusted, an action at law may be maintained thereon. Buckner v. Rice, 34 Mo. 357; Byrd v. Fox, 8 id. 574. So, if one copartner contribute funds which it was the duty of the other to furnish in furtherance of the corporate enterprise, such advances may be recovered without waiting for an adjustment of the business of the copartnership. Wright v. Eastman, 44 Me. 220. As to mode of adjusting accounts where one of three partners has failed to furnish his equal share of capital according to stipulation, see Smith v. Hazelton, 34 Ind. 481; Fleming's Appeal, 67 Penn. St. 18. And where one partner upon the settlement of the partnership account promised to pay the other partner a certain sum, provided he had not already paid it to another party, it was held that assumpsit might be maintained to recover it. Adams v. Funk, 53 Ill. 219; see, also, Dakin v. Graves, 48 N. H. 45. And where one partner sued another on a note having no connection with the partnership business, it was held that the defendant could not set up as a counter-claim his payment of his copartner's share of partnership debts. Wright v. Jacobs, 61 Mo. 19; see, also, Willis v. Simmonds, 51 How. (N. Y.) Pr. 48; Bethel v. Franklin, 57 Mo. 466; Wiggin v. Goodwin, 63 Me. 389. The general doctrine that one partner cannot maintain an action against the firm or his other partners at law where the matter relates to the partnership business affects only the remedy and not the right. Hence, one partner may purchase a note made by the firm of which he is a member. And although he may not be able to maintain an action on it, he may indorse it to a third party who may maintain an action on it against the firm. Kipp v. McChesney, 66 Ill. 460; see, also, Thayer v. Smith, 116 Mass. 363. And the rule that one partner cannot sue another to recover money paid into the firm does not apply where one was induced by another to sign articles of partnership and to pay in the money through the misrepresentation of the other, who obtained the money not for partnership purposes but for his own private use. Hale v. Wilson, 112 Mass. 444. See note 3, *ante*, pp. 322–337.

[1] Preston v. Stratton, 1 Anstr. 50; Stephens v. Thompson, 28 Vt. 80; Moore v. Gano, 12 Ohio, 300; Mulholan v. Eaton, 11 La. 293; Case v. Maxey, 6 Cal. 276; Bonaffe v. Fenner, 14 Miss. 216. So an action will lie upon any promise express or implied. Thus, where it is ascertained by partners who are about closing their partnership concerns, that a balance will be due to one of them on a final settlement, although the exact amount of such balance cannot be ascertained, yet, if the debtor partner gives the creditor partner a promissory note for a sum not exceeding the amount of the balance which will be due on final settlement, such note is founded upon a sufficient consideration, and may be enforced by action at law. Rockwell v. Wilder, 4 Met. (Mass.) 556. If one partner advances money for the benefit of another, to relieve him from his liability for the debts of the firm, and takes his note therefor, this is to be regarded as a private transaction, and the note may be enforced without reference to the state of the partnership accounts; Chamberlain v. Walker, 10 Allen (Mass.) 429.

[2] 4 Bing. 151.

between partners, for contribution in respect of *damages* recovered against one of them. But, with these few exceptions, it may, perhaps, be laid down generally, that in no case can money be so recovered which, when the cause of action accrued, might be placed as an item in the partnership account. It must either have been the basis of the account when the partnership commenced, a sum separated from the account while the partnership continued, or the balance of the account when the partnership ceased, or when a general adjustment of its affairs took place. In these cases, however, an action between the partners may be supported as will appear from the following decisions:

First, then, in Venning v. Leckie,[1] an action was brought to recover money laid out in goods which were to form the stock of a future partnership, and such action was held to be maintainable. The following was the contract in writing for the breach of which the action was brought: "London, 1st of Dec. 1808, Messrs. W. Venning & Co., I agree to take one-half share of the flax undermentioned, bought by you on our joint account, say half in the profits or loss, and to furnish you with half the amount in time for the payment thereof, in case you require it." (Signed by the defendant.) Under which contract was written—

"Dec. 1st, 1-15 of H. & Co., 20 tons——six months;
2nd, 2-16 of A. B. &c., 10 tons——six months;"

together with other like memoranda.

It was objected that no action lay in this case, but that the plaintiffs should have proceeded by bill in equity; for the defendant had had no account of the produce, and would be compelled to seek his relief there. But Lord Ellenborough said there were many deeds of copartnership in which the partners covenant each to advance a certain sum at first, and could it be said that no action would lie by one to enforce that covenant against another, because there were accounts between them afterward which would require unraveling in a court of equity? The purchase of the goods was to launch the partnership; for which between themselves each was to contribute his share. Le Blanc, J., concurred, and observed that the respective sums were to be paid by each, before there could be any account of profit or loss

[1] 13 East, 7. One partner cannot recover in assumpsit against another for advances until a settlement of the partnership accounts, without there was an express promise to pay, even though the partnership has ceased to exist. Leidy v. Messinger, 71 Penn. St. 177. See as to right of a partner to recover of a copartner for money advanced in a transaction not connected with the partnership affairs, Seaman v. Johnson, 46 Mo. 111.

between them, as partners, upon the goods. We may here notice the case of Gale v. Leckie,[1] which in one point was the reverse of that just cited, as it arose from a breach of contract to supply stock in order to launch the partnership. There A agreed to supply B with the manuscript of a work to be printed by the latter, the profits of which were to be equally divided between them. It was held that B might maintain assumpsit against A for refusing to supply manuscript after part of the work had been printed. If A and B commence business as partners, and A advance the whole capital, he may maintain an action against B for a moiety, because, *quoad* B's share, the partnership may be considered as having not yet commenced.[2] But if A and B commence partnership, each advancing their respective shares, and the business is afterward abandoned, neither can maintain an action against the other for his share, because both shares are in partnership, and liable to an account. In the course of the argument in Nockles v. Crosby,[3] Holroyd, J., said: "Suppose five persons enter into partnership, and contribute 1,000*l.* each, and they afterward find the concern a losing one, and put an end to it, can any one maintain an action against the other for his share?" It appears clearly from the judgment of the same learned judge in that case, that he was of opinion that such an action would not be maintainable.

When assumpsit will be maintained.

SEC. 258. *Secondly,* an action of *assumpsit* by one partner against another may be sustained, the money sought to be recovered being deemed to be *separated* from the partnership account. In the case of Coffey v. Brian,[4] Thomas Coffey, John Coffey and Brian, were jointly concerned in the butter trade. John Coffey consigned the butters to Brian, in London, who sold them, and Thomas Coffey accepted bills drawn by John to the amount of the butter sent. Brian having received the proceeds of certain of the butters, engaged to provide for the bills drawn on Thomas Coffey, by a letter in the following terms: "Sir, Your brother, John Coffey, junior, having drawn two bills on you, *viz.*, one for 238*l.* due on, etc., and another for 300*l.* due on, etc., on account of butters sold here for our joint account, the proceeds of which are now in my hands, if you will accept the bills, I hereby

[1] 2 Stark. 107; see, also, Nichol v. Prime, 8 Allen (Mass.) 405; Wills v. Simmonds, 51 How. Pr. (N. Y.) 84.

[2] D. Le Blanc, J., *supra*. D. Park, J., 7 Bing. 714. If there be three intended partners, and one of them fail to bring in his share, it seems that the two may sue the third jointly, without encroaching on the principle laid down in Brand v. Boulcott, 3 Bos. & Pull. 235.

[3] 3 Barn. & Cress. 315. And see the judgment of Littledale, J., in the same case.

[4] 10 Moore, 341; 3 Bing. 54.

formally engage to provide for them when at maturity." Thomas Coffey having been obliged to pay the bills, brought an action against Brian for money had and received, and it was held that he could recover. Best, C. J.: "It had been objected that this is a partnership transaction, and no doubt the money came to the defendant as the money of all three of the partners, but that has happened which divests them of the joint property in it, and vests it in the plaintiff. When the plaintiff paid his acceptances, the money the defendant held as the proceeds of the butters, became separated from the partnership account, and was money had and received by him to the plaintiff's use. When a contract has been executed a party is entitled to recover on the common counts. Here the contract was executed when the plaintiff took up the bills." It is difficult to reconcile the foregoing case with that of Robson v. Curtis,[1] decided by Lord Ellenborough. Robson and Curtis were in the habit of purchasing jointly lots of cattle from the breeders, and selling them in smaller parcels. Cole purchased some of the cattle and paid for them by a bill drawn by Cole and Bruce payable to Robson. Robson indorsed this bill to Curtis. Curtis indorsed it over, and the bill being dishonored, he promised that if Robson would take it up he, Curtis, would pay Robson one-half the amount. Curtis having failed in his payment, was sued by Robson in an action for money paid, but the plaintiff was nonsuited. At the trial it was submitted for the plaintiff, that all partnership had ceased with respect to the transactions on this bill, and that, since it was to be presumed that Curtis had received

[1] 1 Stark. 78. A partner may be sued on a promissory note given for balance of account. Van Amringe v. Ellmaker, 4 Penn. St. 281. In Thouron v. Paul, 6 Whart. (Penn.) 615, the plaintiffs, being owners of goods, sold half to the defendant. The goods were agreed to be shipped to a foreign port, on joint account, the shipment to be under the control of plaintiffs, and profits and loss to be equally divided. The result was a sale by plaintiffs. They received the proceeds of sales, and claimed by action of account rendered, to recover one-half of the loss sustained. Held, the plaintiffs could recover, there being but one item of the account, and the case not being a partnership transaction. In Hourquebie v. Girard, 2 Wash. (U. S. C. C.) 246, the court held that where an adventure is terminated by the sale of the property, and the agent or factor receives the money and applies it to his own use, or charges himself with the part belonging to the other adventurer, assumpsit will lie therefor. See, also, Buckner v. Ries, 34 Mo. 357; Myers v. Winn, 16 Ill. 136; Wright v. Cumpsty, 1 Penn. St. 112.

Money advanced.—Each partner has a specific lien on the partnership stock, not only for the amount of his share, but for money advanced by him beyond the amount to the use of the copartnership. Allen v. Hawley, 6 Fla. 142; see, also, Wade v. Rusher, 4 Bosw. (N. Y.) 537. And one partner may recover from another the amount of a promissory note given by the latter for money advanced to be used in the partnership business, where the action does not involve the examination of the partnership accounts. Crater v. Bininger, 45 N. Y. 545.

the whole amount, the plaintiff was entitled to recover as upon a transaction entirely insulated. But, per Lord Ellenborough: "If there had been partnership dealings and only one item remained unadjusted, the difficulty as to partnership would disappear, but that is not the case here since some of the beasts remained after the sale to Cole." Lord Ellenborough seems to have thought that, as some of the beasts remained yet to be accounted for as between the plaintiff and defendant, the transaction as to the bill alone could not be considered as taken out of the partnership account. For a similar reason the plaintiff might have been nonsuited in Coffey v. Brian, where some of the butters remained undisposed of, and consequently subject to an account. In a suit founded in substantial justice, this reason for nonsuiting a plaintiff appears unsatisfactory, but it seems to indicate an opinion on the part of Lord Ellenborough, that actions of this nature are contrary to the general course of the common law.

Particular transactions may be separated.

SEC. 259. It is clear, however, that particular transactions *may* be abstracted from the partnership account and give rise to actions between the partners, and, upon this principle, the case of Jackson v. Stopherd[1] was decided. That was an action of assumpsit for goods sold and delivered, brought by one joint lessee of a coal mine against the other. The parties had jointly carried on the working of the mine for some years prior to December, 1831, when the coal having been all gotten, and the pit filled up, one Whitehead, at the request of the plaintiff and defendant, balanced the profit and loss of the concern, with the exception of some small coal on the coal-pit hill, and some debts due to the firm, and accounts to a small amount, which were not come in. The plaintiff said he would join in no more coal-pits. The defendant said he would open another, whether the plaintiff joined in it or not. It was agreed that Whitehead should value the materials and utensils used for working the coal mine, and that they should take each an article successively, article by article, until the whole had been divided. Whitehead made an inventory and a valuation; and a few days afterward he met them by appointment, in order to arrange about the division of the utensils valued, and told them that 171*l.* 17*s.* 9*d.* was the amount of the valuation. It was ultimately agreed that the defendant should take the whole of the utensils at the valuation, which he accordingly did. The jury having found a verdict for 85*l.* 19*s.* 10*d.*, being one-half of the amount

[1] 2 Crom. & M. 361; 4 Tyr. 330.

of the valuation, the Court of Exchequer, on the authority of Coffey v. Brian, and other cases, was of opinion, that the verdict ought to stand; this transaction being the subject of a distinct settlement, and unconnected with the general winding up of the partnership concern. And Bayley, B., said, that, independently of the general law of partnership, it seemed to him that the nature of the bargain, as to the division of the property, raised an implied obligation on the defendant to pay in money before the final settlement of the accounts.

Illustration.

SEC. 260. So, where, upon settling for a voyage between A and B, part owners, A gives B a sum of money for the specific purpose of paying the broker's bill, that is a sum of money separate from any matter of account between A and B, as partners in the proceeds of the voyage; and if B fails in payment, the money is recoverable in action by A against B. This, at least, may be inferred from the case of Wilson v. Cutting,[1] though the facts of that case do not, to the fullest extent, warrant the position here laid down. In that case there was a settlement of accounts between two partners after a voyage, and one of the partners agreed to pay the broker's bill, in consideration of being allowed a larger share of the profits; and, upon his omission to pay the broker, it was held, that the other part owner might sue him for the amount. The action, therefore, was brought to recover the final balance of an account, which, as we shall see presently, it is competent for any partner to do.

The case of Sharpe v. Warren,[2] although not a case of trading partnership, is in some degree illustrative of the point under discussion. There the auditor of a benefit club, who was himself a member, was intrusted with the funds of the society for safe custody, which funds he applied to his own use and refused to pay over, and he ran away with the box. It was held that the steward of the club might maintain an action of *indebitatus assumpsit* against him for the amount, upon the ground that his carrying away the money, and leaving the society, made him liable to them, as if he were not himself a member of the society; and he had in fact placed himself out of the protection of his situation in the society by his conduct in withdrawing under the circumstances.

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[1] 10 Bing. 435. And see per Alderson, J., p. 438. Crosby v. McDermott, 7 Cal. 146; Battaile v. Battaile, 6 La. An. 118.

[2] 6 Price, 132. See Simpson v. Rackham, *ante*, p. 157.

Accounting settlement.

SEC. 261. Thirdly, it appears from a variety of cases, that one partner may maintain an action against his copartner, to recover the whole or an aliquot part of the general balance of a partnership account. Even where partners have covenanted to account at certain times, if in pursuance of the covenant an account is entered into and a balance struck, and the debtor partner expressly promise to pay, the creditor partner may maintain an action of *assumpsit* against his copartner on such express promise, notwithstanding the covenant.[1] So, on the other hand, where no account has been settled, but there has been an agreement by the retiring partner or his representative, to take a certain sum of money in consideration of relinquishing the account, this is a valid consideration to support an action of *assumpsit* for the recovery of the sum agreed upon.[2]

In case of complete balances.

SEC. 262. Provided the balance be complete, it is immaterial whether it were settled at the dissolution, or during the continuance of the partnership.[3] Therefore, where two proprietors of a stage-coach, A and B, dissolved their partnership in November, and it appeared that during their partnership monthly accounts were made up, on each of which a balance was struck in favor of A, and the balances were never carried forward from one account to another, and B had paid A the balance on the November account, which was made up to the time of the dissolution, it was ruled, that A might maintain an action for the balances in his favor, on the September and October accounts; and it being objected that the plaintiff could only maintain an action for the final balance, and not on the monthly balances, Tindal, C. J., who tried the cause, said, that each of the monthly accounts was final, no balance being carried forward from any of them.[4] And if the balance on the partnership account be included as an item in a larger account, on which latter account a balance covering the item is due to one of the partners, the creditor partner may maintain an action to recover the amount of the item. Thus, where A

[1] Moravia v. Levi, 2 T. R. 483, n.; Foster v. Allanson, id. 479. But, in the latter case, other matters not relating to the partnership were introduced into the account, and the court seemed to rely in some measure on this circumstance. Wycoff v. Purnell, 10 Iowa, 332; Kockler v. Brown, 31 How. Pr. (N. Y.) 235; Clark v. Dibble, 16 Wend. (N. Y.) 601; Lane v. Tyler, 49 Me. 252; Nims v. Bigelow, 44 N. H. 376; Moore v. Thomas, 12 Ohio, 300; Mulholan v. Eaton, 11 La. 193; Gulick v. Gulick, 14 N. J. L. 578.

[2] Wells v. Wells, Ventr. 40.

[3] Preston v. Strutton, 1 Anstr. 50. See also Wells v. Carpenter, 65 Ill. 447; Wiggins v. Goodwin, 63 Me. 389; McGun v. Hanlin, 20 Mich. 476.

[4] Brierly v. Cripps, 7 C. & P. 709.

and B had become partners in certain transactions for the purchase and sale of wool, and had also had other dealings together, and they settled a general account in which was an item to B's debit, "to loss on wool," and the general account showed a balance of 15*l.* against B, it was held that A might maintain an action to recover the amount of the item for the loss on the wool.[1] But in a case where the balance was only the aggregate of a number of sums due upon a series of weekly accounts, it was holden that an action would not lie by one partner against his copartner to recover this balance.[2]

Settlement between the parties—Debt lies for agreed balance.

SEC. 263. It makes no difference whether the balance is settled by a court of judicature, or by the parties themselves out of court. Therefore it has been held, that debt lies on the decree of a colonial court made for payment of a balance due on a partnership account; and there seems no doubt that a decree of a court of equity fixing the balance due on a partnership account might, if necessary, be enforced in a court of law, though the items of the account cannot be sued for.[3]

Awards.

SEC. 264. If several partners submit *all* differences between them to arbitration, and the arbitrator award that a sum of money shall be paid by A, one of the partners, to B, another partner, B may sue A in an action of debt on the award; for in such case the sum awarded is virtually the final balance of the partnership account. In the case of Winter v. White[4] such an action was held to be maintainable, although, under the circumstances, B could not have sued A upon the bond of submission. Six partners entered into two bonds of submission to arbitration; in the one, three gave a joint and several bond to the other three, conditioned for the due performance of the award, and the three latter gave a similar bond to the three former. The arbitrator awarded that one of the three should pay a certain sum to one of his *co-obligors*. The Court of Common Pleas held (*dissentiente* Mr. Justice Richardson), that the partner to whom the money was decreed to be paid could maintain an action of debt on the award against his copartner, although, there being no *contract* between them, he could not sue him on either of the bonds. Burrough, J., said:

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[1] Wray v. Milestone, 5 M. & W. 21.

[2] Fromont v. Coupland, 2 Bing. 170; 9 Moore, 319.

[3] Henley v. Soper, 8 Barn. & Cres. 16; 2 Man. & Ryl. 153.

[4] 3 Moore, 674; 1 Brod. & Bing. 350. See Brooke v. Enderby, 4 Moore, 501.

"The action is not founded on a contract, for the sum, when it has been awarded, becomes in the nature of a judgment or decree, and has therefore nothing to do with a promise on which the action on contract is founded. Debt lies on the award, because the subject-matter of reference by the award *transit in rem judicatum.* It is not essential to an action on an award, where the submission is by bond, that the plaintiff should be enabled to recover the same sum by an action on the bond. The bonds and their conditions are only to be looked to, in order to see whether the matter awarded be authorized by an agreement to submit."

Balance found due—When assumpsit lies for—Rackstraw v. Imber.

SEC. 265. It seems to have been held by some judges, that, in order to sustain an action of *assumpsit* between partners, there must have been in all cases an *express* promise by the defendant to pay the balance for which the action is brought.[1] But it is clear that an express promise, either by word of mouth or by writing, cannot be necessary where an action is brought upon an account stated, which is meant to be final.[2] In Foster v. Allanson,[3] Buller, J., said: "If it be a question, whether a previous partnership being dissolved, and an account settled, is or is not, in point of law, a sufficient consideration for a *promise?* I have no difficulty in saying that it is;" which words are equally applicable to an implied as to an express promise. And in Rackstraw v. Imber,[4] Gibbs, C. J., held clearly, that to sustain an action of this kind, after a dissolution of partnership, an implied promise is sufficient. In the case just mentioned, it appeared that after the dissolution of the partnership, the partners met together to adjust their accounts, and at this meeting the books were produced, and the plaintiff claimed of the defendant, his partner, a balance in his favor of 200*l.*, and the defendant admitted the sum to be due. Gibbs, C. J., said: "The plaintiff is entitled to recover. It is a mistake to suppose that it is necessary there should be an express promise. The action is not brought upon any express promise at the meeting, but upon the implied undertaking. This I consider to be sufficient. The dissolution of a pre-existing partnership, and the mutual settlement of an account, are a sufficient consideration in law for an implied promise to pay a balance on the side of the partner from whom such balance is due.

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[1] Fromont v. Coupland, 2 Bing. 170; Moravia v. Levi, 2 T. R. 486.
[2] See D. Parke, J., 5 M. & W. 24.
[3] 2 T. R. 479.
[4] Holt, N. P. C. 368.

When promise may be implied from acts of a partner.

SEC. 266. The true principles upon this subject appear from the decisions in some recent cases. Thus, in Jackson v. Stopherd, the facts of which have been already stated,[1] the court held that the nature of the bargain as to the division of the property, and the actual taking and using by the defendant of the materials and utensils, raised an implied promise on his part to pay the value of one moiety of them; and that, although there had been no final settlement of accounts.

Again, in Wray v. Milestone,[2] it appeared that the plaintiff and the defendant having been partners in the purchase and sale of wool, and having had other transactions together, came to a general account, in which the balance due on the wool account formed one item. The amount showed a general balance of 15*l.* in favor of the plaintiff, and opposite that sum the defendant wrote: "Due from me to Mr. Wray," to which he signed his name. The plaintiff having, in an action of debt for goods sold and on an account stated, recovered the amount of the item for wool, one question on a motion for a new trial was, whether there was a sufficient promise to support the action, and the Court of Exchequer held in the affirmative. Lord Abinger, C. B.: "I think there is no ground for the motion, and that there is quite sufficient evidence of this being a final account. This was not the case of a general continuous partnership, but only in a particular adventure; and it was quite natural that the partners should take a settlement on the conclusion of each adventure, as ship-owners settle on the conclusion of each voyage. Then the account being settled, there is an unqualified acknowledgment, signed by the defendant, that 15*l.* is due from him to the plaintiff on the general balance of accounts between them. If the item forms part of a settled account, with a promise to pay the balance, I think there is no need of an express promise to pay the particular item." Parke, B.: "If there be any case which lays it down that an express promise is necessary after an account stated, which was meant to be a final account, I dissent from that doctrine. Here the partnership item is introduced as an item in the general account, and the defendant acknowledges the balance, and thereby becomes liable to pay; there is no occasion afterward to go through the form of words that he promises; the transaction speaks for itself." Maule, B.: "I know of no rule of law which requires, in this, or in any other case, an *express* promise. The law

[1] *Ante*, p. 182.

[2] 5 M. & W. 21.

requires a *promise*, which may be collected, sometimes from an expression in words, sometimes from other matters. Sometimes an account is so stated as in itself to import no promise; then a subsequent promise in words supplies the legal promise stated in the declaration. Here it is clear that the statement of the account itself imported a promise to pay the items included in it."

Upon these authorities, therefore, it is clear that upon the *dissolution* of a partnership, and a final account between the partners, and also on an account taken of a matter abstracted from the partnership, an action will lie fer the recovery of the balance of the account, without an express promise to pay.[1]

Contribution.

SEC. 267. We have thus seen in what particular cases actions may be maintained between partners in respect of partnership contracts. After what has been said, it seems difficult, upon principle, to state that *contribution* may be had between partners at law. It has been usual, however, to lay it down as a general rule, that contribution may be obtained in an action of assumpsit by one partner against another

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[1] *Action for balance found due.*—One partner may, however, maintain an action against another for a balance found due on a final settlement of the partnership transactions. McGehee v. Dougherty, 10 Ala. 863; Wycoff v. Purnel, 10 Iowa, 382; Fanning v. Chadwick, 3 Pick. (Mass.) 420; Wilby v. Phinney, 15 Mass. 116; Pope v. Randolph, 13 Ala. 214; Holyoke v. Mayo, 50 Me. 358; Kockler v. Brown, 31 How. (N. Y.) Pr. 235; Sturgis v. Swift, 32 Miss. 259; Lane v. Taylor, 49 Me. 252; Nims v. Bigelow, 44 N. Y. 376; Wood v. Morrow, 25 Vt. 265. But it has been held in Pennsylvania that there should be an express promise to pay the amount found due on the accounting. Killan v. Preston, 4 W. & S. 14. In the settlement of partnership accounts, it should be ascertained first what each party has contributed, and then make them equal in this respect, and divide the balance of the proceeds. Frigero v. Crottes, 20 La. An. 351. See, also, Lusk v. Graham, 21 id. 159; Chambers v. Crook, 42 Ala. 171. But the general rule is that unless there has been a settlement between the parties as to the partnership accounts, and a promise to pay the balance, one partner cannot maintain an action against another at law for any matter relating to their partnership affairs. Lamalere v. Caze, 1 Wash. (U.S. C.C.) 435; Goldsborough v. McWilliams, 2 Cr. (U. S. C. C.) 401; Barry v. Barry, 3 id. 120; Pote v. Phillips, 5 id. 154; Chadsey v. Harrison, 11 Ill. 151; Dewit v. Staniford, 1 Root (Conn.), 270; Kennedy v. McFadden, 3 Harr. & J. (Md.) 194; Young v. Brick, 3 N. J. L. 663; Murry v. Bogert, 14 Johns. (N. Y.) 318; Springer v. Cabell, 10 Mo. 640; McNight v. McCutchen, 27 id. 436; Smith v. Smith, 33 id. 557; Robinson v. Green, 5 Harr. (Del.) 115; Ives v. Miller, 19 Barb. (N. Y.) 196; Lower v. Denton, 9 Wis. 268; Holyoke v. Mayo, 50 Me. 385; Oseas v. Johnson, 4 Dall. (Penn.) 434; S. C., 1 Binn. 191; Andrews v. Allen, 9 S. & R. (Penn.) 241; Ferguson v. Wright, 61 Penn. St. 258; Klase v. Bright, 71 id. 186; Buel v. Cole, 54 Barb. (N. Y.) 353. Where, however, by the agreement of members of a partnership, certain of them were to have the exclusive management of the business and the collection and disbursement of its revenues, and to pay over to each of the partners separately his share of the dividends of the profits, it was held that each partner might sue at law for his unpaid dividend. Wadley v. Jones, 55 Ga. 329.

for money laid out to the defendant's use.[1] This position was questioned by one learned writer,[2] and has since been entirely abandoned by another, who, in the last edition of his book, has confined it to cases of partnership in particular transactions.[3] To be sure, there is a *dictum* of De Grey, C. J.,[4] which seems to warrant the opinion which has generally been given on this subject. He says: "Where the suit is only brought against one partner, the law, perhaps, cannot do complete justice in the *same* suit. I know of no writ of contribution. But, in *another suit for money laid out for the other's use,* contribution may in effect be obtained." But in the same case the same very learned judge observed that, "equity must be called in to make the rest contribute." With regard to the *dictum* of Lord Kenyon,[5] which is usually cited in support of the same position, it is to be observed that he only speaks generally of a case where damages have been levied against one of several defendants in an action of *assumpsit,* his Lordship not particularly alluding to defendants who are partners in trade. In the case In re Webb,[6] it was unnecessary to discuss the question whether or not contribution could be had at law, because it was there settled that the partner, having paid money from a misapprehension that it was a partnership debt, paid it in his own wrong, and was not, under any circumstances, entitled to contribution.

Rule in Wooley v. Batte.

SEC. 268. The case which seems most to favor the doctrine of contribution at law amongst partners in trade is that of Wooley v. Batte.[7] There it was ruled that, if a party recover damages in *case* against one of two joint coach proprietors, for any injury sustained by the negligence of their servants, such proprietor may maintain an action against his copartner for contribution, if he prove at the trial that he was not personally present when the accident happened. It was argued for the plaintiff that the declaration against him for the injury might have been in *assumpsit,* in which case he *might clearly have recovered contribution* and, therefore, that he ought not to be

[1] Car. Partn. 65; Mont. Partn., Vol. 1, p. 50; Gow. Partn. 90, 2nd ed., citing Abbott v. Smith, 2 W. Bl. 947; Wright v. Hunter, 5 Ves. 792; Merryweather v. Nixan, 8 T. R. 186.

[2] 7 Jarm. Conv. 17.

[3] Gow. Partn. 79, 3rd ed.

[4] In Abbott v. Smith, 2 W. Bl. 947; see, also, Holmes v. Williamson, 6 M. & S. 158; D. Holroyd, J., Blackett v. Weir, 5 Barn. & Cres. 388. But see D. Bayley, J., id.

[5] Merryweather v. Nixan, 8 T. R. 186.

[6] 2 Moore, 500.

[7] 2 Car. & Payne, 417; see, also, Dakin v. Graves, 48 N. H. 45, and Wheeler v. Arnold, 30 Mich. 304, where it was held that a surviving partner might maintain an action at law against the representative of the deceased for contribution. Johnson v. Kelly, 4 Thomp. & C. (N. Y.) 417.

deprived of his contribution under the existing circumstances, and the court apparently assenting to this argument directed a verdict for the plaintiff. If that decision, however, depended on the argument which has been adverted to, it seems now to be overruled by the case of Pearson v. Skelton,[1] in which several persons being interested in a stage-coach, and there being a partnership fund, out of which expenses were first to be paid and the residue divided amongst them, it was held that one of them, against whom damages and costs had been recovered for negligently driving the coach, could not recover against another proprietor his proportion of such damages and costs.

Cannot be enforced at law — Sadler v. Nixon.

SEC. 269. Upon the whole, it may now be considered to be the better opinion that in cases of general trading partnership one partner cannot at law enforce contribution from his copartner for moneys laid out on the partnership account. In Sadler v. Nixon,[2] three persons,

[1] Pearson v. Skelton, 1 M. & W. 504.

[2] 5 B. & Ad. 936. And see D. Tindal, C. J., 7 Bing. 709. This doctrine is generally held by the courts of this country. De Jarnette v. McQueen, 31 Ala. 230; Lawrence v. Clark, 9 Dana (Ky.), 257; Morin v. Martin, 25 Mo. 360; Westerloo v. Evertson, 1 Wend. (N. Y.) 532; White v. Harlow, 5 Gray (Mass.), 463; Brown v. Agnew, 6 W. & S. (Penn.) 238; Kennedy v. McFadden, 3 H. & J. (Md.) 194; Roberts v. Fitter, 13 Penn. St. 265. And it has been held that under no circumstances will an action at law lie for a contribution in consequence of the payment by him of a judgment obtained against him in an action of tort. Miller v. Fenton 11 Paige's Ch. (N. Y.) 18; Vose v. Grant, 15 Mass. 521; Peck v. Ellis, 2 Johns. Ch. (N. Y.) 131; nor for money paid, or losses sustained in an illegal transaction. Watson v. Fletcher, 7 Gratt. (Va.) 1. But, where money is expended by one partner for the firm at its request, so that a promise to repay it, express or implied, can be raised, Murray v. Bogert, 14 Johns. (N. Y.) 318; or where money is paid by one partner to liquidate a partnership debt, an action of assumpsit lies therefor. In these instances the transaction is treated as being outside the partnership. Forbes v. Webster, 2 Vt. 58; Cumming v. Hackley, 8 Johns. (N. Y.) 202; Dupuy v. Johnson, 1 Bibb (Ky.), 562. Upon this question, Mr. Lindley, p. 634, says: "A right to contribution or indemnity, arising otherwise than by special agreement, is only enforceable at law by a person who can prove that he has already sustained a loss. See Maxwell v. Jameson, 1 B. & Ald. 51. A plaintiff who can only show that he will sustain loss beyond what is right as between himself and the defendant, unless the latter contributes his proportion of the funds necessary to defray the loss, must fail in an action at law, unless it is founded on some other ground than that above supposed. A special contract may of course be so framed as to entitle a person, even at law, to call for payment for his own safety before he has sustained loss himself. But in equity it is very reasonably held that even in the absence of any special agreement a person who is entitled to contribution or indemnity from another is in a position to enforce his right before he has sustained actual loss. In equity, a person who is entitled to be indemnified against loss is not obliged to wait until he has suffered, and perhaps been ruined, before having recourse to judicial aid. Thus, in the ordinary case of principal and surety, as soon as the creditor has acquired a right to immediate payment from the surety, the latter is entitled to call upon the principal debtor to pay the amount of the debt guaranteed, so as to relieve the surety from his obligation. Nesbit v. Smith, 2 Bro. C. C. 582. And where one person has covenanted to indemnify another, a suit in equity for specific performance may be sustained before the plaintiff has actually been damnified. See Ranelagh v. Hayes, 1

A, B and C, being copartners in trade, employed a builder to repair a building, which was their joint property, and in which they carried on their trade. The builder brought an action against the three

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Vern. 190. In strict analogy with these principles, partners and directors who are individually liable to be sued on bonds and notes, which as between them and their copartners are to be regarded as the bonds and notes of the firm or company, are entitled to call for contribution before these bonds or notes have been actually paid. See, for example, The Norwich Yarn Co.'s case, 22 Beav. 143; the money borrowed by the directors in that case was secured by their own notes, but these notes had not been actually paid when the call on the shareholders was made. This does not appear very clearly from the report referred to, but the writer has been informed by persons conversant with the case that the above statement is correct. Another difference between law and equity, to which it is necessary to advert, affects the mode in which the amount to be paid by each of several contributories is ascertained. At law, if several persons have to contribute a certain sum, the share which alone each has to pay is the total amount divided by the number of contributors, and no allowance is made in the event of the inability of some of them to pay their shares. See Cowell v. Edwards, 2 Bos. & P. 268; Batard v. Hawes, 2 E. & B. 287. But in equity, those who can pay must not only contribute their own shares ascertained as above, but they must also make good the shares of those who are unable to furnish their contributions. For example, if A, B, C, and D are liable to a debt which A has paid, he cannot at law do more than make B and C contribute each one-fourth, although D may be able to pay nothing in respect of his fourth; but in equity A could compel B and C to contribute one-third each, if D could contribute nothing, and this, as between A, B, and C, is evidently only fair and just. Dering v. Winchelsea, 1 Cox, 318; Hole v. Harrison, 1 Ch. Ca. 246; Peter v. Rich, Rep. in Ch. 19. In Wadeson v. Richardson, 2 V. & B. 103, one of four partners assigned property to trustees upon trust, *inter alia* to pay his proportion or share of all such debts as were or should be owing by him and his three copartners. He and they afterward became bankrupt; and it was held that the share and proportion of debts which the trustees were to pay was, not the share and proportion which, as between the assignor and his copartners, he ought to contribute to the funds of the firm, but the share and proportion which, as between him and the creditors of the firm, it was necessary for him to pay in order that they might receive twenty shillings in the pound. The creditors were therefore held entitled to come in under the deed for so much as they were not paid out of the partnership funds, and as they could not recover from the estates of the other partners. So, where a loss has been incurred under circumstances which render it wholly chargeable to the account of the partner who caused it, yet, so far as he is unable to make it good it must be borne ratably by the other partners. See Oldaker v. Lavender, 6 Sim. 239; Cruikshank v. M'Vicar, 8 Beav. 117, 118. Upon the same principle, when a company is being wound up, the solvent shareholders must, if their liability to creditors is not limited, contribute whatever may be necessary to pay all the creditors in full, and make up ratably amongst themselves what ought to have been contributed by those who are insolvent. Robinson's Executor's case, 6 De G. Mac. & G. 572. "It was formerly doubted," says Mr. Gow in his work on Partnership, 3d Am. ed. 79, "whether one of two joint contractors, who had paid the *whole* of a joint debt, could maintain an action against the other as for money paid to his use; but the right of such an action is now perfectly settled, and it has become familiar in practice. Wright v. Hunter, 5 Ves. 792; and see 1 East, 20. This action is not, perhaps, to be considered as founded upon contract, so much as on a fixed principle of justice, and a settled rule of law, which requires equality, according to the maxim, *qui sentit commodum sentire debet et onus*. Deering v. Lord Winchelsea, 2 B. & P. 270. Campbell v. Mesier et al., 4 Johns. Ch. (N. Y.) 334. Therefore if one or two partners discharge a joint demand, or if the debt and damages due on a joint judgment, founded on contract, be levied against him separately, he may, in an action for money paid to the use of his copartner, recover from him his proportion, because, both being *in quali jure*, each ought equally to bear the burden. Per Lord Kenyon,

copartners for the repairs, and obtained judgment, but took A only in execution, who, in order to regain his liberty, paid the whole debt. A then brought his action against B, to recover one-third of the

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Herries v. Jamieson, 5 T. R. 556; Bayley, J., Ansell v. Waterhouse, 6 M. & S. 390. So, where the manager or agent of a company has paid a debt due from the company, he may compel all and each of the members to contribute their respective proportions. Carlen v. Drury, 1 Ves. & Bea. 157; see Holmes v. Williamson, 6 M. & S. 158. And if two persons enter into a joint contract with the owner of a vessel to supply her with colonial produce by a given time, and the contract not being complied with, the owner makes a demand on one of them for compensation, who, without the knowledge or consent of the other, agrees to refer the amount of the damage sustained to an arbitrator, and pays to the owner the whole sum awarded to be due, in an action for money paid he may recover from his cocontractor a moiety of his disbursement. Burnell v. Minott, 4 B. Moore, 340; see Noel v. Bowman, 2 Litt. (Ky.) 46. But to enable one partner, who has paid a joint debt, to recover contribution from his copartner, it is essential that the relation of partners, and the consequent obligations should exist *inter se;* for though persons may make themselves partners by means of their transactions with the world, and therefore be liable upon any engagement that may arise out of that relation, yet it does not follow that, with respect to each other, they are to be considered as partners, or that where one has paid the whole of a debt for which both were liable, any obligation attaches to the other to contribute to it. Thus, the manager or servant of a partnership, who acts as one of the partners in the partnership, is responsible to third persons in the character of partner, and, if sued to judgment by a joint creditor, may be compelled to pay not his proportion alone, but the whole of the joint debt; but, if he were so compelled, he would have an indisputable right to be repaid by the partnership whatever sum he may have disbursed, because, as between himself and the firm, he could not be subject to the payment of any part of the joint debts, and that being so, it is clear that, if the payment were made in the first instance by either of the actual members of the firm, that member could not call upon the manager to contribute to it. Geddes v. Wallace, 2 Bligh, 270. So, two persons entering into a trading concern may agree between themselves that neither shall be answerable for the acts or losses of the other, but each for his own; and in such a case the one cannot be compelled to contribute any proportion of a loss sustained by the other. Waugh v. Carver, 2 H. Bl. 235. And when a fire assurance company was established on the principle of mutual guarantee, and by the articles and policies granted it was stipulated and declared that the directors, who might execute the polices, should not be personally responsible for loss, but that the company should be liable for it to the extent of their funds, it was held in an action on a policy against three directors who had subscribed it, to which the defendants pleaded several pleas imputing fraud to the plaintiff, which the jury negatived by finding a verdict for him, that although no personal or individual responsibility attached to them, yet as the plaintiff was clearly entitled to recover from the funds of the society, if they were sufficient to defray the amount of his loss, and as the plaintiff averred that those funds were sufficient, which the defendants had not denied, there was not any ground for arresting the judgment. Andrewes v. Ellison, 6 B. Moore, 199; and see Ellison v. Bignold, 2 J. & W. 503. Besides a joint obligation *inter se*, it is also requisite that a joint legal liability should originally have existed, or at least that the creditor should have had an equitable claim in respect of a joint debt, upon the party paying; Hutton v. Eyre, 1 Marsh. 698; a mere voluntary payment by one partner, unconnected with legal or equitable responsibility, being insufficient to confer upon him any right as against the other members of the firm. Murray v. Bogert et al. 14 Johns. (N.Y.) 318. Therefore, where four persons, being in partnership as carriers, entered into an agreement, with a third person, to carry goods for him from London to Frome, where they were to be deposited in the warehouse of the resident partner until the owner should be ready to receive them into his own; and certain goods having been forwarded, were, after they had been deposited in the partner's warehouse, destroyed there by fire, it was determined, that, as the liability of the partners, in their capacity of carriers,

money so paid. At the trial it was contended for the plaintiff that the action was maintainable, on the ground of the plaintiff having been *compelled* to pay the money, such compulsion taking the case out

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ceased on the arrival of the goods at Frome, the resident party, who had paid over the amount of the loss to the owner of the goods, could not recover from his copartners any proportion of the sum he had paid. In re Webb, 2 B. Moore, 500. But where two partners executed a deed of dissolution of the partnership, whereby it was stipulated that neither of them should afterward make any purchase to bind the other, but that every subsequent purchase should be on the private account of the purchaser, it was held, that if one afterward made purchases in the name of the firm, and the other paid for them, he might maintain an action against the former for money paid to his use, notwithstanding the defendant had, by deed, assigned his property to his creditors, who covenanted not to sue him, and which latter deed the plaintiff himself signed. Hutton v. Eyre, 1 Marsh. 603; S. C., 6 Taunt. 289. And it is essential that the debt itself should be discharged by an actual payment, since a mere extinguishment of it by one joint contractor giving a higher security, will not entitle him to maintain an action for money paid against his cocontractor. Thus, where one of the makers of a joint and several promissory note, after the same has become due, gave his bond to the holder for the amount, but, before the commencement of the action, no money was actually paid on the bond, it was held, that until he had paid the money, he could not maintain an action to recover contribution against any of the other makers of the original note. Maxwell v. Jameson, 2 B. & A. 51; Taylor v. Higgins, 3 East, 169; acc. Barclay v. Gooch, 2 Esp. 571, cont.; See Ex parte Sergeant, 1 Glyn & J. 183. Where a joint liability existed, and the debt or demand in respect of which that liability was created has actually been discharged by one partner out of his separate funds, he may nevertheless be precluded from calling upon his copartner to contribute his proportion of the debt by the illegality of the original contract; for, if the agreement out of which the debt or demand originated were contaminated with, or arose out of an illegal transaction, the action for a contribution cannot be sustained. Therefore, if partners are engaged in any thing *malum in se*, one of them cannot acquire a right of action by paying a sum of money which they may jointly have promised to a third person in the course of their immoral transactions. Per Heath, J., Aubert v. Maze, 2 B. & P. 371. So, where the transaction in respect of which the payment is made is not *malum in se*, but only *malum prohibitum*, yet if the money were advanced in the course of, and with the view of furthering the illegal contract, a claim of contribution cannot be supported. For it is a maxim in law, that a party must show that he stands on fair ground when he calls on a court of justice to administer relief to him; and as that is far from being the case with a suitor who, as the foundation of his claim, discloses a transaction which originated out of a matter prohibited by the municipal regulations of the state, the rule of *ex turpi causa non oritur actio* applies. Thus, if one of two partners advance money in a smuggling transaction he cannot recover his proportion of it against his partner, because the transaction is prohibited. Per Lord Kenyon, Petrie v. Hannay, 3 T. R. 418. Ex parte Bell, 1 Mau. & Selw. 756; Biggs v. Lawrence, 3 T. R. 454. Although these points have always been considered perfectly clear, considerable uncertainty seems for some time to have prevailed in those cases of *mala prohibita*, where the alleged right of insisting upon contribution did not arise *immediately* out of the illegal contract itself, but, to use the expression of Lord Chief Justice Eyre, Mitchell v. Cockburn, 2 H. Bl. 379, was one step removed from it, as if the money were advanced by one, with the consent and by the direction of the other party involved in the illegal concern. And this distinction was drawn between the cases of partners engaged in legal and illegal contracts; in the former, if one of the partners pay the whole of a partnership debt without any express promise from the other, the law, on the ground that both were liable to pay, will give him a right to recover back a moiety in an action for money paid to the use of that other partner. But in the case of illegal contracts, as the partners are not bound to pay, one of them cannot acquire a right of action against the other by paying the whole without his consent, if, however, it be paid with his

of the general rule by which partners are prevented from bringing actions against each other to recover money paid on the partnership account; but Lord Denman, C. J., was of opinion that the general

knowledge and consent, and by his authority, the action for contribution may be maintained, because then the action is not founded on a promise arising by implication of law out of the illegal transaction, but upon an express request subsequently made. Thus, where two persons jointly engaged in illegal stock-jobbing transactions with a third, and a loss having arisen, one of them paid the whole, and took the bond of the other for his proportion, the bond was decided to be good, for, being voluntarily given, it created a new original duty which could not be impeached on account of the illegality of the transactions, which gave rise to the payment it was intended to secure. Faikney v. Renous, 4 Burr. 2,069. So, where two partners, having sustained losses in similar transactions, employed a broker to pay the differences, and one of them repaid the broker the whole sum with the privity and by the direction of the other, the majority of the judges of the Court of King's Bench, contrary to the opinion of Lord Kenyon, determined on the authority of the preceding case, that an action might be sustained for a moiety of the payment, but without such direction it was agreed that an action would not lie, for, in consequence of the illegality of the transactions the parties were under no legal obligation to make good their losses. Petrie v. Hannay, 3 T. R. 418; see the observation of Lord Erskine in Ex parte Bulmer, 13 Ves. 319; and see Steers v. Leshley, 6 T. R. 61; Brown v. Turner, 7 id. 630. But the soundness of the distinction established by the two last decisions, between express and implied promises, has been much questioned, and the distinction itself may, perhaps, be said to have been denied. Aubert v. Maze, 2 B. & P. 371. For where persons engage in partnership in an illegal concern, each of them must be considered as giving an authority to the other to transact all business relating to the partnership, otherwise no profit could ever arise from the undertaking. Indeed, if such an authority were not impliedly conferred, the partnership must be terminated the moment occasion arose for the first transaction in it. The consequence, therefore, seems to be this, that if a partnership be legal the law raises an implied consent to every payment, and if it be illegal, yet if the payment be made in the course of the partnership business, an implied consent may be raised to that payment, without which the partnership could not subsist an instant. But, consistently with the rules of law, an implied consent can, in no instance, be so raised as to confer a right of action, where the consideration for it is bottomed on an illegal contract, and the case of payments made in the course of an illegal partnership must always be open to the objection of having an illicit foundation, for if there had been no partnership, a payment could not have arisen out of it. The distinction, therefore, on which the decisions in Faikney v. Renous, and Petrie v. Hannay proceeded, being untenable, the cases them selves cannot be supported; and notwithstanding there be an express request the general principle, that where one person pays money for another in the course of an illegal transaction, he cannot recover it back, will apply. And whatever diversity of opinion may formerly have prevailed as to the legal effect of a loan of money, where the lender knew that the money was borrowed for the purpose of being applied to an illegal purpose not *malum in se*, it is now completely established on the ground that that which is *malum prohibitum* cannot in this view be contradistinguished from that which is *malum in se*, that the lender cannot resort to a court of justice to give effect to any claim that may arise out of the loan, even although the conduct of the borrower be most unconscientious. Aubert v. Maze, *supra;* Webb v. Brooke, 3 Taunt. 6; Ex parte Mather, 3 Ves. 373; Ex parte Daniels, 14 Ves. 192; Ottley v. Brown, 1 Ball. & B. 366; Lightfoot v. Tenant, 1 B. & P. 554; Langton v. Hughes, 1 M. & S. 594; Bensley v. Bignold, 5 B. & A. 335; Evans v. Richardson, 3 Mer. 470; but see Ex parte Bulmer, 13 Ves. 313; Griswold v. Waddington, 16 Johns. (N. Y.) 486, 487; Beding v. Pitkin, 2 Cai. (N. Y.) 147 (2d ed.), and the Reporter's note. Thus, in a modern case, Cannan v. Bryce, 3 B. & A. 179, and see Amory v. Meryweather, 2 B. & C. 573, it was held that money lent for the express purpose of settling losses on illegal stock-jobbing transactions, to which the lender was not a party, and which was so applied

rule was applicable to this case, and the action was not maintainable, and his Lordship's opinion was confirmed by the Court of King's Bench, who thought there was no ground for the distinction which had been taken on the part of the plaintiff.

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by the borrower, could not be recovered back. And if before the statute enabling partners jointly to underwrite policies of insurance, 5 Geo. 4, c. 114, s. 1, one of two partners, who had engaged in such transactions, paid the whole of the losses, he could not recover a moiety of the money so paid from his copartner, Aubert v. Maze, *ante*, although the losses paid exceeded the premiums he received. Mitchell v. Cockburn, 2 H. Bl. 379. Nor could he maintain an action against the other for premiums received by him, Booth v. Hodgson, 6 T. R. 405, or to recover back advances on account of payments to be made on policies of insurance; because such advances must have been made in the very execution of the illegal contract. Ex parte Bell, 1 M. & S. 752. In all such cases the claim of the plaintiff could not be established, except through the illegal contract in which all were concerned; and it would therefore have been inconsistent with the principles of justice to have allowed a *particeps criminis* to enforce such a claim in a court of law. The same doctrine was recognized in a case which was recently brought under the consideration of the Court of Common Pleas. There A betted twenty-five guineas with B on a horse-race, of which C, at his own request, staked ten; and A having won, paid C ten guineas in the expectation of receiving the whole amount of the bet from B, but in which, in consequence of B's death, he was disappointed. A having brought an action to recover from C the ten guineas, as having been paid on a consideration which had failed, the Court of Common Pleas held that the action was not maintainable because A could not make out his claim without going into proof of the illegal transaction on account of which it was paid. Simpson v. Bloss, 2 Marsh. 542; S. C., 7 Taunt. 246, and Holt, 273. In a case, Sullivan v. Greaves, Parke on Insur. 8, where one of two joint underwriters had paid to a broker a moiety of a loss sustained by them upon a policy, in an action against the broker by the underwriter who had discharged the whole loss, it was held that he could not establish his right to the moiety so paid over; and Lord Kenyon observed that a party could not appeal to a court of justice to enforce a contract founded in a breach of the law. But the authority of this determination has been subsequently shaken; see Tenant v. Elliot, 1 B. & P. 3; Farmer v. Russell, id. 296; Thomson v. Thomson, 7 Ves. 473. Where the money was not actually paid, but only allowed in account between the broker and one of the underwriters, in an action against the broker by the other underwriter to recover the amount so allowed, the court would not sustain the demand; for, by so doing, they would have compelled the execution of an illegal contract, as if it were a legal one. Edgar v. Fowler, 3 East, 222; and seemingly with reason; for although the underwriter has a right to shelter himself under the invalidity of such a contract, yet he may waive the benefit which, by so doing, he would derive from its illegality, and consider it as operative and binding upon him; and if he do, it is irreconcilable with justice that a person, who is a mere instrument of transmission, should be allowed to intercept and appropriate to his own use what he receives in execution of the engagement entered into by the underwriters. See Anderson v. Moncrieff, 3 Desau. Ch. (S. C.) 125. Besides, in the cases of contracts rendered illegal by legislative prohibition, one partner cannot in the action of assumpsit for money paid to the use of his copartner, or in any other action, recover from his contribution, on a tort, for which both have been sued, and a joint judgment being obtained against them, the entire damages have been levied against one individually. Thus, where Merryweather v. Nixan, 8 T. R. 186; see also Philips v. Biggs, Hardr. 164; Lingard v. Bromley, 1 V. & B. 116-17; and the observation of Bayley, J., Ansell v. Waterhouse, 6 M. & S. 390; a sum of money had been recovered against two defendants in an action for an injury done to a mill, in which action was included a count in trover for the machinery, one of the defendants, against whom the whole had been levied, brought an action against the other for a contribution of a moiety, as for so much money paid to his use; but the

Insulated transactions.

SEC. 270. But in insulated transactions, where there is no general partnership, it is evident that a clear cause of action may arise between the partners, unshackled by any accounts. Thus, in

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Court of King's Bench, in affirmance of the opinion of Mr. Baron Thompson at Nisi Prius, determined that such an action would not lie, since by law no contribution could be claimed as between joint wrongdoers. Rose v. Oliver et al., 2 Johns. (N.Y.) 365, the close of Judge Spencer's opinion. Nor would equity interpose. Peck v. Ellis, 2 Johns. Ch. (N. Y.) 131. In a recent case, however, which was an action for contribution by one of two defendants, coach proprietors, against the other, to recover a moiety of the costs and damages recovered in an action for negligence, it was held that upon its being proved that the plaintiff was not personally present at the time of the injury complained of, and so in no personal default, he was entitled to recover. Woolley v. Batte, 2 C. & P. 417. The action of assumpsit is in some instances a necessary remedy to enforce rights, which may result to some of the partners from the misconduct of the others, after a general partnership has been dissolved or a single joint transaction has been terminated. If, for instance, subsequently to a dissolution, a bill of exchange be drawn by a single partner in the partnership firm, and the holder of the bill proceed against all the partners, and obtain payment from those who were not privy to its concoction, they, in an action for money paid to the use of the actual drawer, may recover from him the sum they have been compelled to pay in satisfaction of the judgment obtained against them upon the bill. Osborne v. Harper, 5 East, 225. But to enable them to obtain repayment of the sum advanced in a joint action, the payment must have been joint, and consequently must have been made out of some joint stock or fund; and, generally speaking, such a fund does not exist after a dissolution: where, however, the attorney for the parties advanced part of the sum required on their joint credit, and borrowed the remainder on their joint note, it was held that that created such a fund as would entitle them to maintain a joint action. Id. But if the payment be not of the description from which a joint cause of action can accrue, as if each individual in the first instance contribute his proportion out of his own separate funds, and with the aggregate the payment be made, then each contributor must bring a separate action for what he actually advanced, because *quoad* that payment they were not partners. Id; Graham v. Robertson, 2 T. R. 282. Therefore where there were three assignees of a bankrupt's estate who had acted in the commission, and two of them paid the solicitor's bill, it was held that the two could not maintain a joint action against the third for contribution, but that each ought to sue separately. Brand v. Boulcott, 3 B. & P. 235. So where three had entered into a joint and separate bond of indemnity to a sheriff, for the protection of their separate interests, and the sheriff had compelled two of them to pay the whole sum, it was holden that they could not maintain a joint action against the third for contribution. Kelly v. Vernon, 5 Esp. 194. In the case of Low v. Copestake, 3 C. & P. 300, where three persons, not partners in trade, had separately indorsed a bill for the accommodation of the drawer, and, on its being dishonored, had paid in equal portions the amount to a party who had discounted it subsequently to their indorsements, it was held that they might strike out their indorsements, and proceed jointly as possessors of the bill against a previous indorser. The rule, however, which requires a severance of actions where the payment is not made out of, or in respect of any joint fund or credit, does not apply where the payment in dispute has been made by some on behalf of all the partners on a partnership account, for in such a case the action for contribution must be brought in the name of all those partners on whose behalf the payment was made. Thus, where five joint owners of a privateer and the owner of another privateer cruised in company, under an agreement to share prizes equally, and a prize being taken by the five and condemned, a moiety of it was paid to the single owner; but the sentence of condemnation being afterward reversed, and restitution ordered, the whole value was repaid on the partnership account by three of the five, after the bankruptcy of the other two;

Graham v. Robertson,[1] the plaintiffs were joint owners of a privateer and had cruised in company with the defendant, the owner of another privateer, under an agreement to share all prizes equally. They took a prize in the Mediterranean, which was condemned in the Vice Admiralty Court of Morocco. Upon this, half the money arising from the sale was paid to the defendant. Sentence of condemnation was afterward reversed, and the money decreed to be refunded to the

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it was decided by the Court of King's Bench, that as the payment was on account of the partnership, the three could not maintain an action against the single owner, without joining the assignees of the bankrupt partners. Graham v. Robertson, 2 T. R. 382; Manahan v. Gibbons et al., Doremus v. Selden, 19 Johns. (N. Y.) 109, 213, 426. An undertaking by two partners to pay a sum of money to a third equally out of their own private funds is a joint undertaking, and they can only be sued jointly upon it. Byers v. Dobey, 1 H. Bl. 286. Where an individual is a common partner in two concerns, no legal contract can arise between the partnerships, and therefore no engagement entered into, or debt incurred, by the one with or to the other can be enforced. Bosanquet v. Wray, 2 Marsh. 319; S. C., 6 Taunt. 597; see, also, Mainwaring v. Newman, 2 Bos. & Pul. 120; De Tastet v. Shaw, 1 B. & A. 664; Neale v. Turton, 4 Bing. 149; Teague v. Hubbard, 8 B. & C. 345; S. C., 2 Mann. & Ryl. 369; Jones v. Yates, 9 B. & C. 532; Harvey v. Kay, id. 356; per Duncan, J., Griffith v. Chew's Ex., 8 S. & R. (Penn.) 30.

The general rule applicable to a bill of particulars of demand delivered under a judge's order is that the party shall be confined to his particular, and not admitted to give evidence of any additional demand; but under certain circumstances, in a case where the proofs produced by the defendant himself establish another claim in his favor, the plaintiff has been allowed to have the benefit of such evidence even beyond the contents of the particular. Thus, where an action was brought by one partner against another to recover a balance due on a statement of accounts; the plaintiff, by his bill of particulars, confined himself to the balance due on separate accounts; in support of which he gave in evidence an account, in which the defendant made himself debtor to a certain amount; and in answer to this evidence, the defendant produced an account subsequently rendered by the plaintiff, according to which there appeared to be a balance due to the defendant on the separate accounts; but on the opposite side of the page there was a statement also of the partnership accounts, on which the balance was in favor of the plaintiff, and greatly exceeded the balance on the separate account, it was objected that the plaintiff could not recover beyond his particular. The court, however, said that the defendant himself had given the plaintiff a better case than he was at liberty to make for himself, and that the plaintiff was entitled to a verdict for all that had been proved to be due him. Hurst v. Watkins, 1 Camp. 68. One partner may maintain an action at law against his copartner, notwithstanding it has been agreed between them that the matter in dispute shall be determined by arbitration; because, *although a reference depending, or made and determined, might be a bar, yet, a mere agreement to refer* cannot oust the courts of their general jurisdiction. Kirk v. Hollister, 1 Wils. 129; Thompson v. Charnock, 8 T. R. 139; see also, James v. David, 5 id. 141. Indeed, it has been said that many cases exist, in which, on a plea of an award, or of a submission to a reference, the court has gone into the merits, Michel v. Harris, 4 Bro. C. C. 311; S. C., 2 Ves. Jr. 129; see Coxeter v. Anderson, 3 Vin. Abr. 134, pl. 19. And, although partners covenant that all differences arising between them, etc., shall be referred to the decision of indifferent persons to be elected by themselves, yet on the death of one an action cannot be maintained by his representatives against the other for refusing to nominate a referee." Tattersall v. Groote, 2 B. & P. 131; see Gow. on Part. 3d Am. ed. pp. 79–90.

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[1] 2 T. R. 282; And see French v. Fenn, 1 Co. B. L. 536; M'Ilreath v. Margetson, 4 Doug. 278.

appellants, with costs, which was paid by the plaintiffs, who then brought their action against the defendant to recover a moiety of the sum so paid. The Court of King's Bench expressed no doubt that the action was maintainable.[1]

One partner paying whole debt may sue the others for their share.

SEC. 271. In cases of this nature, if the whole damages in assumpsit

[1] The plaintiffs were nonsuited because the assignees of such of them as had become bankrupts were not joined with them as plaintiffs. Hourquebie v. Girard, 2 Wash. (U. S. C. C.) 246; Wright v. Cumsty, 1 Penn. St. 112; Buckner v. Ries, 34 Mo. 357. But this is confined exclusively to single transactions, where it is entirely *insulated* from other partnership matters, and when there is either an express promise to pay, or such facts and circumstances that the law will imply a promise. Murray v. Bogert, 14 Johns. (N. Y.) 318; Wills v. Simmonds, 51 How. Pr. (N. Y.) 48; Wheeler v. Arnold, 30 Mich. 304; Kelly v. Kauffman, 18 Penn. St. 351. The rule seems to be that a recovery may be had at law when the action does not involve an examination of partnership accounts. Edens v. Williams, 36 Ill. 252; Downs v. Jackson, 33 id. 464; and such is the doctrine of the English cases. Burnell v. Minot, 4 J. B. Moore, 340; Abbott v. Smith, 2 W. Bl. 947; Wright v. Hunter, 5 Ves. 792. Generally, the only remedy is by an action of account or by bill in equity. De Jarnette v. McQueen, 31 Ala. 230; Lawrence v. Clark, 9 Dana (Ky.), 257; Westerloo v. Evertsen, 1 Wend. (N. Y.) 552; Marvin v. Martin, 25 Mo. 360; Bracken v. Kennedy, 4 Ill. 564; Kennedy v. McFadden, 3 H. & J. (Md.) 194; Gridley v. Dale, 4 Mills (S. C.), 486; Roberts v. Fitter, 13 Penn. St. 265; Brown v. Agnew, 6 W. & S. (Penn.) 238. In White v. Harlow, 5 Gray (Mass.), 463, the court held that the payment of a partnership debt by one partner did not raise an implied promise to pay by the others their proportion, so as to uphold an action at law. But in Downs v. Jackson, *ante*, it was held that such a promise is implied where one partner pays the amount of a judgment against the firm. In any event, no such promise can be implied or action sustained, until the money has been actually paid, or the debt has been discharged as to the other partners. Dedman v. Williams, 2 Ill. 154; Cumming v. Hackley, 8 Johns. (N. Y.) 202. And the money must have been paid upon a debt arising out of matters connected with the firm. Thus, money paid to settle a judgment in an action against *one* partner for a tort has been held not recoverable, either at law or in equity. Vose v. Grant, 15 Mass. 521; Pecks v. Ellis, 2 Johns. Ch. (N. Y.) 131; Miller v. Fenton, 11 Paige's Ch. (N. Y.) 18; Thweatt v. Jones. 1 Rand. (Va.) 328; Dupuy v. Johnson, 1 Bibb (Ky.), 565; Merryweather v. Nixon, 8 T. R. 186. But it is not believed that this rule is sound as applied to partners, when the action arose out of a tort for which the partners, as partners, were liable. In any event, in such cases contribution would be enforced in equity. Pearson v. Skelton, 1 M. & W. 504. "Although," says Mr. Bissett in his work on Partnership, 122, "the rule that joint wrong-doers cannot have redress or contribution against each other does not extend to those cases where the tort is one merely by inference of law, yet in cases arising between partners the same substantial obstacle, which prevails in cases of contract, frequently operates as a bar to redress in actions for contribution grounded upon constructive tort. Thus, in Pearson v. Skelton, *ante*, the plaintiff and defendants, with several others, were jointly interested in running a public stage coach. The coach having through the negligence of the coachman occasioned damage, and the plaintiff having paid the debt and costs, recovered in an action brought against him by the person aggrieved, sued the defendant, his copartner, for contribution. Upon an application to set aside a nonsuit at Nisi Prius, Parke, B., is reported to have said, Lee v. Tryon, Gr. 346: 'Did the partnership divide the net profits after the payment of all expenses, or the gross profits according to the number of miles that each partner horsed the coach? If the latter was the case, you will be entitled to a rule; but if there was a *partnership fund*, out of which losses were to be paid, your remedy is in equity.' And the court, afterward finding from the judge's notes that there was a partnership fund, refused to set aside the nonsuit."

be levied on one of several defendants, he may sue the others for their contributions.[1] So, also, where the whole damages awarded by an arbitrator have been levied upon one of two joint contractors, he has been held to be entitled to contribution at law. In Burnell v. Minot,[2] A and B, who were not partners in trade, entered into a joint undertaking with C. They failed to perform their contract. C then applied to A for compensation, and, in default thereof, threatened him with an action. A, not choosing to defend an action without the privity of B, agreed to refer the amount of the damages to an arbitrator. The arbitrator awarded a certain sum to be due, which A paid, and of which he brought his action against B to recover a moiety. It was held that such an action was maintainable.

May proceed in equity.

SEC. 272. However, even in cases of this nature, the aggrieved partner may proceed, if he pleases, in a court of equity. In a case where five persons, in partnership as coach proprietors, had incurred a partnership debt, which the creditor, after the death of one of the partners, recovered in an action against the survivors on a bill filed for that purpose by the partner who had paid the damages and costs of the action, against the representatives of the deceased partner, Sir John Leach decreed contribution not only for the damages, but also for the costs.[3]

When the partnership is dissolved.

SEC. 273. The rule that actions of contract are not maintainable between partners on the partnership account evidently arises from their situation *inter se,* and not from their situation *quoad* third persons. When, therefore, the partnership is actually at an end, as the partnership account is also at an end for all future purposes, it follows that the way is clear for any action between the parties, arising from causes subsequent to the dissolution, although these causes may originate in their situation of partners *quoad* third persons. Thus, A, B and C, having dissolved partnership, C, after such dissolution, drew bills in the partnership firm in favor of D, the latter not knowing of such dissolution. D brought this action on the bills against A, B and C. C having pleaded his bankruptcy, judgment was recov-

[1] Per Bayley, J., Ansell v. Waterhouse, 6 Mau. & Sel. 390. And see Herries v. Jameson, 5 T. R. 556; Holmes v. Williamson, 6 Mau. & Sel. 158; Meryweather v. Nixan, 8 T. R. 186.

[2] 4 Moore, 340.

[3] Thomas v. Lichfield, Rolls, H. T. 1831. See Browne v. Gibbins, 5 Bro. P. C. 491. A bill will be entertained by members of an insolvent association for an account, and to compel each solvent member to contribute *pro rata* to the indebtedness. Hodgson v. Baldwin, 65 Ill. 532.

ered against A and B, who satisfied it from their joint fund. It was held that A and B might recover the money so paid in an action brought by them jointly against C.[1] Again, A and D were partners, D became a bankrupt. After D's bankruptcy, A paid two partnership debts for which he had contributed his share before the bankruptcy. One of these debts was provable under the commission; the other, under the existing law, was not provable. It was held that, upon D's receiving his certificate, A might maintain an action against him for the debt not provable under the commission.[2] Again, the partnership of A and B having been privately dissolved, B, after that period and before the public dissolution, contracted debts in the name of the firm. A having paid these debts, it was held that he could recover the amount in an action against B for money paid to B's use.[3]

Summary.

SEC. 274. From all that precedes, it is evident that where one partner has a claim upon his copartner for a sum of money due on account of the partnership, but not constituting the balance of a separate account, or a general balance of all accounts, his only mode of recovering the amount is by bill filed in a court of equity, praying for an account, and usually also for a dissolution.

[1] Osborne v. Harper, 5 East, 225; 1 Smith, 411.

[2] Wright v. Hunter, 1 East, 20.

[3] Hutton v. Eyre, 1 Marsh. 603.

CHAPTER XI.

OF THE RIGHT TO A DISSOLUTION.

SEC. 275. Of the right to a dissolution.
SEC. 276. The impracticability of the business.
SEC. 277. Incapacity of the partners.
SEC. 278. Insanity of partner.
SEC. 279. Commission of lunacy, conclusive evidence of.
SEC. 280. The misconduct of the partners.
SEC. 281. Fraud, bad faith, etc., cause for dissolution.

Of the right to a dissolution.

SEC. 275. We have already had occasion to notice, that a partnership for a term may be dissolved before the expiration of the term, by the decree of a court of equity.[1] This must be upon a bill filed by one

[1] *Ante*, p. 73. A dissolution may be decreed for a variety of causes, as for embezzling the funds of the firm, or misapplying them, or otherwise violating the partnership articles, Durbin v. Barbet, 14 Ohio, 312; Essel v. Hayward, 30 Beav. 158; for introducing a stranger into the firm, Master v. Kiston, 3 Ves. 75; for acts done by one partner inconsistent with his obligations as a partner. Smith v. Joyes, 4 Beav. 503; because one partner fails to furnish as much capital as he contracted to furnish, Wood v. Beath, 23 Wis. 258; Durbin v. Barbett, *ante;* because one partner contracts habits of drunkenness, or neglects the business or otherwise so conducts himself as to destroy the mutual confidence so essential to this relation, Ross v. Henderson, 77 N. C. 170; Norway v. Rowe, 19 Ves. 148; habitual extravagance in the conduct of the business, Norway v. Rowe, *ante;* Leighortner v. Weisenbom, 20 N. J. Eq. 172; fraudulent conduct, Oldaker v. Laumder, 6 Sim. 239, or indeed any act on the part of one partner that injuriously affects the business, or injures his capacity for usefulness in the firm. Meagher v. Cox, 37 Ala. 401; Richards v. Baurman, 65 N. C. 162. So, too, a dissolution will be decreed, when from any cause the business becomes impracticable; as where the partners cannot agree upon the conduct of the business, and have frequent quarrels, Bishop v. Breckles, 1 Hoff. Ch. (N. Y.) 536; Blake v. Dorgan, 1 Iowa, 540, or where one excludes the other from the business, Dupont v. Ruprecht, 38 Ala. 176, or where from the state of antagonism or ill feeling between the partners the business cannot be profitably conducted to their mutual advantage, Watney v. Wells, 30 Beav. 60; where the business cannot be carried on consistently with the meaning of the contract, as, where it is evident that no profits can be made therefrom, Baring v. Dix, 1 Cox's Ch. 213; Jennings v. Bradley, 3 K. & J. 82. So, a court of equity may decree the dissolution of a partnership during the term for which it was entered into, and declare it void, *ab initio*, where there is fraud, imposition, misrepresentation, or oppression in the original agreement; and may also decree a dissolution, for causes arising subsequently to its formation, founded upon fraud, misconduct, or violation of duty by one partner, or on account of his incapacity to perform his obligation and to contribute his skill, labor, and diligence in the promotion and accomplishment of the objects of the copartnership; or for the existence of an impracticability in the undertaking for which the partnership was formed. Where it is shown the partner

or more of the partners against the others, showing a sufficient cause of complaint; and the cause of complaint may consist in the impracticability of the undertaking, or the incapacity or misconduct of the copartners.

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asking a dissolution was deceived and misled by the representations of his copartner, as to his skill and capacity as a machinist and engineer, a dissolution may be decreed, if the equities require it, to date from the time of his abandonment of the contract, and notice thereof given to the defendant. Fogg v. Johnston, 27 Ala. 432; Brien v. Harriman, 1 Tenn. Ch. 467. So appropriating the funds of the firm to his own use without the consent of his copartners, is such a violation of good faith on his part, and of his obligations as a partner, as affords a very good ground for dissolving the firm. Essel v. Haywood, 30 Beav. 158; Kennedy v. Kennedy, 3 Dana (Ky.), 241. So does any conduct inconsistent with the relation, or a violation of the conditions of the contract, express or implied, as refusing to furnish the capital as agreed, Durbin v. Barbett, 14 Ohio, 312, or refusing to account for, or pay over the profits of the business as agreed, O'Conner v. Stark, 2 Cal. 153; Maher v. Bull, 44 Ill. 99; Meagher v. Cox, 37 Ala. 213; Wood v. Beath, 23 Wis. 254; or because the business has become unprofitable, Dunn v. McNaught, 38 Ga. 179; because one partner refuses to conduct the business as agreed, Wood v. Beath, *ante*, or when by reason of sickness, insanity, or other cause, one partner has become incapacitated to perform his functions as a partner, although it seems that if the cause is removed, before final decree, a dissolution will not be ordered. Atwood v. Smith, 11 Ala. 910; Whitwell v. Arthur, 35 Beav. 140. See *ante*, note 3, p. 149. A partnership for a term can only be dissolved by a decree of a court of equity, and one of the parties cannot of his own volition dissolve it. He may retire, but he cannot withdraw his capital or escape liability for the debts of the firm. Pars. on Partn. 2d ed. 424; Bruce v. Rossett, 18 La. 344. In Ferrero v. Buhlmeyer, 34 How. Pr. (N. Y.) 33, it was held that where the articles of copartnership prescribe a specified period for its continuance, no one of the partners can, by any purely voluntary act done by him, work its dissolution, and that one partner cannot dissolve the partnership during the term. A partner may assign his interest in the goods, profits, etc., subject to the equities, but none of his personal rights. Therefore, the assignee takes no right to sell or dispose of the goods, or to insist on their sale, only in the legitimate prosecution of the business. The assignee acquires no right to participate in the control or supervision of the business. Although the partner may assume the pecuniary interest, he cannot assign the personal rights. A voluntary dissolution of a partnership for a term by one partner is confessedly a wrong done by him to the others; and to allow a voluntary assignment to have that effect would be equally wrong. The assignment cannot of itself be a cause for a dissolution. The only way in which a partnership can be dissolved during the term is by application to the chancellor, setting forth sufficient reasons for such dissolution. But a voluntary assignment by a partner of his interest in a partnership limited to a specified period is not a cause for which a dissolution will be decreed against the consent of the other partners. Mr. Gow in his work on Partnership, 3d Am. ed. 226, in speaking of a partnership for a definite time, says, "A partnership so constituted cannot be defeated by the will of any one of the partners, short of the whole of them." All the partners must be made parties to a bill for dissolution, and if one partner is dead, his representative must be made a party. Gray v. Larrimore, 2 Abb. (U. S.) 542. The withdrawal of one partner dissolves the firm, and although the remaining members go on with the business, yet it is a new firm, and the new firm, as such, only becomes liable for the debts of the old, when they are assumed by the consent of all. Spaunhorst v. Link, 46 Mo. 167. A partnership at will may, of course, be dissolved at the will of either of the partners, but, even in such cases, it is, except where the parties agree upon a distribution of the assets best to apply for a decree dissolving the partnership, and for a receiver. Carlton v. Cummings, 51 Ind. 478. The mere fact that no definite time is fixed for the duration of the firm does not necessarily make the partnership one at will. Its duration for a certain period may be implied. Mr. Gow, in treating of this question in

The impracticability of the undertaking.

SEC. 276. In Baring v. Dix,[1] one partner filed his bill against the other for a dissolution of the partnership, and sale of the partnership premises. The partnership was for spinning cotton by a new inven-

his work upon Partnership, p. 224, says: "The existence of engagements with third persons, which have not come to a conclusion, does not form any objection to a dissolution. For, as partners are necessarily entering into contracts from day to day, which cannot all expire at the same period, it would, if their subsistence furnished ground of objection, be hardly possible to dissolve any partnership. The partners cannot, it is true, by a dissolution relieve themselves from any engagements which they may have contracted with strangers; but, as among themselves, the existence of such engagements cannot prevent a dissolution, either by mutual consent or notice. Featherstonhaugh v. Fenwick, 17 Ves. 298. Articles of partnership frequently contain a provision for a dissolution, upon notice to be given by any one of the partners. In such a case the mode of proceeding pointed out must be strictly pursued, and a regard to good faith must govern the conduct of the partner who withdraws. But if a partnership be commenced for a limited period, with a right reserved to each partner of dissolving it on giving a year's notice, and after the expiration of the period originally agreed upon, it be, by mutual consent, continued, it may then be dissolved by either party at his pleasure. Featherstonhaugh v. Fenwick, 17 Ves. 298. In the absence of an express, there may be an implied contract, as to the time for which a partnership shall endure; Crawshay v. Maule, 1 Swanst. 508. Though a copartnership is by the articles to terminate at a certain period, it may be continued by express or tacit consent; and in such case, the stipulations of the original articles would be considered as those of the continuing partnership. Miffin v. Smith, 17 S. & R. (Penn.) 165; see Dickinson v. Bold's Survivors, 3 Desau. Ch. (S. C.) 501; and where that is the case, the partnership cannot be destroyed by the act of the party until the contemplated period arrives. However, the purchase of a leasehold interest by a partnership firm does not necessarily manifest an intention that the partnership contract shall be coexistent with the duration of the lease. Although, unquestionably, the purchase may be made to imply an agreement that the partnership should last as long as the lease. Per Lord Eldon, id. 521. But if, as a general rule, such an inference were to be drawn from the mere act of purchase, it would apply alike to the acquisition of freehold as of leasehold interests, and consequently, if the partners were to purchase a fee simple, it must, according to that principle, be concluded that they intended the partnership should exist forever. Id.; Featherstonhaugh v. Fenwick, *supra;* Jeffreys v. Smith, 1 J. & W. 301. When the dissolution of a partnership, to which any partner is entitled, is opposed by some of the partners, a court of equity will interfere, and under such circumstances it may be more prudent to file a bill, which may not only pray a dissolution, but likewise an account and an injunction, restraining the dissentient partners from executing securities in the name of the firm, and from receiving the partnership debts. Master v. Kirton, 3 Ves. 74; Lawson v. Morsan, 1 Price, 303; Ryan v. Mackmath, 3 Bro. C. C. 15. There is an instance of an application to a court of equity to inhibit the dissolution of a commercial partnership, Chavany v. Van Sommer, 3 Woodd. Lect. 416 n.; S. C., 1 Swanst. 512 n.; and it has been said that on proper grounds such an application may be sustained. 1 Madd. Ch. Pr. 160. It may be doubted whether as against a client who, having employed solicitors in partnership, has a right to their united exertions, the solicitors are at liberty to dissolve their partnership and turn the client over to one of them, it should seem they have not, as against him, the power of dissolving their partnership, Cook v. Rhodes, in note to 19 Ves. 273; but however that may be, a retiring partner can never be considered as a discharged solicitor. The client, after such disso-

[1] 1 Cox, 212; Wood v. Beatt, 23 Wis. 254; Harrison v. Tenant, 21 Beav. 488; Dunn v. McNaught, 38 Ga. 179; Bishop v. Breckles, 1 Hoff. Ch. (N. Y.) 536; Blake v. Dorgan, 1 Iowa, 540; Dupont v. Rupprecht, 38 Ala. 176.

tion under a patent, which the plaintiff alleged had been found on many trials impracticable. The defendant refused to consent to a dissolution of the partnership, and Lord Kenyon referred it to the

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lution of partnership, cannot employ both, and it would be impossible to maintain that, if he employ one, the other is let loose and discharged from all those obligations which he had undertaken. A solicitor under such circumstances, if retained against his former client, must (however high his personal character) be considered, hypothetically, as employed for no other reason except the very improper one, that he had been previously employed by the other party, and upon the clearest general principle that cannot be admitted. Cholmondeley v. Clinton, 19 Ves. 267; S. C., Coop. 80; and see Beer v. Ward, 1 Jac. 82. The effect of the *marriage* of a *feme sole* partner has never been expressly decided; but, upon general principles, it would most probably be held to operate a dissolution of the partnership. Wats. on Partn. 384; see, also, 1 Swanst. 517 n; see Griswold v. Waddington, 15 Johns. (N.Y.) 82. Where articles of partnership are entered into, it frequently happens that a precise term is fixed for the duration of the contract. In that case the partnership, if it do not meet with an intermediate legal or accidental termination, is regularly dissolved by the effluxion or expiration of the period originally stipulated for its existence. A partnership so constituted cannot be defeated by the will of one or of any number of the partners short of the whole of them, but of course, if they all agree upon a separation, they may do so at any time. Besides the instances of dissolution occasioned by the act of God, or effected by the parties themselves, a partnership contract entered into for a term of years, may, in some cases, before the term has expired, be terminated by the *act of the law.* Where it appears that the contemplated undertaking cannot be carried on according to the true intent and meaning of the articles of copartnership, as if a partnership be formed for carrying into effect a new invention which, after repeated trials, is found impracticable, a court of equity will dissolve it. Baring v. Dix, 1 Cox's Ca. 213. And although the misconduct of a partner in trifling circumstances, which is not of such a nature as to defeat the object for which the partnership was formed, seems not to be a sufficient cause for dissolving a partnership, Goodman v. Whitcomb, 1 Jac. & Walk. 593; Liardet v. Adams, Mont. on Partn. 90, yet, if the conduct of partners has been such as to render it impossible to carry on the partnership upon the terms on which it was entered into, Waters v. Taylor, 2 V. & B. 299; or if one partner be entirely excluded by the others from his interest in the partnership, Goodman v. Whitcomb, *supra;* or if there be a gross abuse of good faith between the parties, Chapman v. Beach, 1 Jac. & Walk. 594, a dissolution will, in such cases, be decreed at the instance and on the complaint of a single partner, notwithstanding the other partners object to it. Baring v. Dix, *supra;* see Glassington v. Thwaites, 1 Sim. & Stu. 129, notes a and b. So violent and lasting dissension seems to be a ground upon which a court of equity will decree a dissolution; as where the parties refuse to meet each other on matters of business; a state of things which precludes the possibility of the partnership business being conducted with advantage. De Berenger v. Hamell, cor. Sir L. Shadwell; Jarman's Con. 7th vol. p. 26. A society for relief in sickness, by means of a fund raised by subscription of the members, has been considered as a partnership, it having no corporate character, Beaumont v. Meredith, 3 V. & B. 180; Babb v. Reed, 5 Rawle (Penn.), 151; and where it has been found that the society has existed upon principles which, with reference to the amount of the number of subscribers, and the nature of the subscriptions, made the whole a bubble, the same has been dissolved, each member receiving a portion of the sums subscribed. Buckley v. Cater, stated 17 Ves. 15; Pearce v. Piper, id. 1; Beaumont v. Meredith, *supra.* The court will likewise dissolve friendly societies founded on erroneous principles; and, until a dissolution takes place, will restrain the trustees from making payments which may tend to exhaust the funds. Reeve v. Parkins, 2 J. & W. 390; and see Ellison v. Bignold, id. 503. An *act of bankruptcy* committed by one partner, if followed by a commission and assignment, is a dissolution of the partnership for all purposes, as regards the bankrupt partner, by virtue of the relation to the statutes concerning bankrupts, which avoid all the acts of a bankrupt from the time

master to inquire whether the partnership could be carried on according to the intent of the articles of copartnership, and said that if the master should declare that it could not be carried on, he would decree

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of the act of bankruptcy, and from the necessity of the thing, all his property being vested in his assignees, who become tenants in common of his share of the partnership stock. Hague v. Rolleston, 4 Burr. 2174; Smith v. De Sylva, Cowp. 471; Ex parte Ruffin, 6 Ves. 126; Ex parte Williams, 11 id. 5; Wilson v. Greenwood, 1 Swanst. 480; S. C., 1 J. Wilson, 223; In re Wait, 1 J. & W. 609; Per Bayley, J., 10 East, 426; Griswold v. Waddington, 15 Johns. (N. Y.) 82; 17 id. 535. So a voluntary *bona fide* assignment by one of several partners, of all his interest in the copartnership stock, etc., *ipso facto* dissolves the partnership; although one of the articles expressly provides that the partnership is to continue until two of the contracting parties shall demand a dissolution, and the other partners wish the partnership business to go on notwithstanding the assignment. Marquand et al. v. The N. Y. Man. Co., 17 Johns. (N.Y.) 525; Mumford v. Mc Kay, 8 Wend. (N. Y.) 442. But an assignment of their property by a firm consisting of two partners, containing a condition that it shall inure only to the benefit of such creditors as shall agree to look to each of the partners for only such moiety of such balance as shall remain after a dividend of the property assigned, followed up by a covenant to that effect on the part of the creditors, does not produce a severance of the partnership, although in the instrument executed by the creditors there be a covenant on the part of the partners that they will individually pay a moiety of such balance. Le Page v. McCrea, 1 Wend. (N. Y.) 164. And with respect to the solvent partner, the bankruptcy of his copartner so far operates a dissolution of the partnership as to prevent his dealing with the partnership property for future purposes, as if the partnership continued; but in respect of past transactions or claims which were consummate at the time of the bankruptcy, the solvent partner is not prevented from exercising the control which rests with him over the partnership effects, to take care that they are duly applied in liquidation of the partnership debts. Harvey v. Crickett, 5 Mau. & Selw. 336; see, also, dictum of Lord Ch. B. Thomson, in Coldwell v. Gregory, 1 Price, 129; S. C., 2 Rose, 149; Ex parte Blakey, 1 Glyn & J. 198. With reference to the bankrupt partner, it was for some time doubtful, whether the act of bankruptcy, the commission, or the assignment should be considered as operating the dissolution. In one case, Fox v. Hanbury, Cowp. 448, Lord Mansfield seemed to conceive that it was the act of bankruptcy; in another case, Hague v. Rolleston, *supra*, that effect was ascribed by him generally to the bankruptcy. However, from several decisions which have subsequently taken place, it seems now settled that the joint tenancy is not fully severed until the partner against whom the commission issues is adjudged a bankrupt, but that the dissolution has then a retrospect to the act of bankruptcy. Ex parte Smith, 5 Ves. 295; Smith v. Stokes, 1 East, 363; Dutton v. Morrison, 17 Ves. 204; Barker v. Goodair, 11 id. 78. Upon the issuing of a commission, the assignment by the commissioners has a relation back to the first act of bankruptcy, committed subsequent to the petitioning creditor's debt. Ex parte Birkett, 2 Rose, 71. The adjudication that the party is a bankrupt is, indeed, so effectual a dissolution that the bankrupt himself may, it has been said, insist upon its having terminated the partnership. Pidcock v. Kilby, Mont. on Part. 91 n. (1). But if the commission be fraudulently taken out for a purpose foreign to its object, as with the express view thereby of working a dissolution of the partnership, the Lord Chancellor will direct it to be superseded at the cost of those at whose instance it was issued, although there be a trading, a debt, and an act of bankruptcy, for the great seal will not permit such an abuse of its process. Ex parte Browne, 1 Rose, 151; see, also, Ex parte Harcourt, 2 id. 203; Ex parte Gallimore, id. 424. To warrant the granting a *supersedeas*, however, there must be fraud, it not being sufficient to show the existence merely of a by-motive, because a commission is, in a qualified sense, a legal right, like an action, and courts of justice have no concern with, or power to inquire into, the motives of parties who assert a legal right. Therefore, where a creditor of a firm, being displeased with the conduct of one of the partners, and being convinced that if he continued in the concern he would ruin it, ar-

a dissolution of the partnership, and a sale of the premises. The defendant soon afterward consented to the partnership being dissolved. So, in a very important case, a court of equity declared the partner-

rested all the partners, they, with the exception of the one with whom the creditor was displeased, put in bail, but he remained in prison until two months expired, and then he was made a bankrupt by the creditor, who continued his dealings with the other partners. On a petition being presented by the bankrupt to supersede the commission, on the ground that an unfair use had been made of the same, it being issued for the purpose of dissolving the partnership so far as respected him, the Vice-Chancellor, after conferring with the Lord Chancellor on the subject, dismissed the petition, observing that the commission was not affected by any by-object in the petitioning creditor, and that it was not fraudulent on his part, if, without concerting with the other partners, he desired to operate a dissolution, considering it an advantageous measure for himself that the bankrupt should not continue in a firm with which he had dealings. Ex parte Wilbran, 5 Madd. 1; and see Ex parte Bourne, 1 Glyn & J. 311; but see S. C., 2 id. 137, in which the former order was reversed. An execution, likewise, under which all the interest of one partner is seized and sold, is a determination of the partnership as to him; because whatever interest he possessed is divested out of him, and becomes, by the sale, vested in the vendee of the sheriff, who is tenant in common with the solvent partners. Sayer v. Bennet, Mont. on Part., notes, p. 17. In Fox v. Hanbury, Cowp. 445, Lord Mansfield assumed that a partnership might be dissolved by an execution; and see Waters v. Taylor, 2 V. & B. 299; Per Curiam, Murray v. Mumford, 6 Cow. (N. Y.) 443. A partnership may likewise be dissolved by an award. It is customary in regular partnerships to insert a clause in the articles, by which the partners covenant to submit to arbitration any matter or thing which may become the subject of controversy or dispute between them. And although in such cases the arbitrators are usually judges of the parties' own choosing, and proceed in a summary way, yet, if duly authorized, their reward is considered final, consequently binding upon the parties, unless there should appear just grounds, either at law or in equity, to set it aside."

To attempt to give all the instances in which the dissolution of a firm will be decreed, would be an endless, as well as useless task, as every case must stand upon its peculiar facts and equities, and the relief will be granted or denied according to the determination of the question, whether there has been any violation of the express or implied conditions of the contract, or whether there has been such a change of circumstances as defeats the ends and purposes for which the firm was established.

That, in the absence of notice of dissolution, except when the dissolution results from death or by decree of court, all the general partners are bound by the acts of either as to any matter within the scope of the partnership business real or apparent, to all who have previously dealt with the firm, see Van Epps v. Dillaye, 6 Barb. (N. Y.) 250; Kitcham v. Clark, 6 Johns. (N. Y.) 144; Gould v. Horner, 12 Barb. (N. Y.) 604; Spaulding v. Ludlow Woolen Mills, 36 Vt. 157; Simmonds v. Strong, 24 id. 642; Turney v. N. E. Protective Union, 37 id. 64; City Bank of Brooklyn v. McChesney, 20 N. Y. 252; Martin v. Searles, 28 Conn. 46; Goddard v. Pratt, 16 Pick. (Mass.) 431; Davis v. Keyes, 38 N. Y. 94; Banks v. Mudgett, 45 Barb. (N. Y.) 663; White v. Murphy, 3 Rich. (S. C.) 367; Pape v. Risley, 23 Mo. 187; Ellis v. Bronson, 40 Ill. 456; Edwards v. McFall, 5 La. An. 168; Carroll v. Daws, 40 Ill. 374; Reilly v. Smith, 16 La. An. 31; Walton v. Tomlin, 19 N. C. 593; Bank v. Camp, 4 Humph. (Tenn.) 394; Williamson v. Fox, 38 Penn. St. 216; Hutchins v. Bank of Tenn., 8 Humph. (Tenn.) 418; Davis v. Allen, 3 N. Y. 169; but as previously intimated, in the case of the death of a partner no notice is necessary. Marlett v. Jackman, 3 Allen (Mass.), 287. Nor is notice generally necessary in the case of a dormant partner's retirement. Indeed, never except as to those who had notice or knowledge of his connection with the firm. Scott v. Calmensil, 7 J. J. Marsh (Ky.) 423; Warren v. Ball, 37 Ill. 81.

As to circumstances such as should put a person dealing with a firm on inquiry, see Clapp v. Upson, 12 Wis. 492; Pomeroy v. Coons, 20 Mo. 599; Barefoot v. Goodall, 3 Camp. 146; Stewart v. Caldwell, 9 La. 419. To wit, a change in the firm name, Barefoot v. Goodall,

ship in the Opera house to be dissolved; the conduct of the parties making it impossible to carry it on upon the terms stipulated. Accordingly the decree was for a sale of the whole concern.[1] In a Scotch case, noticed by Mr. Bell in his Commentaries, a partnership was agreed upon by three persons for three years, and buildings were erected in prosecution of the design. Two of the three partners finding that still larger advances were necessary, and the event problematical, they were held entitled to dissolve.[2]

The incapacity of the copartners.

SEC. 277. Where a partner is of unsound mind, and there is every probability of a continuance of the malady, a court of equity will relieve the copartner by dissolving the contract of partnership.[3] "If a case arose," says Lord Eldon, "in which it was clearly established, as far as human testimony can establish, that the party is what is called an incurable lunatic, and he had, by the articles, contracted to be always actively engaged in the partnership, and it was therefore as clear as human testimony can make it, that he could not perform his contract, there could be no damages for the breach in consequence of the act of God. But it would be very difficult for a court of equity to hold one man to his contract, when it was perfectly clear that the other could not execute his part of it.[4]

Insanity of partner.

SEC. 278. In Sayer v. Bennet,[5] where a bill was brought to dissolve a partnership, on the ground of the insanity of the defendant, Lord Kenyon said, "Where there are two partners, both of whom are to contribute their skill and industry in carrying on the trade, the insanity of one of them, by which he is rendered incapable to contribute that skill and industry on his part, is a good ground to put an end to the partnership, not by the authority of either of the

ante; Kirby v. Hewitt, 26 Barb. (N. Y.) 608; Caldwell v. Hickey, 9 La. 419. A change of location from one state to another, Clapp v. Upson, *ante*, and all such matters as should lead an ordinarily prudent man to inquire as to whether the firm has been changed.

[1] Waters v. Taylor, 2 Ves. & Bea. 299.

[2] Barr v. Spiers, 2 Bell's Comm. 642.

[3] Jones v. Noy, 2 Myl. & Kee. 125; Wrexham v. Huddlestone, 1 Swanst. 504, n.

[4] Waters v. Taylor, *supra*. See note, *ante*, p. 152.

[5] Mont. Partn. Vol. 1, Append. p. 18; Wats. Partn. 382; 1 Cox, 107. In Griswold v. Waddington, 15 Johns. (N. Y.) 57, it was urged by counsel and recognized by the court, that the incurable insanity of a partner, *ipso facto*, dissolves the partnership. But this is wholly inconsistent with reason or authority. Jones v. Noy, 2 My. & K. 152; Gow on Partnership, 223. The partnership in such cases exists until dissolved by decree. See *ante*, note 3, p. 152, where the question is discussed at length.

partners, but by application to a court of justice, and this, for the sake of the partner who is rendered incapable, as well as of the other; for it would be a great hardship upon a person so disordered, if his property might be continued in a business which he could not control or inspect, and be subject to the imprudence of another." In accordance with the opinion so expressed, his Lordship in that case laid the foundation of a practice which has since been uniformly followed, namely, of referring the question of insanity to the Master, in cases in which the fact of insanity is not sufficiently established at the hearing of the cause. In the particular case before Lord Kenyon, the Master's report appears to have been unsatisfactory, and an issue was ultimately directed, the result of which is not known; but in the recent case of Kirby v. Carr,[1] a partnership was dissolved by a decree of the Court of Exchequer, on the authority of the practice as established by Lord Kenyon.

Commission of lunacy conclusive.

SEC. 279. In cases of this nature, it is usual to produce evidence of the defendant's insanity at the hearing of the cause, and it should seem that proof of his having been found a lunatic under a commission of lunacy, is conclusive evidence on which to found a decree for dissolution.[2] But if no commission of lunacy has issued, strict evidence of the defendant's permanent and incurable lunacy must be given at the hearing, if a decree be sought without a reference to the Master; for, as Lord Abinger justly observed in the case of Kirby v. Carr, the bill in these cases proceeds on the ground that the defendant, being insane, is unable to accept notice of dissolution. He must, therefore, be proved to be insane in the strict sense of the word, and not merely incapable of conducting the affairs of the partnership.

The misconduct of the copartners.

SEC. 280. Lord Thurlow once said that, as to misbehavior in one of the partners, he did not see what line could possibly be drawn, and what degree of misconduct was to be held a sufficient ground for dissolving the partnership.[3] And certainly, a court of equity will not dissolve a partnership on slight grounds; as, for instance, because one partner may have conducted himself toward the other in an overbearing and insulting manner. "The court," to use Lord Eldon's

[1] 3 You. and Col. 184. But if, before final decree, the partner becomes sane, or if the insanity resulted from a temporary cause, and restoration to sanity is beyond question, a dissolution will not be decreed. Atwood v. Smith, 11 Ala. 910

[2] Milne v. Bartlett, 3 Jurist, 358. See also, to same effect, Isler v. Baker, 6 Humph. (Tenn.) 85.

[3] Liardet v. Adams, 1 Mont. Partn. 112.

expressions before adverted to, "having no jurisdiction to make a separation between them, because one is more sullen or less good tempered than the other."[1] So, again, want of prudence or ability on the part of the person seeking relief is no just ground for a dissolution, as where he has made larger advances of capital than he is bound to do, and has received none of the profits.[2]

Fraud, bad faith, etc., cause for dissolution.

SEC. 281. However, it may with safety be laid down, that not only willful acts of fraud and bad faith, but gross instances of carelessness and waste in the administration of the partnership, as well as exclusion of the other partners from their just share of the management, so as to prevent the business from being conducted on the stipulated terms, are sufficient grounds for the dissolution of the contract by a court of equity.[3] So also, it seems clear that a habit on the part of one partner of receiving moneys and not entering the receipts in the books, or not leaving the books open to the inspection of the other partners, whether such conduct arise from a fraudulent intent or not, is good ground for a dissolution.[4] So, if a partner in a banking-house allows a customer to overdraw, and by way of security takes bonds from the customer, executed to himself separately and not to the firm, this is such misconduct as will warrant a court of equity in decreeing a dissolution.[5] And although this relief will not be administered for mere defects of temper in some of the parties, yet violent and lasting dissension seems to be a ground upon which a court of equity will decree a dissolution; as where the parties refuse to meet each other upon matters of business, a state of things which precludes the possibility of the partnership affairs being conducted with advantage.[6] And it has been laid down, that though the court stands neuter with respect to occasional breaches of agreements between partners, which are not so grievous as to make it impossible for the partnership to continue, yet when it finds that the acts complained of are of such a character that relief cannot be given to the parties except by a dissolution, the court will decree a dissolution, though it is not specifically asked.[7]

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[1] Goodman v. Whitcomb, 1 Jac. & W. 592. See Wray v. Hutchinson, 2 Myl. & Kee. 235.

[2] Goodman v. Whitcomb, *supra*.

[3] See Marshal v. Colman, 2 Jac. & W. 200; Goodman v. Whitcomb, 1 id. 592; Chapman v. Beach, id. 594; Norway v. Rowe, 19 Ves. 248; Waters v. Taylor, 2 Ves. & B. 304.

[4] Goodman v. Whitcomb, 1 Jac. & W. 593.

[5] Master v. Kirton, 3 Ves. 74; R. L. 1796, B. 428.

[6] De Berenger v. Hommell, 7 Jarm. Conv. p. 26.

[7] Per Sir L. Shadwell, 4 Sim. 11. See note 3, *ante*, p. 149, *et seq.*

CHAPTER XII.

OF ACCOUNT BETWEEN PARTNERS.

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SEC. 350. Just allowances, what are regarded as:
SEC. 351. Interest on profits in the hands of a partner.
SEC. 352. Costs.

Of account between partners — Usually consequent on dissolution.

SEC. 282. The account which a court of equity[1] decrees between partners is usually consequent upon a dissolution, and Lord Eldon was inclined to hold that it *must* depend upon a dissolution. Thus in Forman v. Homfray,[2] a bill filed by one partner against the other prayed payment by the defendant of certain sums alleged to have been taken by him out of the partnership funds, or that an account might be taken of the copartnership dealings, and that an injunction

[1] For some particulars as to the action of account, which is now fallen into disuse, see Co. Litt. 172 a; 11 Rep. 3 a; Brownl. 24; Hutton, 133; Cro. Car. 116; 2 Bulstr. 256; 2 Lev. 126; 1 Ld. Raym. 340; 11 Mod. 1817; Willes, 208; 2 Ves. 388; 3 Wils. 73; 8 Marsh. 115; 3 Dowl. & Ryl. 596; Com. Dig. Accompt, B. N. P. 127; Wats. Partn. 394; and see the late case of Baxter v. Hosier, 5 Bing. N. C. 288; 2 Scott, 129.

[2] 2 Ves. & B. 329.

might be granted restraining the defendant from receiving the partnership moneys, etc. The prayer did not extend to a dissolution. The defendant having put in his answer, a motion was made by the plaintiff that the defendant might be ordered to pay into court or into the cash of the copartnership, a sum of 1,478*l.* 14*s.* 6*d.*, admitted in his answer to be due from him to the copartnership concern. Lord Eldon refused the motion, observing that he did not recollect an instance of a bill, filed by one partner against the other, praying for an account merely, and not a dissolution — proceeding on the foundation that the partnership was to continue. If a partner could come here for an account merely pending the partnership, there seemed to be nothing to prevent his coming annually.[1]

Rule as to bill for accounting without paying for dissolution.

SEC. 283. In a subsequent case of Harrison v. Armitage,[2] Sir John Leach was clearly of opinion that one partner might file a bill against another for an account, without praying for a dissolution, since it was the only remedy he had; and in a still later case,[3] his Honor adhered to his former opinion, observing that, to refuse relief in these cases except upon the terms of putting an end to the partnership, was contrary to the plain principles of justice. And in answer to an objection which had been raised for the defendant, that if this suit were entertained he might be vexed by a new bill whenever new profits accrued, his Honor said: "What right has the defendant to complain of such new bill, if he repeats the injustice of withholding what is due to the plaintiff? Would not the same objection lie in a suit for tithes, which accrue *de anno in annum?*"

Contrary rule in Loscombe v. Russell.

SEC. 284. But considerations of general convenience have induced other learned judges to overrule the opinion of Sir John Leach, and to adopt that of Lord Eldon. Thus in Loscombe v. Russell,[4] which was a bill for an account of the profits of a partnership between two carriers, a demurrer was put in on the ground that the bill did not pray a dissolution, and Sir L. Shadwell, V. C., allowed the demurrer. His Honor, in giving judgment, said that there was no instance[5] of an account being decreed of the profits of a part-

[1] Forman v. Homfray, 2 Ves. & B. 329.

[2] 4 Madd. 143.

[3] Richards v. Davies, 2 Russ. & M. 347.

[4] 4 Sim. 8.

[5] But in the case of Knowles v. Houghton, 11 Ves. 168, which was decided many years before that of Forman v. Homfray, the bill was for the *establishment* of the partnership and for an account, and the court did not object to

nership on a bill which did not pray a dissolution, but contemplated the subsistence of the partnership, and he observed strongly on the inconvenience which would arise if such bills were permitted,

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the nature of the relief sought by the bill. Accordingly, though the decree dismissed so much of the bill as sought an account of the profits of the underwriting business (see *ante*, p. 36), yet it directed an account of the other business upon the footing of the partnership. In this case the bill stated that in the year 1794 the plaintiff and defendant agreed to commence partnership in the brokerage and underwriting business, to be carried on in the name of the defendant. That in consideration of the plaintiff's superintending the other mercantile concerns of the defendant, he was to have a yearly salary of 125*l.*, and that, if the moiety of the brokerage business did not amount to 200*l.* the defendant was to make up that sum, so that the plaintiff was to receive at least 325*l.* a year for a salary and brokerage business besides his moiety of the underwriting business. That the plaintiff and the defendant came to yearly statements of the brokerage business up to the beginning of the year 1801, when the plaintiff received what was due to him on that account, except a certain balance in the bill mentioned. That from that period, to the filing of this bill, a moiety of the profits of the brokerage was due and unaccounted for to the plaintiff. That the underwriting account was, for the first time, settled between the plaintiff and defendant in the year 1798, when the defendant gave the plaintiff a promissory note for the balance due to the latter; but that a large sum of money for his moiety of the profits of the subsequent underwriting business was due from the defendant to the plaintiff. That the plaintiff, by reason of ill health, ceased to take an active part in the business of the partnership during several years, and accordingly a deduction on that account was made in his salary. That in the year 1801, the defendant proposed taking other persons as partners in the concern, to which the plaintiff objected, on the ground that his health was improving, and that he should soon be able to resume his duties as a partner. That some time afterward the plaintiff went to the counting-house, and was then for the first time told by the defendant that their partnership must be considered to be at an end, and to have been so as to the underwriting business from the 31st December, 1803, and as to the brokerage business, from the 31st December, 1799. The bill then charged that the partnership was not, and ought not to be considered as dissolved, and prayed "that the plaintiff *may be declared to be and continue a partner* in the said brokerage and underwriting business, as to a moiety or half part thereof; and that an account may be taken of the profits which have been made in the said business of underwriting from the end of the said year 1798; and that a like account may be taken of the profits which have been made in the said brokerage business from the end of the year 1799; and also an account of the moneys paid by the said Henry Houghton, to the plaintiff, in respect of his share in the said concern; and that the said Henry Houghton may be decreed to pay to the plaintiff a moiety or half part of such profits in both businesses, after deducting what he has already paid to the plaintiff in respect thereof; and that an account may also be taken of what is due to the plaintiff in respect of the aforesaid salary of 125*l.* agreed to be allowed to him by the said Henry Houghton; and also an account of what is due to the plaintiff for deficiencies, according to the aforesaid agreement between the plaintiff and the said Henry Houghton, in such years in which the amount of such salary and partnership in the brokerage business has been less than 325*l.* a year; and that the said Henry Houghton may in like manner be decreed to pay to the plaintiff what is due to him for such salary and deficiencies," and for further relief. The defendant by his answer denied that any agreement for a partnership had been entered into between him and the plaintiff, or that any partnership had in fact subsisted between them, or that he had stated to the plaintiff that their partnership had been dissolved. He insisted that he had dealt with the plaintiff merely as his clerk admitting, however, the money transactions stated in the bill, and submitting to an account. The order was "that so much of the plaintiff's bill as seeks to have an account taken of the profits which have been made in the business of underwriting in the pleadings mentioned be dismissed out of this court. That it be referred, etc., to take an account

inasmuch as the court would have to decide upon an endless number of successive applications, made by each party in respect of the balance, and that in fact a balance would never be ascertained till the partnership expired, or the court put an end to it. And this opinion of his Honor was adopted by Mr. Baron Alderson, after some consideration, in the case of Knebell v. White.[1] It may now, therefore, be considered as settled that in the case of ordinary trading partnerships[2] an account of partnership dealings and transactions must be consequent upon a dissolution of the partnership, and the following observations are made with reference to an account so taken.[3]

Accounting without dissolution.

SEC. 285. The conclusion to which the author arrived (and which was doubtless warranted by the preponderance of authorities at that time) is not expressive of the doctrine as now held either in this country or England. In fact, the doctrine was never tenable, for it may frequently occur that a partner may be entitled to an accounting, where his interest and the interests of all parties concerned would forbid a dissolution. It is true that as a general thing the aid of a court of equity is seldom invoked for this purpose, except a dissolution has already taken place, or is asked. But there would seem to be no sound reason or equitable principle to prevent a party from claiming the benefit of either of those remedies. And the current of American as well as modern English authorities sustains this view.[4]

Generally it may be said, that an account cannot be had unless there has been a dissolution either *ipso facto* or one is prayed for in the bill praying for an accounting, but this is not an inflexible rule,

of the profits which have been made by the brokerage business in the pleadings also mentioned, and to state whether any thing and what is due from the defendant to the plaintiff in respect thereof. And, in taking the same account, if the master shall find that any account has been settled between the plaintiff and defendant relating thereto, he is not to unravel the same. And it is ordered that the said master do inquire whether any thing and what is due from the defendant to the plaintiff on account of his salary as clerk to the said defendant, during the time he acted as such clerk. That the said master do also take an account of all sums of money received by the plaintiff from the defendant, or for his use, except such sums as have been received by him on account of the said business of underwriting. That the said master do inquire and state to the court whether the partnership between the plaintiff and the defendant in the pleadings mentioned, hath, at any time, and when, been dissolved," with the usual directions. R. L. 1804, A. fol. 1008.

[1] 2 You. & Coll. 15.

[2] As to mines, see *post*, Book 5, chap. 2.

[3] For some practical details on this subject, see Mr. Cory's useful treatise on Mercantile Accounts.

[4] Hudson v. Barrett, 1 Pars. Sel. Cas. (Penn.) 516; Von Tazan v. Roberts, 4 Leg. Opin. 610; Traphagen v. Burt, 67 N. Y. 30.

and instances often arise in which an accounting is permitted, when a dissolution is neither sought nor desired.[1] When special circumstances arise that make an accounting necessary or proper, the court will order one to be made although a dissolution is not asked; as, when by the articles, an accounting and division of profits is to be had at regular and stated periods, but is refused, or when one partner has money or other property in his hands belonging to the firm, for which he refuses to account. In a case of the latter class this relief was granted,[2] and Lord Cottenham not only reviewed the cases, but in an able opinion sanctioned the doctrine, that, in a proper case, an accounting may be had although the partnership is not to be dissolved. He said: "The demurrer in this case was allowed by the Vice-Chancellor for want of equity, and upon the ground, as I was informed in the argument, that the court could not give relief of the limited kind prayed by the bill; but upon this appeal, all the grounds in support of the demurrer are open to the defendants, viz., want of equity, want of parties, and multifariousness. In support of the last, I have not been able to discover any thing. I shall, therefore, take no further notice of it. The case stated by the bill, which is filed by the plaintiffs on behalf of themselves and all other the shareholders and partners of the banking company called the Imperial Bank of England, except those who are made defendants, is shortly this: that they are shareholders, and have paid all the calls made, which amount to 15*l.* per share; that the business of the company has been suspended since 1839, but that it has not been dissolved; that large debts are due by the company, for which they and the other shareholders are liable, and that there are considerable assets in the hands of the directors and trustees, though not equal to the debts; that all the directors, except one, have become bankrupts, and have thereby, by their regulations, become incapable of acting, and that the trustees refuse to act; and that the other defendants are the only shareholders who have not paid their calls; and it therefore prays for the assistance of this court to relieve them from this difficulty, by causing the assets of the company to be realized, and the debts to be paid; and for this purpose a receiver may be appointed, and authorized to sue for calls unpaid, and other debts due to the company, in the name of the registered officer under the 7 Geo. 4, c. 46, who is one of the defendants.

When it is said that the court cannot give relief of this limited

[1] O'Conner v. Stark, 2 Cal. 155; Traphagen v. Burt, 67 N. Y. 30.

[2] Walworth v. Holt, 4 My. & Cr. 619.

kind, it is, I presume, meant that the bill ought to have prayed a dissolution, and a final winding up of the affairs of the company.[1] How far this court will interfere between partners, except in cases of dissolution, has been the subject of much difference of opinion, upon which it is not my purpose to say any thing beyond what is necessary for the decision of this case; but there are strong authorities for holding that to a bill praying a dissolution all the partners must be parties;[2] and this bill alleges that they are so numerous as to make that impossible. The result, therefore, of these two rules would be—the one binding the court to withhold its jurisdiction except upon bills praying a dissolution, and the other requiring that all the partners should be parties to a bill praying it;—that the door of this court would be shut in all cases in which the partners or shareholders are too numerous to be made parties, which, in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the subjects of the realm, in some of the most important of their affairs. This result is quite sufficient to show that such cannot be the law; for as I have said upon other occasions,[3] I think it the duty of this court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy. This has always been the principle of this court, though not at all times sufficiently attended to. It is the ground upon which the court has, in many

[1] On a motion for an injunction and receiver, by one partner against his copartner, Lord Langdale, M. R., said: "The plaintiff is not entitled to the order for which he asks unless he has shown that he had a right to dissolve the partnership, by notice under the deed, or has shown facts which, if approved at the hearing, would entitle him to a decree for a dissolution." But there being such facts, the motion was granted. Smith v. Jeyes, 4 Beav. 503.

[2] "What the plaintiff asks by his bill is in fact a dissolution of the company. Although the company has suspended its business, it is still a company; and it is new to me that where a dissolution is asked, it can be had in the absence of any of the members." Shadwell, V. C. Abraham v. Hanney, (Nov. 1843), 18 Sim. 581. But in a little later case, (Jan. 1844), Lord Langdale said: "At one time, the court would not entertain a suit between parties in relation to partnership transactions except upon a bill to wind up the partnership. That is not now the rule of the court; for I think, and the cases which have been referred to corroborate that view, that the court will, as between partners, entertain a bill to settle a question which may arise between them, without proceeding to wind up the concerns and affairs of the partnership." Richardson v. Hastings, 7 Beav. 307; and see S. C., id. 328; 9 Sim. 609, n. 1; 1 Story's Eq., § 671. The court ought to interfere between partners wherever the act complained of is one that tends to the destruction of the partnership property, although a dissolution be not prayed for. Miles v. Thomas, 9 Sim. 606; Fairthorne v. Weston, 3 Hare, 387, 391.

[3] See Mare v. Malachy, 1 M. & C. 559; Taylor v. Salmon, 4 id. 134.

cases, dispensed with the presence of parties who would, according to the general practice, have been necessary parties.[1]

In Cockburn v. Thompson,[2] Lord Eldon says: "A general rule, established for the convenient administration of justice, must not be adhered to in cases in which, consistently with practical convenience, it is incapable of application;" and again, "The difficulty must be overcome upon this principle, that it is better to go as far as possible toward justice than to deny it altogether." If, therefore, it were necessary to go much further than it is, in opposition to some highly sanctioned opinions, in order to open the door of justice in this court to those who cannot obtain it elsewhere, I should not shrink from the responsibility of doing so; but, in this particular case, notwithstanding the opinions to which I have referred, it will be found that there is much more of authority in support of the equity claimed by this bill than there is against it.

It is true that the bill does not pray for a dissolution, and that it states the company to be still subsisting; but it does not pray for an account of partnership dealings and transactions, for the purpose of obtaining the share of profits due to the plaintiffs, which seems to be the case contemplated in the opinions to which I have referred; but its object is to have the common assets realized and applied to their legitimate purpose, in order that the plaintiffs may be relieved from the responsibility to which they are exposed, and which is contrary to the provisions of their common contract, and to every principle of justice. But whether the interest of the plaintiffs in right of which they sue arises from such responsibility or from any other cause cannot be material; the question being, whether some partners, having an interest in the application of the partnership property, are entitled, on behalf of themselves and the other partners, except the defendants, to sue such remaining partners in this court for that purpose, pending the subsistence of the partnership; and if it shall appear that such a suit may be maintained by some partners on behalf of themselves and others similarly circumstanced against other persons, whether

[1] In no class of cases has the extension been more frequent than in cases like the present. Richardson v. Hastings, 7 Beav. 326. Lord Cottenham in Attwood v. Smith, [not reported] after saying that the right course was to bring all parties before the court, observed that courts of justice are bound to have regard to the mode in which the affairs of mankind are conducted; and when, in consequence of the mode of dealing, it would be impossible to work out justice if the rule requiring all persons to be present were not departed from, it must be relaxed rather than be allowed to stand as an obstruction to justice. Wigram, V. C., Holland v. Baker, 3 Hare, 74; Foss v. Harbottle, 2 id. 492; 2 Sim. 387, n. 1.

[2] 16 Ves. 321, see pp. 326, 329.

trustees and agents for the company or strangers being possessed of property of the company, it may be asked why the same right of suit should not exist when the party in possession of such property happens also to be a partner or shareholder.

In Chancey v. May,[1] the defendants were partners. In the Widow's case, before Lord Thurlow, cited by Lord Eldon,[2] the bill was on behalf of the plaintiffs and all others in the same interest, and sought to provide funds for a subsisting establishment. In Knowles v. Houghton, 11th July, 1805, reported in Vesey,[3] but more fully in Collyer on the Law of Partnership,[4] the bill prayed an account of partnership transactions, and that the partnership might be established; and the decree directed an account of the brokerage business, and to ascertain what, if any thing, was due to the plaintiff in respect thereof; and the master was to inquire whether the partnership between the plaintiff and the defendant had at any time, and when, been dissolved; showing that the court did not consider the dissolution of the partnership as a preliminary necessary before directing the account. In Cockburn v. Thompson,[5] the bill prayed a dissolution, but it was filed by certain proprietors on behalf of themselves and others, and Lord Eldon overruled the objection that the others were not parties. In Hichens v. Congreve,[6] the bill was on behalf of the plaintiff and the other shareholders against certain shareholders who were also directors, not praying a dissolution, but seeking only the repayment to the company of certain funds alleged to have been improperly abstracted from the partnership property by the defendants; and Sir Anthony Hart overruled a demurrer, and his decision was affirmed by Lord Lyndhurst. In Walburn v. Ingilby,[7] the bill did not pray a dissolution of partnership, and Lord Brougham, in allowing the demurrer upon other grounds, stated that it could not be supported upon the ground of want of parties, because a dissolution was not prayed.

In Taylor v. Salmon,[8] the suit was by some shareholders, on behalf of themselves and others, against Salmon, also a shareholder, to recover property claimed by the company, which he had appropriated to himself; and the Vice-Chancellor decreed for the plaintiff, which was affirmed on appeal. The bill did not pray a dissolution, and the company was a subsisting and continuing partnership. That case

[1] Prec. Ch. 592.
[2] 17 Ves. 15.
[3] 11 Ves. 168.
[4] P. 198, 2d ed.
[5] 16 Ves. 321.
[6] 4 Russ. 562.
[7] 1 Mylne & Keen, 61.
[8] 4 Mylne & Craig, 134.

and Hichens v. Congreve differ from the present in this only, that in those cases the partnerships were flourishing and likely to continue, whereas in the present, though not dissolved, it is unable to carry on the purposes for which it was formed, an inability to be attributed in part to the withholding that property which this bill seeks to recover. So far this case approximates to those in which the partnership has been dissolved, as to which it is admitted that this court exercises its jurisdiction. This case also differs from the two last-mentioned cases in this, that the difficulty in which the plaintiffs are placed, and the consequent necessity for the assistance of this court, is greater in this case;—no reason, certainly, for withholding that assistance.

How far the principle upon which these cases have proceeded is consistent with the doctrine in Loscombe v. Russell,[1] "that in occasional breaches of contract between partners, when they are not of so grievous a nature as to make it impossible that the partnership should continue, the court stands neuter," will be to be considered if the case should arise. It is not necessary to express any opinion as to that in the present case; but it may be suggested that the supposed rule that the court will not direct an account of partnership dealings and transactions, except as consequent upon a dissolution, though true in some cases, and to a certain extent has been supposed to be more generally applicable than it is upon authority, or ought to be upon principle. It is, however, certain that this supposed rule is directly opposed to the decision of Sir J. Leach in Harrison v. Armitage,[2] and Richards v. Davies.[3]

Having referred to so many cases in which suits similar to the present have been maintained by some partners on behalf of themselves and others, it is scarcely necessary to say any thing as to the objection for want of parties; and as to the assignees of those shareholders who have become bankrupts, those assignees are now shareholders in their places, for the purpose of any interest they have in the property of the company; and as such are included in the number of those on whose behalf the suit is instituted. A similar objection was raised and overruled in Taylor v. Salmon, as to the shares of Salmon.

Upon the authority of the cases to which I have referred, and of the principle to which I have alluded, if it be necessary to resort to it, I am of opinion that the demurrer cannot be supported; and that

[1] 4 Sim. 8, see p. 11.
[2] 4 Mad. 143.
[3] 2 Russ & Mylne, 347.

the usual order, overruling a demurrer, must be substituted for that pronounced by the Vice-Chancellor.[1]

[1]Upon the question as to when want of parties is demurrable, or rather, when all the partners must or need not be joined, the case of Richardson v. Hastings, 7 Beav. 323, as well as the cases hereafter cited in this note, will be found useful. In the case named it appeared that by the rules of club the bankers were alone authorized to receive money on account of the club. Some of the members subscribed, and purchased the furniture, which by deed executed by the subscribers was vested in the plaintiff, in trust to repay the amount subscribed, and to pay the surplus to the committee for the benefit of the club. The club becoming embarrassed was afterward dissolved, and the committee were authorized to wind up the affairs. Hastings and Emly, two of the committee, sold the furniture, and alone received the produce, together with other general assets of the club. A bill was filed by the plaintiff on behalf, etc., against Hastings and Emly, and another member of the club, to recover the moneys in the hands of H and E, and praying that the furniture money might be paid to the plaintiff on the trusts of the deed, or otherwise as the court might direct, and that the general assets recovered might be paid to the bankers or otherwise, etc. On demurrer it was held that the bill was not defective for want of parties, and that neither the other parties to the deed, nor the other members of the club were necessary parties. Lord Langdale, M. R. "It was at one time supposed that, in consequence of the general rule that complete justice must be done with respect to the subject-matter, the court could not and would not interfere at all as between partners, unless the partnership was to be dissolved and finally wound up and settled; and there are several conflicting cases in the books on that subject, different judges having entertained very strong opinions and very different views on that question. I noticed on the former occasion (sup. n. 5), that it now appears very clear that there is no such rule. It has been decided that in a continuing partnership, if a few have an interest in a particular subject adverse to all the rest, and claim for themselves the benefit of that interest, a bill may be filed against those few by one or more partners on behalf of themselves and all the rest. That is a remarkable instance of a case where all persons interested are not brought before the court; however, it is not much more remarkable than the cases where one creditor or one legatee is permitted to sue on behalf of himself and many other persons, and some other similar cases. The court has even gone to this extent: in the case of an insolvent partnership not formally dissolved, it has permitted a bill to be filed by one or more on behalf of the rest against the governing body, to have the assets collected, and applied, as far as they would go, toward the discharge of the debts; and that without seeking to ascertain the rights and liabilities of the parties between themselves, and consequently leaving litigation as between those parties entirely open after the debts have been paid, that is, it has sanctioned a suit which sought nothing but to compel a satisfaction *pro tanto*, of the partnership debts, as far as the deficient assets would extend, and then leave all the members of the partnership exposed to such litigation as the unsatisfied creditors might choose to adopt for the recovery of the remainder of their debts; and also leave the partners liable, as among themselves, to such suits for contribution as the particular circumstances of the case might render it necessary. In this case it is alleged that the two defendants, Hastings and Emly, have possessed themselves of property belonging to this club, which I must consider as a partnership; that one of the sums, namely, the furniture money, is subject to a peculiar trust, and the other moneys are general assets of the partnership. They have possessed themselves of these sums of money, and refuse to account for them. This bill desires to recover them, not for the purpose of distribution by the court through the means of this suit, but for the purpose of bringing them within the control of the governing body of the partnership, in order that they may be applied under their control, according to the rights of the parties. That seems to me to be the nature of the bill. Can that be done? The plaintiff and all the other members, except these two defendants, must have an interest in having the money, which the demurrer admits to be in the defendant's possession, brought within the control of the club; that is the common interest of all. How this money, when it is brought within the control of the club, ought to be ap-

On this subject Mr. Parsons observes: "An account and a dissolution seem to be so clearly connected that Lord Eldon, as we have seen, was unwilling to grant an account unless the petitioner prayed also for a dissolution; but this cannot be deemed a rule of equity, although in a great majority of cases where the relations between the partners are such that one of them can obtain an account only through the interposition of a court, a dissolution is, and should be asked."[1]

Mr. Lindley has taken a broad and comprehensive view of this question, in his valuable treatise on partnerships. He says: "Formerly courts of equity were averse to interfering at all between one partner and another, unless it was for the purpose of dissolving the partnership; or, if it was dissolved already, of finally settling up its affairs. Hence, it will be found on reference to the older reported

plied, is another matter. To ask to recover it and place it within the control of the club, and leave it there subject to litigation, is asking no more than was done in the case of Wallworth v. Holt, where matters were thus left. If, then, it is for the common benefit of all, except the two defendants, that those funds should be recovered, why should it not be done? It is said that this is a case of dissolution. Very true, and this shows that there ought to be a winding up and a final settlement. But how is it with a partnership after a dissolution, and before the affairs of the partnership are wound up? The mutual connection between the partners is not dissolved with the dissolution of the partnership, because it must continue for the purpose of collecting the assets and winding up the partnership; and until these matters are all closed, there is a *quasi* partnership, a mutual interest between the parties. In the present state of the record the question is whether the defendants are to answer. I cannot determine at this time whether, in consequence of what may appear in the answer, it may not hereafter be absolutely necessary to make the parties referred to and other persons parties. Taking the statements of the bill as they now stand admitted by the demurrer, it does not appear to me that I ought to allow the present demurrer; but overruling it, I beg to have it clearly understood that it may appear hereafter that it is quite necessary, not only to make the persons now pointed out, but other persons parties; for after this demurrer is overruled, the defendants may still raise the same objection in their answer." Richardson v. Hastings, 7 Beav. 323; S. C., id. 301; sup. n. 6. As to the general rule requiring all parties in interest to be parties to the suit, see Mare v. Malachy, 1 Myl. & Cr. 559; Bayley v. Best, 1 Russ. & M. 659; Hoxie v. Carr, 1 Sumn. (U. S.) 173; Hallett v. Hallett, 2 Paige (N. Y.), 18, 19; Hawley v. Cramer, 4 Cow. (N. Y.) 728; Evans v. Stokes, 1 Keen, 24; Feary v. Stephenson, 1 Beav. 42; Haydon v. Bell, id. 343, and n. 1, id; Brooks v. Stuart, id. 512; Bainbridge v. Burton, 2 Beav. 539; Baldwin v. Lawrence, 2 Sim. & Stu. 19, 26, n. 1; Blain v. Agar, 1 Sim. 44, and n. 1, id.; Lowry v. Fulton, 9 Sim. 114, and n. 1, id.; Mangles v Grand Collier Dock Co., 10 Sim. 541; Perry v. Knott, 4 Beav. 179; Eades v. Harris, 1 Yo. & Coll. C. C. 230; Wardell v. Claxton, id. 265; Hawkins v. Hawkins, 1 Hare, 543; Roberts v. Merchant, id. 549; Holland v. Baker, 3 id. 68. When dispensed with, Walburn v. Ingilby, 1 Myl. & K. 77; Wendell v. Van Rensselaer, 1 Johns. Ch. (N. Y.) 349; Shuttleworth v. Howarth, *ante*, 495; Hallett v. Hallett, *ubi supra;* Wakeman v. Grover, 4 Paige's Ch. (N. Y.) 23; Harrison v. Urann, 1 Story, 64; Harvey v. Harvey, 4 Beav. 215, 230; Eades v. Harris, *ubi sup.;* Blain v. Agar, 2 Sim. 289. As to bill on behalf of plaintiff and others, see Taylor v. Salmon, *ante*, 142, and cases cited n. 1, id.; Milligan v. Mitchell, 3 Myl. & Cr. 84; Dias v. Bouchaud, 10 Paige's Ch. (N. Y.) 447; Harvey v. Harvey, *ubi sup.;* Baldwin v. Lawrence, 2 Sim. & Stu. 19, 26, and n. 1, id.; Benson v. Heathorn, 1 Yo. & Coll. C. C. 326.

[1] Pars. on Part. 512.

decisions that if a dissolution was not sought, the court would not decree a partnership account, nor restrain a partner from infringing the partnership articles, nor protect the partnership assets from destruction or waste. This rule, at no time perhaps very inflexible, has gradually been relaxed, it having been discovered to be more conducive to justice to interfere to prevent some definite wrong, or to redress some particular grievance, than to decline to interfere at all unless complete justice can be done by winding up the partnership, and in that manner settling all disputes."[1]

Again, he says: "The account which a partner may seek to have taken may be either a general account of the dealings aud transactions of the firm, with a view to the winding up of the partnership; or a more limited account directed to some particular transaction as to which a dispute has arisen."

It was formerly considered that no account between partners could be taken in equity save with a view to a dissolution.[2] And a bill praying an account but not a dissolution has been held bad on demurrer.[3] The reason alleged for this doctrine was the impossibility of doing complete justice without winding up the whole concern, and ascertaining the final balances due from the partners respectively. This reason, however, is far from satisfactory, and it has long been felt that in their anxiety to do complete justice, courts of equity often refused relief in cases where their interference, to a limited extent only, would have been highly beneficial and loudly called for. It has been felt, in short, that much more injustice frequently arose from their refusal to do less than complete justice, than could have arisen from their interfering to no greater extent than was desired by the suitor aggrieved. Accordingly in the late case of Prole v. Masterman[4] where the promoter of a company sought to make his co-promoters contribute to a debt paid by him, but for which they were liable as well as he, it was held that a decree might be made without directing a general account of what was due from the plaintiff in respect to other matters. Again, in the case of a mutual insurance society, where the funds of the society are answerable for the payment of moneys due upon their policies, an assured member is entitled to an account of what is due to him upon his policy, and to a decree of payment for what is so due, without involving himself in any general

[1] Lind. on Part. 752.
[2] Torman v. Homfray, 2 V. & B. 329; Knebell v. White, 2 Y. & C. Ex. 15.
[3] Loscomb v. Russell, 4 Sim. 8.
[4] 21 Beav. 61.

account of the dealings and transactions of the society, or praying for a dissolution thereof.[1]

The old rule, therefore, that a decree for an account will not be made save with a view to the final determination of all questions and cross claims between them, and to a dissolution of the partnership, must be regarded as no longer in force.

There are three classes of cases in which suits for an account, without a dissolution, are more particularly common, and to which it is necessary specially to refer. These are:

1. Where one partner has sought to withhold from his copartner the profit arising from some secret transaction.

2. Where one partner has sought to exclude or expel his copartner, or to drive him to a dissolution.

3. Where the partnership has proved a failure, and a limited account will result in justice to all parties.[2]

Of the right to an account and discovery generally, as between partners and those claiming under them.

SEC. 285*a*. The right of every partner to have an account from his copartners of their dealings and transactions is too obvious to require comment. The agreement between partners is for a participation of profits, and generally, also, for a community of loss; and as has been seen, an action at law is not, except under peculiar circumstances, an adequate remedy for the enforcement of the obligations arising from such an agreement. By a suit in equity for an account, however, a partner is enabled to obtain not only a discovery as to his copartner's dealings, but also payment of what on taking the account may be found to be due from him, whether by virtue of his agreement to share profits, or by virtue of his agreement to contribute to losses. By means of a suit for an account, moreover, a partner is enabled to secure the due application of the partnership assets in payment of the debts of the firm, and the distribution of the surplus amongst himself and copartners. The equitable remedy of account is, therefore, most efficacious, and by means of it all disputes between partners as to their mutual rights and liabilities respecting profit and loss are capable of being completely adjusted. This remedy is open to partners although the partnership accounts are not complicated,[3]

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[1] See Hutchinson v. Wright, 25 Beav. 444; Taylor v. Dean, 22 id. 429; Robson v. M'Craight, 25 id. 272.

[2] Lind. on Part. 805, 806. But see in a recent case in Georgia, a contrary doctrine. Wadley v. Jones, 55 Ga. 329. And see same doctrine in case of an injunction. Davis v. Weaver, 49 Ga. 626.

[3] Cruikshank v. M'Vicar, 8 Beav. 100; see Frietas v. Dos Santos, 1 Y. & J. 574.

and although an action at law might, under the circumstances, be sustainable.[1] A court of equity is not, however, the proper tribunal for the investigation of a claim for damages arising from a wrongful act, and a bill by one partner against another for the recovery of such damages will not lie, although in form the suit is for an account.[2]

Executors of deceased partner entitled to an account.

SEC. 286. An account may be had by one partner or his executors or administrators[3] against his copartner or his executors or administrators.[4] So by the assignees of a bankrupt partner against the solvent partner[5] or his executors.[6] So a solvent partner may file a bill for an account against the assignees of his bankrupt copartner; and notwithstanding the rule against making mere witnesses parties, the bankrupt himself may, it is said, be made a defendant for the purposes of discovery, though if relief is prayed against him, a demurrer by him will hold.[7] Again, if a partner's share is taken in execution, the purchaser from the sheriff is entitled to an account from the solvent partners, as is also the execution debtor himself.[8]

Sub-partner has no right to an account.

SEC. 287. A subpartner has no right to an account from the principal firm, or any of the members of it, except the one with whom he is a subpartner, for there is no contract or privity save between those two.[9] It has even been said that if a partner charges or mortgages his share in favor of a creditor, the latter has no right to an account from the other partners of the profits to which their copartner may be entitled. This, however, is by no means clear,[10] and as regards partners in mines, it has been decided that a mortgagee of one partner is entitled to an account against the other partners.[11] If a partner, with the consent of his copartners, assigns his share in the partnership, the assignee

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[1] Wright v. Hunter, 5 Ves. 792, where the bill was for contribution. Blain v. Agar, 1 Sim. 37, and 2 id. 289, where the bill was for the recovery back of deposits; see, too, Townsend v. Ash, 3 Atk. 336, as to the profits of partnership real estate.

[2] Duncan v. Luntley, 2 Mac. & G. 30, where shares had been wrongfully sold by the secretary of a company. Compare Mare v. Malachi, 1 M. & Cr. 559.

[3] Heyne v. Middlemore, 1 Rep. in Ch. 138; Hackwell v. Eustman, Cro. Jac. 410.

[4] Beaumont v. Grover, 1 Eq. Ab. 8, pl. 7.

[5] As in Wilson v. Greenwood, 1 Swanst. 471.

[6] As in Addis v. Knight, 1 Mer. 119.

[7] Whitworth v. Davis, 1 V. & B. 545; see Mitford's Pl. 187, edn. 5.

[8] See Habershon v. Blurton, 1 De G. & Sm. 121; Perens v. Johnson, 3 Sm. & G. 419.

[9] Brown v. De Tastet, Jac. 284; Raymond's case, cited in Ex parte Barrow, 2 Rose, 255; Bray v. Fromont, 6 Madd. 5, and see Killock v. Greg, 4 Russ. 285, as to agents.

[10] Glyn v. Hood, 1 Giff. 328, and on appeal 6 Jur. (N. S.) 153, is an instance of a suit for an account by the assignee of a partner's share.

[11] Bentley v. Bates, 4 Y. & C. Ex. 182.

will, by virtue of this assent, acquire the rights of the assignor, and be, therefore, entitled to an account from the other partners[1]

Rights of creditors and legatees of deceased partner.

SEC. 288. If a partner dies, a question arises as to the right of his creditors and legatees to file a bill against the other partners for an account of the share of the deceased. The creditors of the late firm have an undoubted right to file a bill against the executors of the deceased and the surviving partners, in order to obtain payment of their debt out of the assets of the deceased.[2] But the separate creditors, or the legatees, or next of kin of a deceased partner, stand in a very different position. In the absence of special circumstances, they have no *locus standi* against the surviving partners, but only against the legal personal representative of the deceased partner;[3] and it is only when there is collusion between these persons, or when circumstances have occurred which preclude the representative from himself obtaining a decree for an account of the share of the deceased, that his separate creditors, legatees, or next of kin may themselves file a bill for that purpose against the surviving partners.[4]

Limited account without dissolution.

SEC. 289. The account which a partner may seek to have taken may be either a general account of the dealings and transactions of the firm, with a view to a winding up of the partnership; or a more limited account, directed to some particular transaction as to which a dispute has arisen.

It was formerly considered that no account between partners could be taken in equity, save with a view to dissolution,[5] and a bill praying an account but not a dissolution has been held bad on demurrer.[6] The reason alleged for this doctrine was, the impossibility of doing *complete justice* without winding up the whole concern, and ascertaining the final balances due to or from the partners respectively. This reason, however, is far from satisfactory, and it has been long felt that in their anxiety to do complete justice, courts of equity often refused relief in cases where their interference, to a limited extent only, would have been highly beneficial and was loudly called for. It has been felt, in short, that much more injustice frequently

[1] See Fawcett v. Whitehouse, 1 R. & M. 132.

[2] Wilkinson v. Henderson, 1 M. & K. 582, and see *post*.

[3] Davies v. Davies, 1 Keen, 534; Travis v. Milne, 9 Ha. 141; Langley v. The Earl of Oxford, 2 Amb. 798, Blunt's ed.; Seeley v. Boehm, 2 Madd. 180.

[4] See the cases last cited. This subject will be again alluded to.

[5] Forman v. Homfray, 2 V. & B. 329; Knebell v. White, 2 Y. & C. Ex. 15.

[6] Loscomb v. Russell, 4 Sim. 8.

arose from their refusal to do less than complete justice, than could have arisen from their interfering to no greater extent than was desired by the suitor aggrieved. Accordingly, in the late case of Prole v. Masterman,[1] where the promoter of a company sought to make his co-promoters contribute to a debt paid by him, but for which they were liable as well as he, it was held that a decree might be made without directing a general account of what was due from the plaintiff in respect of other matters. Again, in the case of a mutual insurance society, where the funds of the society are answerable for the payment of the moneys due upon their policies, an assured member is entitled to an account of what is due to him upon his policy, and to a decree for the payment of what is due, without involving himself in any general account of the dealings and transactions of the society, or praying for a dissolution thereof.[2]

The old rule, therefore, that a decree for an account between partners will not be made save with a view to the final determination of all questions and cross claims between them, and to a dissolution of the partnership, must be regarded as no longer in force.

Instances in which limited accounts may be had.

SEC. 290. There are three classes of cases in which suits for an account without a dissolution, are more particularly common, and to which it is necessary specially to refer. These are—

1. Where one partner has sought to withhold from his copartner the profit arising from some secret transaction.

2. Where one partner has sought to exclude or expel his copartner or to drive him to a dissolution.

3. Where the partnership has proved a failure, and a limited account will result in justice to all parties.

1. Where one partner has obtained a secret benefit, from which he seeks to exclude his copartners, but to which they are entitled, they can obtain their share of such benefit by a suit for an account, and such a suit is sustainable, although no dissolution is prayed. The cases illustrating this doctrine have been already noticed at length, and it will, therefore, be sufficient here to state that an account was directed, although the plaintiff did not seek to have the partnership dissolved or its affairs wound up.[3]

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[1] 21 Beav. 61. Compare Munnings v. Bury, Tam. 147. The circumstance that an action for contribution will lie does not oust the jurisdiction of a court of equity. Wright v. Hunter, 5 Ves. 792.

[2] See Hutchinson v. Wright, 25 Beav. 444; Taylor v. Dean, 22 id. 429. See, too, Robeson v. McCreight, 25 id. 272.

[3] Hichens v. Congreve, 1 R. & M. 150; Fawcett v. Whitehouse, id. 132; The Society of Practical Knowledge v. Abbott, 2 Beav. 559; Beck v. Kantorowicz, 3 K. & J. 230.

In all the other cases of this class, except Clegg v. Fishwick,[1] in which a dissolution was prayed, the report is silent as to whether a general winding-up was sought or not.

With reference to cases of this description, it may be observed that where the benefit which the plaintiffs assert their right to share has not yet been obtained, but only agreed for by their copartners, the plaintiffs have no *locus standi* against the person with whom the agreement has been entered into by those partners, and cannot therefore restrain such person from performing that agreement. The proper course for the aggrieved partners to take is to proceed against their delinquent copartners, and claim from them the benefit of the agreement into which they have entered.[2]

2. Where one partner has sought to exclude or expel his copartner, or to drive him to a dissolution. In cases of this description an account has been directed, although no dissolution was asked.

The general proposition, that courts of equity will interfere under the circumstances now supposed, was laid down by Sir John Leach in Harrison v. Armitage,[3] where, however, no account was directed, inasmuch as the evidence did not establish a partnership. But in Chapple v. Cadell[4] an account was directed at the suit of a minority where the majority had sold a partnership newspaper to a stranger, and some of the more active of the majority had then entered into a fresh agreement with the purchaser to carry on the paper in partnership with him. Richards v. Davies[5] went a step further. There a partnership had been entered into for a number of years which was still unexpired. The defendants would come to no account with the plaintiff respceting the partnership dealings and transactions, but on the application of the plaintiff a decree for an account of all past transactions was made. Sir John Leach, in pronouncing judgment, observed that the plaintiff had no relief at law for money due to him on a partnership account; that if a court of equity refused him relief, he would be wholly without remedy; and in answer to the objection that if such a suit were entertained the defendant might be vexed by a new bill whenever new profits accrued,[6] his Honor asked what right

[1] 1 Mac. & G. 294.

[2] See Adler v. Fouracre, 3 Swanst. 489, where an injunction was granted restraining the executors of a deceased partner who had agreed for a renewal of a lease from disposing of the lease when granted, except for the benefit of the partnership.

[3] 4 Madd. 143.

[4] Jac. 537.

[5] 2 R. & M. 347.

[6] This objection was made by Lord Eldon in Forman v. Homfray, 2 V. & B. 330; by V. C. Shadwell in Loscomb v. Russell, 4 Sim. 8; and by Baron Alderson in Knebell v. White, 2 Y. & C. Ex. 15.

would the defendant have to complain of such new bill if he repeated the injustice of withholding what was due to the plaintiff?

Fairthorne v. Weston[1] is another authority in point. In that case two solicitors entered into partnership for a term of years, and before the term expired the defendant conducted himself in such a way as to prevent the possibility of the partnership business being carried on. The defendant's object was to compel the plaintiff to dissolve. The plaintiff, however, instead of dissolving, filed a bill for an account of the partnership dealings and transactions since the last settlement, and for a receiver. The defendant insisted that the plaintiff was entitled to no relief, except with a view to a dissolution; but the court held otherwise, and observed that there was no universal rule to the effect that a bill, asking for a particular account, but not a dissolution, was demurrable; and that, if there were any such rule, a person fraudulently inclined might, of his mere will and pleasure, compel his copartner to submit to the alternative of dissolving a partnership, or ruin him by a continued violation of the partnership contract.

Again, where a person seeks to establish a partnership with another who denies the plaintiff's title to be considered a partner, if the former is successful upon the main point in dispute, an account of the past dealings and transactions will be decreed, although the plaintiff does not seek for a dissolution of the partnership which he has proved to exist.[2] Upon the same principle it is apprehended, that if a partner is wrongfully expelled, and he is restored to his status as partner by the decree of the court, an account will be directed, but the partnership will not necessarily be dissolved.[3]

As regards mines it has also been decided, that if one co-owner excludes another from his share of the profits, an account will be directed, although no dissolution is prayed.[4] But, as each co-owner of a mine can sell his share without the consent of the other owners, there is no occasion for him to ask for a dissolution, and the case of a mine is, therefore, perhaps, not an apt illustration of the doctrine in question.

3. Where the partnership has proved a failure, and a limited account will result in justice to all parties, such an account will be directed, although the bill contains no express prayer for a dissolution. The leading case in support of this proposition is Walworth v. Holt,[5] in

[1] 3 Ha. 387.

[2] Knowles v. Houghton, 11 Vesey, 168.

[3] See Blisset v. Daniel, 10 Ha. 493, where the bill prayed for a dissolution, but no dissolution was decreed.

[4] Bentley v. Bates, 4 Y. & C. Ex. 182.

[5] 4 M. & Cr. 619.

which Lord Cottenham, in an elaborate and justly celebrated judgment, overruled a demurrer to a bill by some of the shareholders of an insolvent joint-stock bank, on behalf of themselves and others, against the directors, trustees, and public officer of the company, and certain shareholders who had not paid up their calls, praying that an account might be taken of all the partnership assets, and that the outstanding assets might be got in by a receiver, and that the whole might be converted into money and applied toward the satisfaction of the partnership debts. In delivering judgment, the Lord Chancellor observed, "When it is said that the court cannot give relief of this limited time, it is, I presume, meant that the bill ought to have prayed a dissolution, and a final winding up of the affairs of the company. How far this court will interfere between partners, except in cases of dissolution, has been the subject of much difference of opinion, upon which it is not my purpose to say any thing beyond what is necessary for the decision of this case; but there are strong authorities for holding that, to a bill praying a dissolution, all the partners must be parties; and this bill alleges that they are so numerous as to make that impossible. The result, therefore, of these two rules would be, the one binding the court to withhold its jurisdiction, except upon bills praying a dissolution, and the other requiring that all the partners should be parties to a bill praying it, that the door of this court would be shut in all cases in which the partners or shareholders are too numerous to be made parties, which, in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the subjects of the realm, in some of the most important of their affairs. This result is quite sufficient to show that such cannot be the law."

In Walworth v. Holt the bill was filed for the sole purpose of having the assets of the company applied in payment of its joint debts; it did not pray an account of the partnership dealings and transactions for the purpose of obtaining a division of the profits (if any) amongst the persons entitled thereto. If it had, probably a decree would have been refused, either because a dissolution ought to have been asked, or because all the shareholders were not parties to the bill.[1] But since Walworth v. Holt, other cases have been decided in which bills praying for a division of the surplus assets amongst the shareholders, but not expressly praying for a dissolution, have been held good on

[1] See Richardson v. Hastings, 7 Beav. 323, and 11 id. 174; Deeks v. Stanhope, 14 Sim. 57, which were similar cases to Walworth v. Holt.

demurrer.[1] The case which has gone furthest in this direction is Sheppard v. Oxenford;[2] for there every kind of relief which would have been required in the event of a dissolution was prayed for, although a dissolution in terms was not asked. In Sheppard v. Oxenford,[3] a number of persons formed an association for working mines in Brazil. The defendant was the sole trustee of the property, and the sole director. Disputes having arisen, a bill was filed by a shareholder on behalf of himself and all the other shareholders against the defendant for an account of the moneys received and paid by him on behalf of the association, and for an account of its debts, and for their payment out of the available assets, and for a sale, if necessary for that purpose, of part of the property, and for a division of *profits*. The bill also prayed an injunction to restrain the defendant from selling or disposing of the property, and for a receiver to get in the debts due to the association, and to manage the affairs thereof, until the accounts were taken, but no dissolution was asked. A demurrer to this bill was put in and overruled,[4] and an injunction was granted restraining the defendant from selling or disposing of the property otherwise than in the ordinary course of business, and a receiver and manager of the property in this country was appointed. It is to be observed that, although this was a case of a mine, the mine was in a foreign country, and was, strictly speaking, partnership property, and not merely so much land belonging jointly or in common to several co-owners.

Having regard to the decisions in Sheppard v. Oxenford, and other modern cases of a similar kind (especially Apperley v. Page[5] and Clements v. Bowes[6]) it is conceived that the doctrine established in Walworth v. Holt may be considered as extending not only to cases where an account is sought for the purpose of having joint assets applied in discharge of the joint liabilities, but also to cases where an account is sought for the additional purpose of obtaining a division of the surplus assets and *profits* amongst the parties entitled thereto. If this be so, the last remnant of the doctrine that, in partnership cases, there can be no account without a dissolution, must be considered as swept away.

Similar in many respects to the class of cases last referred to, are

[1] See Apperley v. Page, 1 Ph. 779; Wilson v. Stanhope, 2 Coll. 629; Cooper v. Webb, 15 Sim. 454, and Clements v. Bowes, 17 id. 167.

[2] 1 K. & J. 491.

[3] 1 K. & J. 491.

[4] See 1 K. & J. 501.

[5] 1 Ph. 779.

[6] 1 Sim 37, and 2 id. 289; see, too, Green v. Barrett, 1 Sim. 45; Cridland v. De Mauley, 1 De G. & S. 459.

those in which an unsuccessful attempt has been made to form a company, and the shareholders seek an account of the application of the money subscribed, and for a return of the whole or part of their subscriptions. That a suit in equity is in such cases sustainable, although the subscriptions or deposits might be recovered at law, admits of no doubt, and that no dissolution need be prayed is also clearly established.

The instances in which courts of equity have interfered at the suit of the subscribers of bubble companies, and compelled the projectors to return the deposits, have been very numerous during the last quarter of a century.

The earliest case of importance in which this was done was Colt v. Woollaston.[1] There one of the defendants had obtained a patent for extracting oil from radishes, and, in conjunction with his co-defendant, had got up a company to work the patent. The whole business was an imposture and it ended in failure. The plaintiffs had paid 120*l.* each for six shares in the company, and they filed a bill for repayment of their money with interest, which was decreed, with costs. So in Blain v. Agar,[2] subscribers to an abortive mining concern obtained a decree for a return of their subscriptions with interest. In these cases relief was sought and obtained on the ground of fraud, which, it was held, clearly gave courts of equity jurisdiction to interfere, although an action for money had and received might have been brought with success.

But it has also been decided that a court of equity will decree the return of subscriptions where the company has become abortive, although no fraud be proved.[3] It will also, if necessary, direct an account of the moneys received, and of the expenses properly incurred by the managers, and payment out of the deposits of those expenses, and a distribution of the surplus; and it will interfere by injunction, and by appointing a receiver in the mean time, although no dissolution is asked.

Who may seek an accounting—What must appear in bill for.

SEC. 291. A bill for an account need not contain an offer by the plaintiff to pay what, if any thing, may be found due from him on taking such account.[5] It is, however, usual, and at one time it was necessary, to insert such an offer in the bill.

[1] See Harvey v. Collett, 15 Sim. 332.

[2] 17 Sim. 167.

[3] 2 P. W. 154.

[4] Cooper v. Webb, 15 Sim. 454; Wilson v. Stanhope, 2 Coll. 629; Apperley v. Page, 1 Ph. 779; Clements v. Bowes, 17 Sim. 167, and 1 Drew. 684, where demurrers to such bills were overruled. See, too, Sheppard v. Oxenford, 1 K. & J. 491; Butt v. Monteaux, id. 98.

[5] The Columbian Government v. Rothschild, 1 Sim. 103.

A bill for an account of partnership dealings is not objectionable, simply because it relates to the dealings of several partnerships, if they, in point of fact, are nothing more than continuations of one firm.[1] But a suit which prays for, or involves the taking of, an account of the dealings and transactions of two co-existing firms, is open to objection on the ground of multifariousness.[2]

A suit in equity cannot be sustained by a person who ought to be a defendant; and although a misjoinder is not attended with the same consequences as formerly, still, if there is only one plaintiff, and he fills two characters, in one of which he is entitled to sue, whilst in the other he ought to be a defendant, the suit cannot, it seems, be sustained. Therefore, in a case where there was a partnership of three persons, A, B and C, and A retired, and B filed a bill against A and C to set aside a fraudulent transaction in which the two defendants had concurred, and then A and B became bankrupt, it was held that the joint assignees of A and B could not proceed with the suit against C.[3]

Again, it must be borne in mind that a bill in equity against two persons praying for relief against one, and in the event of the plaintiff not being entitled to relief against him, then for relief against the other, is bad. In Seddon v. Connell,[4] a bill was filed by a person who alleged that he had been induced by the fraud of directors to buy shares, and the relief prayed was, that it might be declared that the purchase was void as between the plaintiff and the company, and that the company might be ordered to repay the plaintiff his purchase-money, with interest; or, in the event of the court not thinking the plaintiff entitled to such relief, then that the purchase-money might be repaid by the directors who had been guilty of the fraud. A demurrer to the bill was allowed, on the ground that it ought to have shown, and prayed, a direct, and not a contingent, right to relief against each defendant against whom relief was sought.

What defendant partners must do.

SEC. 292. A defendant to a suit for an account is often required to discover and set forth in his answer, details which it is impossible for him to remember, and to ascertain which inquiry and study are necessary. In such a case, all that a defendant is bound to do is, it seems, to put the plaintiff in the same position as himself; furnishing the plaintiff with every means of information possessed or obtainable by the defendant,

[1] See Jefferys v. Smith, 3 Russ. 158.
[2] See Rheam v. Smith, 2 Ph. 726.
[3] Robertson v. Southgate, 6 Ha. 536.
[4] 10 Sim. 79.

and leaving the plaintiff to make what he can of the materials thus furnished to him. A defendant is not bound to digest accounts, or to set out in his answer voluminous accounts existing already in another shape, and which he offers to produce to the plaintiff. Thus, in Christian v. Taylor,[1] in which the executor of one deceased partner filed a bill for an account against the executors of another deceased partner, and required them to set out in detail many complicated and voluminous accounts, it was held that they were not bound to do so; that they were under no obligation of going through the books for the purpose of giving the plaintiff the information which he asked; and that the defendants could not be compelled to do more than to refer to the books and documents in their possession in such a way as to entitle the plaintiff to have them produced for his inspection.[2]

A defendant, however, is bound to state what he knows, to make inquiries of his agents and servants, to obtain documents to the possession of which he has a right, and to afford the plaintiff either the information sought, or all the means of obtaining information which the defendant himself possesses. A defendant who has it in his power to obtain information cannot escape from discovery simply by saying he does not know. In Taylor v. Rundell,[3] the executors of a lessor of a mine filed a bill against the lessees for a discovery of the ground opened, and for an account of the produce. The defendants were two of the directors of the company by which the mine was worked. The defendants put in an incomplete answer, stating, by way of excuse for so doing, that certain accounts were in the possession of the company's agent in America; that the copies furnished by him were in the custody of the secretary of the company, that the defendants had no power to inspect the accounts except by an order of the board, or, as shareholders, at certain short and specified times; and that the plaintiffs had, by means of an agent appointed for that very purpose, equal facilities and powers with the defendants to obtain the information desired. The answer was held insufficient, first, by Vice-Chancellor Shadwell, and afterward by Lord Cottenham, on appeal; the former holding that the defendants ought to have stated that they had applied to the agent abroad; and the latter holding that it ought to have appeared in the answer that the board of directors had been applied to for leave to procure and give the information required, and that such leave had been refused. Lord

[1] 11 Sim. 401.

[2] See, too, White v. Barker, 5 De G. & Sm. 746; Seeley v. Boehm, 2 Madd. 176; and compare Drake v. Symes, 8 W. R. 85.

[3] 11 Sim. 391, and Cr. & Ph. 104.

Cottenham added: "If it is in your power to give the discovery, you must give it; if not, you must show that you have done your best to procure the means of giving it."[1]

In another suit between the same parties for similar objects, but relating to another mine,[2] the defendants again put in an incomplete answer, excusing themselves on the ground that the books and documents containing the information sought to be obtained were in the possession of the secretary as the agent of the company, and that the directors had ordered him not to allow the defendants to see the books; but this was held insufficient by the V. C. Knight Bruce, and by Lord Cottenham, on the ground that the defendants had a *right* to see the books, and that they were bound to exercise that right, and if necessary, to file a bill for the purpose of enforcing it. Lord Cottenham there said: "A party is bound to inspect and answer as to the contents of all documents that are in his possession or *power*; and all which he has a *right* to inspect, provided he can enforce that right, are in his *power*."

In case it becomes necessary for a defendant to remove obstacles thrown in his way, he should apply for further time to answer, and not put in an answer which is insufficient.[3]

Relative to production of books, etc.

SEC. 293. In connection with this subject it may be useful to remind the reader of the rule that a person cannot be compelled to produce books which belong to himself and others who are not before the court. Thus, in Murray v. Walter,[4] the defendant in his answer stated that certain books relating to a concern in which the plaintiff claimed to be a partner with the defendant, were in the possession of the treasurer of the concern on behalf of the several shareholders in it, many of whom were not parties to the suit; and it was held that the defendant could not be compelled to produce the books in question, although it was insisted, on the authority of Walburn v. Ingilby,[5] that the plaintiff had a right to have whatever access to the books the defendant himself was entitled to. There are several other decisions to the

[1] See, too, Stuart v. Lord Bute, 11 Sim 442, and 12 id. 460; A. G. v. Rees, 12 Beav. 50; Earl of Glengall v. Fraser, 2 Ha. 99, and compare Martineau v. Cox, 2 Y. & C. Ex. 688, where it was held that a partner here in a firm carrying on business in a foreign country, was not bound to set out a list of documents in the possession of the partners abroad.

[2] Taylor v. Rundell, 1 Y. & C. C. 128, and 1 Ph. 222.

[3] Taylor v. Rundell, 1 Ph. 222; Pickering v. Rigby, 18 Ves. 484.

[4] C. R. & Ph. 114.

[5] 1 M. & K. 79.

same effect as Murray v. Walter,[1] but the doctrine there laid down does not apply to cases in which the absent parties interested in the books are in fact represented by the defendants on the record, and have no interest in conflict with theirs.[2]

Who is entitled to inspection of.

SEC. 294. A person who obtains an order for the production of documents is entitled not only to inspect them himself, but to have them inspected by his solicitors and agents.[3] But neither he nor they are entitled to make public the information they obtain by means of such inspection. The order is made with a view to the administration of justice between the litigant parties; and an injunction will, if necessary, be granted to restrain the communication to strangers of what may be ascertained in the course of an examination of the books and documents produced under the order.[4]

If, in a suit by one partner against another for an account, the defendant admits in his answer that he has in his hands money belonging to the firm, a motion that he may pay that money into court will, under certain circumstances, be successful. As a general rule, a partner having partnership moneys in his hands cannot be made to pay those moneys into court if he insists that on taking the accounts a balance will be found due to him. Nor will he be compelled so to do unless the other partners will pay in what they may have in their hands.[5] Nor will a partner be ordered to pay into court the amount of a debt admitted by him to be due from him to the firm, if he insists that on the whole he is not a debtor thereto;[6] nor if the amount to which he is indebted is not admitted, and can only be ascertained by a complicated transaction.[7] But if a partner admits that he has partnership moneys in his hands, and it appears from his own statements that they came there improperly,[8] or in violation of good faith, he will be compelled to pay them into court;[9] so if he admits facts

[1] Reid v. Langlois, 1 Mac. & G. 627; Burbidge v. Robinson, 2 id. 244; Penney v. Goode, 1 Drew. 474; Stuart v. Lord Bute, 13 Sim. 453.

[2] Glyn v. Caulfield, 3 Mac. & G. 463.

[3] Williams v. Prince of Wales Life, etc., Co., 23 Beav. 338.

[4] Ibid.

[5] Foster v. Donald, 1 J. & W. 252.

[6] Richardson v. The Bank of England, 4 M. & Cr. 165.

[7] See Mills v. Hanson, 8 Ves. 68.

[8] See Costeker v. Horrox, 3 Y. & C. Ex. 530, where a surviving partner, being also the executor of his deceased copartner, was ordered to pay into court 7,000*l.*, the amount of assets of the deceased improperly applied to partnership purposes. See, too, Gaskell v. Chambers, 5 Jur. (N. S.) 52, M. R., also reported in 26 Beav. 360. See *supra*, note, p. 497.

[9] Jarvis v. White, 6 Ves. 738; Foster v. Donald, 1 J. & W. 252; in the first of these cases the motion was made before answer.

from which it appears that he is indebted to the firm in a certain sum, and he does not insist that on the whole the firm is indebted to him, the money admitted by him to be due will be ordered paid into court.[1]

If the partnership debts are unpaid, and the defendant is liable to be sued for them, the order directing payment into court should reserve to him liberty to apply for payment out of court, of the amount of debts he may be compelled to pay.[2]

Of the defenses to a suit for an account and discovery between partners and persons claiming under them.

SEC. 295. The defense on the ground of illegality and of laches on the part of the plaintiff have already been examined at some length. The defense on the ground that the suit is improperly constituted as regards the parties to it will be reserved for future consideration. In addition, however, to such grounds of defense, there are others which require notice, and which cannot be more conveniently alluded to than in the present place, and under the following heads.

Denial of partnership.

SEC. 296. A suit by one partner against another for an account of the dealings and transactions of an alleged partnership may be met by a denial of the existence of any such partnership. This defense should, if possible, be taken by plea,[3] and not by answer; for if a defendant answers he must answer fully; and in accordance with this rule it has been held that a defendant cannot by answer deny the alleged partnership, and excuse himself on that ground from setting forth the accounts required by the bill.[4] The inconvenience and greater expense of putting in a partial answer, and of having its sufficiency discussed upon exceptions, are the reasons relied upon as justifying the rule in question;[5] but on the other hand it must not be forgotten that there are so many purely technical requisites to the validity of a plea in equity, that a substantial defense so raised is always lia-

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[1] Toulmin v. Copland, 3 Y. & C. Ex. 643; Costeker v. Horrox, id. 530. In Domville v. Solly, 2 Russ. 372, an order was made though the defendant insisted that the plaintiff was entitled to nothing.

[2] Toulmin v. Copland, 3 Y. & C. 643. In S. C., 6 Price, 405, it was held that a surviving partner was not entitled to have partnership funds, on which the plaintiffs had put a *distringas*, transferred to him, to enable him to pay outstanding debts.

[3] Drew v. Drew, 2 V. & B. 159. The plea must be accompanied by an answer denying allegations, which, if true, would establish the partnership. Harris v. Harris, 3 Ha. 450; Sanders v. King, 6 Madd. 61.

[4] Hall v. Noyes, 3 Bro. C. C. 483; ——— v. Harrison, 4 Madd. 252; Somerville v. Mackay, 16 Ves. 382; Clegg v. Edmondson, 22 Beav. 125; The Great Luxembourg Rail. Co. v. Magnay, 28 id. 646; Reade v. Woodroofe, 24 id. 421; Blackley v. Rymer, 4 Drew. 248.

[5] See 16 Ves. 387.

ble to be overruled on some point of form having a very remote if any bearing on the true merits of the case. It would, therefore, be much to be regretted, if the older cases[1] in which a defendant was allowed by answer to deny the partnership alleged by the plaintiff, and to decline to set out the accounts sought by him were overruled; for if the plaintiff's bill be artfully framed, it may be impossible for the defendant to protect himself by a plea or demurrer, or consequently at all, from setting out voluminous accounts with which the plaintiff may have no concern whatever.

This seems to have been felt by the court of appeal. For in a late case on this subject, where the defendant denied the plaintiff's title, by answer, and declined setting out accounts which could not by any possibility be of use to the plaintiff until he had succeeded on the issue thus raised, although exceptions to the answer were allowed by the Master of the Rolls, the Lords Justices directed the case to be argued on its merits (on a motion for decree to come with the appeal), and they ultimately dismissed the bill.[2] So, in a still more recent case, exceptions were taken to an answer denying the plaintiff's title, and declining to set out accounts which could not be of the least use to the plaintiff until after he had established that title, and Vice-Chancellor Wood directed the exceptions to stand over until the hearing of the cause.[3]

Upon the whole, therefore, it is conceived that where the title of the plaintiff to relief is denied, it is competent to a defendant to deny the plaintiff's title by *answer*, and whilst giving him every discovery which can possibly assist him in establishing that title, to decline to answer those interrogatories, which can only be material after that title is established.[4]

The Statute of Limitations.

SEC. 297. The statute of limitations, 21 Jac. I, c. 16, § 3, enacts that all actions of account (other than for such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants,[5] shall be commenced and sued within six years next after the cause of such action or suit.

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[1] Jacobs v. Goodman, 2 Cox, 282; Donegal v. Stewart, 3 Ves. 446, and see Mitf. Pl. 318.

[2] See Clegg v. Edmondson, 22 Beav. 125, and 3 Jur. (N. S.) 299.

[3] De la Rue v. Dickinson, 3 K. & J. 388.

[4] See Mitf. Pl. 371, 5th ed.; Wigram on Disc. 221, 2d ed.

[5] This exception no longer exists. See 19 & 20 Vict. c. 97, § 9. See as to the exception, Robinson v. Alexander, 8 Bli. (N. S.) 352, and 2 Cl. & Fin. 717, and the cases there referred to.

A court of equity is as much bound by this statute as a court of law,[1] and advantage may be taken of it by plea,[2] or by answer,[3] or by demurrer, if the facts sufficiently appear on the face of the bill.[4]

Thus, where an account had been stated between two partners, and a balance was found due to one of them from the other, and twenty-four years afterward a bill was filed by the former against the latter for discovery and an account, a plea that, according to the plaintiff's own showing, the balance was due twenty-four years before the filing of the bill, and that his remedy was barred by the statute, was allowed.[5] In a subsequent case the defendant insisted in his answer that none of the transactions in respect of which the account was sought occurred within six years before the filing of the bill, and the bill was thereupon dismissed.[6] So, when a partner died, and seven-

[1] Foley v. Hill, 1 Ph. 399; Hovenden v. Annesley, 2 Sch. & Lef. 607; and see Whitley v. Lowe, 25 Beav. 421, and 2 De G. & J. 704.

[2] See Welford v. Liddel, 2 Ves. Sr. 400; Beames' Plea in Eq. 161. In Robinson v. Field, 5 Sim. 14, and Jones v. Pengree, 6 Ves 580, the plea was overruled as covering too much.

[3] As in Martin v. Heathcote, 2 Eden, 169; Tatam v. Williams, 3 Ha. 347.

[4] Foster v. Hodgson, 19 Ves. 180; Hoare v. Peck, 6 Sim. 51; Prance v. Sympson, Kay, 678.

[5] Bridges v. Mitchell, Bunb. 217. See, too, Whitley v. Lowe, 25 Beav. 421, and 2 De G. & J. 704.

[6] Martin v. Heathcote, 2 Eden, 169; and see Barber v. Barber, 18 Ves. 286. These cases were overruled by Robinson v. Alexander, 2 Cl. & Fin. 717, on the ground that they came within the exception relating to merchants' accounts, but that exception no longer exists.

Where a partner permits the statute to run upon the partnership accounts so as to bar an action at law, a court of equity will give effect to the statute. Atwater v. Fowler, 1 Edw. Ch. (N. Y.) 417; Allen v. Farrington, 2 Sneed (Tenn.), 534; Prewett v. Buckingham, 28 Miss. 97. In Wilhelm v. Caylor, 32 Md. 152, the plaintiff's testator and defendants dissolved their copartnership on March 28, 1841. There were no business transactions on the part of the partnership after the dissolution. To the plaintiff's demand (November 28, 1848), the defendants pleaded the statute of limitations of three years. It was held that the statute of limitations, when insisted upon, is a full and complete bar to relief between partners as in a court of law. It was also held that referring a case to a master to take an account without deciding any question, does not prevent the defendant from insisting upon the statute of limitations. Partial settlements may be made between partners from time to time, and from the dates of such settlements the statute of limitations will begin to run as to the accounts so settled. Foster v. Rison, 17 Gratt. (Va.) 322; Robertson v. Read, id. 555. Where one of three creditors lived in Tennessee and the two others in New Orleans, and all had a demand against the estate of a deceased person in Tennessee, it was held that as one of the plaintiffs resided in Tennessee, the statute of limitations of two years was a bar to the suit. Allen v. Farrington, 2 Sneed (Tenn.), 534. Where there has been gross and palpable delay, and in consequence the debt has been lost, a court of equity will not assist in making the estate of the deceased liable. Jackson v. King's Admr., 12 Gratt. 499, 507. One partner to a bill for settlement of accounts by another partner may plead the statute of limitations in bar of taking an account. Lansdale v. Brashear, 3 T. B. Monr. (Ky.) 333.

The creditor of a partnership under process of administration cannot sue upon a bond of a surviving partner, unless he presents his demand to the surviving partner to be classified within two years, or have the claim allowed against the estate of the deceased partner. State v. Woods, 36 Mo. 73. Lapse of time, after a settlement and note given for a balance due, is a strong

teen years afterward a bill for an account was filed against his executor by his surviving partners, the bill was dismissed with costs.[1]

Again, in Foster v. Hodgson,[2] the case was, in substance, as follows: there was a running account between a firm and its bankers; the head of the firm died, and the account then stopped, but was not formally adjusted or settled; twelve years afterward, a bill was filed against the bankers for an account, on the ground that a considerable balance was, in fact, due from them to the firm. The defendants demurred, and the demurrer was allowed, on the ground that the case did not appear to be within the exception relating to merchants' accounts; that consequently the lapse of more than six years since the account stopped was an answer to the suit; and that as this fact appeared on the face of the bill, the objection was properly taken by demurrer.[3]

But although courts of equity, like courts of law, are bound by the statutes of limitations, there are cases in which those statutes do not afford a defense in equity, although they might do so at law. Where, for example, a partner died, having by will disposed of his property on trusts for payment of his debts, this was held to be sufficient to justify a decree for an account of partnership transactions in respect of which claims existed when he died, although more than six years had elapsed since that time, and before the filing of the bill.[4] Again, in cases of breach of trust and fraud, there seems to be no limit to the time at which a court of equity will interfere and afford redress to the parties aggrieved. The mere lapse of thirty or forty years since the right first accrued, is insufficient to bar the remedy in such cases.

In the late case of Stainton v. The Carron Company,[5] the management of the affairs of a company was intrusted to a person who was entitled to one-sixth of the shares in it. He was the manager of the company from 1808 until 1851, when he died. For twenty-five years

ground for refusing to look behind the settlement. Honore v. Colmensil, 1 J. J. Marsh. (Ky.) 518. The right of a surviving partner to an account in chancery with the estate of a deceased partner is not barred by the statute of limitations if one item of the account is within the statute. The claim does not acrue to the survivor until he has exhausted the partnership assets, and paid more debts than the assets amount to. Cannon v. Copelen, 43 Ala. 263. The surviving partner is bound to settle up the partnership business, and until there has been a final settlement of the partnership dealings and a balance struck, the surviving partner has no claim which he can legally assert against the administrator of the deceased partner, and therefore the limitation of action does not commence to run until such settlement. Gleason v. White, 34 Cal. 263.

[1] Tatam v. Williams, 3 Ha. 347.

[2] 19 Ves. 180.

[3] See, too, Hoare v. Peck, 6 Sim. 51, and Prance v. Sympson, Kay, 678.

[4] Ault v. Goodrich, 4 Russ. 434.

[5] 24 Beav. 346.

he rendered accounts regularly, and these accounts were never questioned during his life. But after his death, it was discovered that upwards of 2,000*l.* a year for many years had not been properly accounted for by him, and the company claimed from his estate nearly 70,000*l.* in respect of this annual deficiency, and asserted a lien for this sum on his shares and assets in the hands of the company. Notwithstanding the lapse of time, and the reception without dispute of the accounts sent in by the manager from year to year, a decree was made, opening the whole account from the year 1825 down to his death.[1]

Again, several modern Acts of Parliament limit the duration of a retiring shareholder's liability to creditors to three years after his retirement; but it does not, therefore, follow that the duration of his liability to contribute with his late co-shareholders to debts for which he was liable with them, is also limited to the same three years.[2]

With respect to accounts between partners, an important question arises with reference to the effect of the repeal of so much of the old statutes as relates to merchants' accounts. The authorities which have been already referred to as showing that the statutes of limitations are a bar to a suit for an account, did not apply to open unsettled accounts, extending from a time more than six years before a bill was filed, down to a time within such six years. Formerly, by reason of the express exception in the statute of James, accounts which concerned the trade of merchandise between merchant and merchant might be taken, although more than six years had elapsed since the last transaction forming an item in the account, and although there had been no acknowledgment, or part-payment, to take the case out of the statute.[3] And notwithstanding the words in the Statute of James: "All actions of account * * * shall be commenced and sued," etc., it was held that, even as between ordinary persons, the statute did not begin to run so long as the account was continued,[4] and that the statute did not, in any case, apply to an unsettled, open, mutual account, with items on both sides representing cross demands.[5] The law in this respect was modified by Lord Tenterden's Act,[6] the effect of which is that,

[1] See, too, Allfrey v. Allfrey, 1 Mac. & G. 87; Wedderburn v. Wedderburn, 2 Keen, 722, and 4 M. & Cr. 1.

[2] Gouthwaite's case, 3 Mac. & G. 187.

[3] Robinson v. Alexander, 8 Bli. (N. S.) 352, and 2 Cl. & Fin. 717, settled this point, and finally overruled a number of earlier cases.

[4] See per Lord Eldon in Foster v. Hodgson, 19 Ves. 185; Scudemore v. White, 1 Vern. 456.

[5] See the notes to Webber v. Tivill, 2 Wms. Saund. 126, *et seq.*, and Catling v. Skoulding, 6 T. R. 189.

[6] 9 Geo. IV, c. 14.

although there may be a mutual open running account, the mere existence of items not barred is not sufficient, in actions of debt or assumpsit, to take earlier items out of the Statutes of Limitations.[1] It has, however, never yet been held in equity, that where there is a mutual open running account, a decree for taking it must be confined to items not more than six years old. Lord Tenterden's Act is silent as to suits for account, and applies, in terms, only to actions of debt and on the case (*i. e.* assumpsit,) and if the older authorities are right in the position that the Statute of James had no application to mutual open running accounts, then the abolition of the exception as to merchants' accounts will have no effect on running accounts between partners. But if the older authorities cannot be supported,[2] then the effect of the abolition of the exception in question becomes very serious; for, upon the present supposition, it will be found difficult to justify a decree for an account extending to a period more remote than six years before the filing of the bill, unless there has been a breach of an express trust, or fraud, or payment, or an acknowledgment. Perhaps, however, the lien to which each partner is entitled would be held to render it necessary, in any event, to take an unsettled and current *partnership* account, without reference to the Statutes of Limitations.

With reference to acknowledgments, it was held in a recent partnership case, where no account had been come to for six years, that a signed acknowledgment of a liability to account in respect of matters more than six years old, was sufficient to justify a decree for an account in respect of them, although the acknowledgment did not contain an admission that any thing was due, or any express promise to pay what might be found due on taking the account.[3]

Where a partnership account is decreed to be taken, and a receiver is appointed, a payment made by the receiver to one of the partners, on account of a debt owing to him by another partner, is not sufficient to prevent the statute from being a bar to such debt.[4]

Account stated.

SEC. 298. To a bill for an account of partnership dealings and trans-

[1] Williams v. Griffiths, 2 Cr. M. & R. 45; Cottam v. Partridge, 4 Man. & Gr. 271, E. C. L. R. 43; Ashby v. James, 11 M. & W. 542; Clark v. Alexander, 8 Scott (N. R.), 147; Inglis v. Haigh, 8 M. & W. 780; see, too, Jackson v. Ogg, 1 Johns. 397.

[2] It is difficult to reconcile the older cases with the words of the act.

[3] See Prance v. Sympson, Kay, 678.

[4] Whitley v. Lowe, 25 Beav. 421, and 2 De G. & J. 704.

actions an account thereof already stated between the parties[1] affords a good defense.[2] Such a defense may be pleaded, or relied on in an answer.[3] An account, to be a sufficient defense to a bill for a further account, must be in writing; but it is not necessary that it should be signed by the parties, if it can be shown to have been acquiesced in by them.[4] It is to be observed that the fact that an account has already been *rendered* by the defendant to the plaintiff does not deprive the latter of his right to have the same account taken under the direction of a court of equity;[5] to have that effect an account must not only have been sent in to the plaintiff, but also have been acquiesced in by him.[6] Accounts of companies laid before the shareholders at a general meeting, and approved and adopted by them, cannot be impeached by absent or dissentient shareholders, except upon the ground of proved error or of fraud.[7] A stated account may be impeached either wholly or in part on the ground of fraud or mistake. If there be fraud, or if any mistake affects the whole account, the whole will be opened, and a new account will be directed to be taken, without reference to that which has been stated;[8] but if there be no fraud, and if no mistake affecting the whole account can be shown, but the correctness of some of the items in it is, nevertheless, disputed, the account already stated will not be treated as non-existing, but will be acted upon as correct, save so far as the party dissatisfied with any item can show it to be erroneous.[9] In a case of fraud, an account will be opened *in toto*, even after the lapse of a considerable time;[10] but if no fraud be proved, an account which has been long settled will not be re-opened *in toto;* the utmost which the court will then do will be to give leave to surcharge and falsify,[11] and

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[1] Of course the maxim, *Res inter alios*, etc., applies to settled accounts, Carmichael v. Carmichael, 2 Ph. 101.

[2] Taylor v. Shaw, 2 Sim. & Stu. 12. An account settled by a majority was held binding on the minority in Robinson v. Thompson, 1 Vern. 465; see, too, Stupart v. Arrowsmith, 3 Sim. & G. 176, and Kent v. Jackson, 2 De G. Mac. & G. 49.

[3] Endo v. Caleham, You. 306.

[4] See Morris v. Harrison, Colles, 157; Willis v. Jernigan, 2 Atk. 252. See on this defense in general, Beames' Pleas in Equity, 222, and Mitford, 302, 5th ed. A verbal account and a receipt in full is not equivalent to a stated account. Walker v. Consett, Forrest, 157.

[5] See Clements v. Bowes, 1 Drew. 692.

[6] Irvine v. Young, 1 Sim. & Stu. 333.

[7] See Stupert v. Arrowsmith, 3 Sm. & G. 176; Kent v. Jackson, 2 De G. Mac. & G. 49; Ex parte Bignold, 22 Beav. 165.

[8] As in Clarke v. Tipping, 9 Beav. 284; Wharton v. May, 5 Ves. 68; Beaumont v. Boultbee, id. 485, and 7 Ves. 599; Allfrey v. Allfrey, 1 Mac. & G. 87; Coleman v. Mellersh, 2 id. 309.

[9] Pitt v. Cholmondeley, 2 Ves. Sr. 565; Vernon v. Vawdry, 2 Atk. 119.

[10] Allfrey v. Allfrey. 1 Mac. & G. 87; Stainton v. The Carron Co., 24 Beav. 346; see Vernon v. Vawdry, 2 Atk. 119; Beaumont v. Boultbee, 5 Ves. 68.

[11] See Miller v. Craig, 6 Beav. 433; Brownell v. Brownell, 2 Bro. C. C. 61, and 1 Mac. & G. 94.

there are cases in which, in consequence of lapse of time, the court will do no more than itself rectify particular items, instead of giving leave to surcharge or falsify generally.[1] If a settled account is impeached for errors, particular errors must be stated and proved;[2] and the same rule holds where the account is settled, "errors excepted."[3] In surcharging and falsifying, errors of law, as well as errors of fact, may be set right;[4] and where leave is given to one party to surcharge and falsify, similar leave is thereby also accorded to his opponent.[5]

On the retirement or death of a partner, it is usual for an account to be stated between him or his representatives on the one hand, and the continuing partners on the other, and for mutual releases to be given. Afterward attempts are occasionally made to open the accounts thus stated, and to set aside the releases, and to have a new account taken, and a fresh settlement of the partnership affairs. In such cases as these, before the settled accounts can be opened, the release must be set aside.[6] Whether this can be done or not, depends upon circumstances which will be found discussed under the title Rescission of Contract.

Award.

SEC. 299. Another defense to a bill for an account is, that the matters in difference between the partners have been disposed of by arbitration.

A mere agreement that the matters in question should be referred has frequently been held to be no defense to an action or suit in respect of them.[7] But if those matters have actually been disposed of by the award of an arbitrator, they cannot afterward be made the foundation of any action or suit between the parties on whom the award is binding. An award may be pleaded in bar to a bill for an account;[8] but such a defense will not, of course, hold if the account

[1] See Twogood v. Swanston, 6 Ves. 485.

[2] Dawson v. Dawson, 1 Atk. 1; Taylor v. Haylin, 2 Bro. C. C. 310; Kinsman v. Barber, 14 Ves. 579.

[3] Johnson v. Curtis, 2 Bro. C. C. 311, note.

[4] Roberts v. Cuffin, 2 Ark. 112.

[5] 1 Madd. Ch. 144, where it is said to have been so held by V. C. Leach in Anon., 6 March, 1821.

[6] See Fowler v. Wyatt, 24 Beav. 232, and see Parker v. Bloxham, 20 id. 294

[7] Thompson v. Charnock, 8 T. R. 139; Michell v. Harris, 4 Bro. C. C. 312.

[8] Tittenden v. Peat, 3 Atk. 529; Routh v. Peach, 2 Anst. 519, and 3 id. 637; Haynes v. Forskoll, 13 Me. 115; Gibson v. Moore, 6 N. H. 549; Tomlinson v. Hammond, 8 Iowa, 42; Kimball v. Walker, 30 Ill. 482; Coleman v. Coleman, 12 Rich. (S. C.) 183; Brink v. New Amsterdam F. Ins. Co., 5 Robt. (N. Y.) 104; Riley v. Rupert, 34 Mo. 524.

But there must be a submission of the very matters involved in the action in defense to which it is plead, Morrow v. Riley, 15 Ala. 710, and even though the submission is made by one partner only, it may be ratified by the others, even after award. Buchanan v. Curry, 19 Johns. (N. Y.) 142.

sought by the bill is different from that to which the award applies.[1] So an award on a reference of all matters in difference is no defense to a suit for an account of moneys received after the making of the award, and not dealt with by it, owing to a mistake on the part of the arbitrator. Thus, in Spencer v. Spencer[2] the partners on a dissolution referred all matters in difference to arbitration. The arbitrator awarded that one of the partners should get in the outstanding debts, which were estimated by the arbitrator at a certain amount. The award was acted on, but it appeared that the debts ultimately got in amounted to more than the sum at which they had been estimated. One of the partners claimed a share of the difference between the estimated and the actual amount of these debts, and as it was plain that the award had proceeded on a mistake, an account was directed, notwithstanding all matters in difference had been referred.

Payment and accord and satisfaction.

SEC. 300. Payment, *per se*, is not a defense to a suit for an account, for the object of such a suit is to ascertain how much is or was payable. But payment of a sum of money and acceptance of it in lieu of all demands is equivalent to accord and satisfaction, which is as much a defense to a suit for an account as is a release.[3]

With respect to accord and satisfaction, it is to be observed that there must be no uncertainty in the agreement relied on as an answer to the suit for an account, and that it must be shown that such agreement has been performed; for in the performance lies the satisfaction.[4] On these grounds the late Vice-Chancellor Wigram, in a suit for an account by the executors of a deceased partner against the surviving partner, overruled a plea that it was agreed between the defendant and the deceased that all accounts between them, and all claims of the deceased in respect of the partnership should be waived; and that in consideration thereof the deceased should be permitted to carry on business alone, without any further question or dispute by the defendant, which the deceased accordingly did.[5]

Release.

SEC. 301. A release is a good defense to a suit for an account.[6] But where the release has been executed on the faith of representations as to

[1] As in Farrington v. Chute, 1 Vern. 72.
[2] 2 Y. & J. 249.
[3] See Bac. Ab., Accompt, E.; Vin. Ab., Account, N.; Brown v. Perkins, 1 Ha. 564; but see Com. Dig., Accompt, E. 6, pl. 8.
[4] Com. Dig. Accord (B. 3) and (B. 4).
[5] Brown v. Perkins, 1 Ha. 564.
[6] See Mitford's Pl. 304, ed. 5.

the correctness of certain accounts, which representations are afterward ascertained to be untrue, a fresh account will be decreed notwithstanding the release.[1] A release, moreover, can, of course, be set aside for fraud.[2] A release, to be effectual as such, must be under seal. A release not under seal is regarded as a stated account.[3]

Of the decree for a partnership account.

SEC. 302. A decree for a partnership account in its simplest form, is to this effect: "Let an account be taken of the partnership dealings and transactions between the plaintiff and the defendant, from ——. Just allowances[4] ——. And let what upon taking the said account shall be certified to be due from either of the said parties to the other of them be paid by the party from whom to the party to whom the same shall be certified to be due. Liberty to apply."

The method of taking a partnership account under such a decree is as follows:—

1. Ascertain how the firm stands as regards non-partners.

2. Ascertain what each partner is entitled to charge in account with his copartners, remembering, in the words of Lord Hardwicke, that "each is entitled to be allowed, as against the other, every thing he has advanced or brought in as a partnership transaction, and to charge the other in the account with what that other has not brought in, or has taken out more than he ought."[6]

3. Apportion between the partners all profits to be divided or losses

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[1] See, for example, Wedderburn v. Wedderburn, 2 Keen, 772, and 4 M. & Cr. 41; Millar v. Craig, 6 Beav. 433, and see Phelps v. Sproule, 1 M. & K. 231.

[2] Carter v. Cornell, 1 Whart. (Penn.) 397.

[3] Mitf. Pl. 307, 5th ed.

[4] These will be made, although the decree is silent as to them. See 16 Ord. of Aug. 1859; Consolidated Orders, p. 79.

[5] Seton on Decrees, 275, 2d ed., where several other useful forms will be found given and referred to. The reports of the following cases also contain useful precedents: Devaynes v. Noble, 1 Mer. 530, account where one firm succeeded another; Wedderburn v. Wedderburn, 2 Keen. 752, account where one firm succeeded another, and the capital of a deceased partner was continued in trade; Cook v. Collingridge, Jac. 628, and more fully in Collyer on Part., § 831, sale of a testator's share set aside and account of subsequent profits; Crawshay v. Collins, 12 Ves. 230, and 2 Russ. 347, account of subsequent profits; Millar v. Craig, 6 Beav. 442, setting aside a release and opening accounts; Fereday v. Wightwick, Taml. 262, declaration that property acquired by one partner was partnership property, and an account accordingly Wilson v. Greenwood, 1 Swanst. 483, sale, receiver, and account; Blisset v. Daniel, 10 Ha. 538, decree restoring a partner wrongfully expelled; England v. Curling, 8 Beav. 140, specific performance of agreement for a partnership; Pillans v. Harkness, Colles, 442, decree relieving a person who had been induced to become a partner by fraudulent misrepresentations.

[6] West v. Skip, 1 Ves. Sr. 242. The rule in Clayton's case respecting the appropriation of payments applies to partners *inter se* as well as to other persons. See Toulmin v. Copland, 3 Y. & C. Ex. 625, and 7 Cl. & Fin. 350.

to be made good; and ascertain what, if any thing, each partner must pay to the others, in order that all cross claims may be settled.

In order, therefore, to take a partnership account, it is necessary to distinguish joint estate from separate estate; joint debts from separate debts; and to determine what gains and what losses are to be placed to the joint account of all the partners, or to the separate accounts of some or one of them exclusively. The principles upon which this is to be done have been explained in previous chapters. Referring the reader, therefore, to them, and reminding him that, in taking accounts between partners, attention must be paid, not only to the terms of the partnership articles, but also to the manner in which they have been acted on by the partners, there[1] remains but little to add on the present subject, except as regards just allowances, the period over which the account is to extend, and the evidence upon which it is to be taken.

With respect to just allowances.

SEC. 303. When a partnership account is decreed it is not usual for the court to determine beforehand what are, and what are not, just allowances. That is determined on taking the account, and, if necessary, the decree will direct the chief clerk to state the fact and reasons upon which he shall adjudge any allowances to be just allowances.[2] What ought to be so allowed must be determined by the articles of partnership.

With respect to the period over which an account is to extend.

SEC. 304. This can only be determined by ascertaining the time from which it is to begin, and the time at which it is to cease.

The time from which the account is to begin will, in a general account of partnership dealings and transactions, be the commencement of the partnership, unless some account has since that time been settled by the partners, in which case the last settled account will be the point of departure.[3] If there has been an account settled so as to be binding on the parties, such account will not be re-opened. This is ordinarily provided for in the decree for an account by the insertion

[1] It is said a partner is not to be charged as such with what he might have received, without his willful default, Rowe v. Wood, 2 J. & W. 556, but *quære* whether a surviving partner could not be made so to account, as he alone can get in the assets of the firm.

[2] See Crawshay v. Collins, 2 Russ. 347; Brown v. De Tastet, Jac. 294, 298, and 299; Cook v. Collingridge, id. 623, 625; Wedderburn v. Wedderburn, 2 Keen, 753.

[3] See Cook v. Collingridge, Jac. 624; Beak v. Beak, Rep. Temp. Finch, 190. An incoming partner has no right to profits made before he became a partner. Gordon v. Rutherford, T. & R. 373.

of the clause, "And if, in taking the said account, it shall appear that any account has been settled and agreed upon between the parties up to any given time, the same is not to be disturbed."[1] This direction is not, however, inserted in the decree as a matter of course; nor does it apply to any accounts except those which have been so settled as to be conclusive on all parties interested in them.[2]

The time at which an account and partnership dealings and transactions is to stop will, naturally, be the date of the dissolution of the firm,[3] not that no account is to be taken of what occurs after that date; for some time or other must elapse between the dissolution and the final winding up of the affairs of the concern, and such time cannot in fairness to any one be excluded from consideration.[4] Notwithstanding dissolution, a partnership is deemed to continue so far as may be necessary for the winding up of its affairs; and an account of partnership dealings and transactions, although in one sense it stops at the date at which the partnership is dissolved, must still be kept open for the purpose of debiting and crediting the proper parties with the moneys payable by or to them in respect of fresh transactions incidental to the winding up, as well as in respect of old transactions engaged in prior to the dissolution.[5] Moreover, upon the retirement, bankruptcy or death of a partner, it often happens that the continuing or surviving partner carries on the partnership business without coming to any settlement of the partnership accounts, and without paying out the share of the late partner. When this is done, and no agreement is made as to the terms on which the capital of the late partner is to be left in the concern, a question of considerable difficulty arises as to the right of the late partner, or of those representing him, to a share of the profits made since the dissolution.

The first case of importance in favor of a right to subsequent profits is Crawshay v. Collins.[6] There one partner had become bankrupt, and the solvent partners had carried on the business without paying out the bankrupt's share of the assets, and an inquiry was directed with a view to ascertain whether profits made subsequently to the bankruptcy were made by the application of the funds which then

[1] Seton, 276.

[2] Milford v. Milford, McCl. & Y. 150.

[3] See accordingly, Beak v. Beak, Finch, 191, a case of dissolution by death; Jones v. Noy, 2 M. & K. 125, a case of dissolution by decree on the ground of lunacy.

[4] See per Lord Eldon in Crawshay v. Collins, 2 Russ. 345; Hale v. Hale, 4 Beav. 375.

[5] See Willett v. Blandford, 4 Ha. 270.

[6] 15 Ves. 218; 1 J. & W. 267, and 2 Russ. 325; Brown v. Vidler, cited in 15 Ves. 223, and 2 Russ. 340, is an earlier case in point. See, too, Brown v. Litton, 1 P. W. 141, and 10 Mod. 20; Hammond v. Douglas, 5 Ves. 539.

constituted the capital of the concern,[1] or by the application of any other, and what funds; and the master was directed to distinguish between capital and stock in trade.[2] The object of this inquiry was to ascertain whether the profits made after the dissolution were actually made by the application of the funds that belonged to the bankrupt as a member of the partnership.[3] And it appearing that such profits were made, it was held by Lord Eldon, and afterward by Lord Lyndhurst (on a rehearing), that the assignees had a right to a share of these profits, and that the account could not stop until the claims of the assignees were satisfied. The bankrupt was originally entitled to three-eighths of the partnership assets, and although he was indebted to the firm, so that the sum actually payable to him was less than three-eighths of the net assets of the firm, still he was held entitled to be credited throughout with three-eighths of the profits, being debited with what he owed. The decree in this important case declared that the three-eighth parts or shares of the bankrupt in the partnership ought to be considered as continuing notwithstanding and after his bankruptcy; and that the assignees were entitled to three-eighth parts of the profits which had been already reported to have been made; and three-eighth parts of such further profits as (on taking the further accounts thereby directed) should appear to have been made.[4]

So, in Brown v. De Tastet,[5] where one partner died and the survivor carried on the partnership business without accounting for the share of the deceased to his administratrix, an account was directed at the suit of the administratrix, not only of the dealings and transactions of the partners up to the death of the deceased partner, but also of the property of the deceased in the hands of the surviving partner, and of all profits and gains made by him by means of such property. A similar decree was made in Cook v. Collingridge,[6] where a sale of a deceased partner's share by his executors to the surviving partners was set aside.[7]

The above cases clearly establish the doctrine that where capital of a late partner has been employed in carrying on the business of the concern, so much of the subsequent profits as can be attributed to the

[1] 15 Ves. 218.
[2] 1 J. & W. 267.
[3] 2 Russ. 337.
[4] 2 Russ. 347.
[5] Jac. 284. See, too, Featherstonhaugh v. Fenwick, 17 Ves. 314, and Wedderburn v. Wedderburn, 2 Keen, 722; Palmer v. Mitchell, 2 M. & K. 672, note; Heathcote v. Hulme, 1 J. & W. 122; Clement v. Hall, 4 Jur. (N. S.) 494; Featherstonhaugh v. Turner, 25 Beav. 382.
[6] Jac. 607.
[7] See, too, Stocken v. Dawson, 9 Beav. 239, affirmed on appeal, 17 L. J. Ch. 282.

employment of that capital must be accounted for by those who have used it. It is not, however, so clear what the principle is on which this doctrine is based. It may be supported on the mere ground of ownership, in conformity with the maxim, *accessorium sequitur suum principale*, or upon the ground that the employment of the capital is a breach of trust.[1] In most of the cases this latter ground seems to have been adopted. The capital of a deceased partner has been treated as trust property; the continuing or surviving partners, by keeping it in their own hands, knowing that it did not belong to them, but that it formed part of the estate of their late partner, have been held guilty of a breach of trust, and liable to account like any other trustee who wrongfully employs in trade the property of his *cestui que trust*. In conformity with this principle the surviving partners have been charged, at the option of those interested in the estate of their late partner, either with the profits made or with interest at 5*l.* per cent,[2] and they have been disallowed compensation for trouble, and contribution toward losses.[3]

Whichever principle be thought correct, the difficulty of determining upon what the profits are to be calculated still remains. It is very easy to say they can be ascertained by the rule of three — as the whole capital is to the whole profits, so is the late partner's share in the capital to his share of the profits — but this assumes that the profits in question have been made by capital only.[4] Profits, and very large profits, may be made by skill, and an extensive connection, with little or no capital; and even if there be capital, the profits may be attributable less to it than to other matters, and it may be impossible to determine with any precision the extent to which the capital has contributed to the realization of the profits obtained.[5]

The present question was elaborately discussed by the late V. C. Wigram in Willett v. Blanford,[6] and the conclusion arrived at by him was that no general rule could be laid down upon the subject, and

[1] See Docker v. Somes, 2 M. & K. 672; Heatchcote v. Hulme, 1 J. & W. 122.

[2] See Townend v. Townend, 1 Giff. 201; Docker v. Somes, 2 M. & K. 672; Palmer v. Mitchell, id., note; Heathcote v. Hulme, 1 J. & W. 122; Booth v. Parks, 1 Moll. 465, and Beatty, 444; Toulmin v. Copeland, 2 Ph. 711, reversing S. C., 4 Ha. 41. In this last case interest was claimed by a supplemental bill and the surviving partner was not the executor of the deceased.

[3] See Stockton v. Dawson, 6 Beav. 371, and 9 id. 247; Burden v. Burden, 1 V. & B. 170. In Brown v. De Tastet, Jac. 284, however, an allowance for trouble was made.

[4] *Quære* whether, as against a wrongdoer, this may not be a legitimate assumption.

[5] This difficulty was seriously felt in Featherstonhaugh v. Turner, 25 Beav. 382, where the profits accrued almost entirely from personal skill.

[6] 4 Ha. 253.

that every case must depend on its own circumstances. "The nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the late partnership and the deceased partner at the time of his death, and the conduct of the parties after his death, may materially affect the rights of the parties." This conclusion of the Vice-Chancellor has been approved by subsequent judges, and in conformity therewith two cases have lately been decided, in which profits acquired after the death of a partner were held to belong wholly to those by whose labor they had been made. The first of these was Simpson v. Chapman.[1] There three persons were partners as bankers. The bank was in such good credit as to render no capital necessary for the purpose of carrying it on. One of the partners died, leaving his son, one of the surviving partners, and a third person, his executors. At the time of his death the assets of the bank exceeded its liabilities. The estate of the deceased was a creditor of the bank to the extent of his share, viz., one-third of its net assets, but there was a much larger sum owing from his estate to the bank on his overdrawn private account. The son, being also an executor of the deceased, was admitted as a partner in the bank, and the business was carried on by the son and surviving partners, but the amount of the deceased's share in the business was never paid out, or separated from the moneys of the bank. Considerable profits were made by the new partnership, and of these the son, as partner, received his share. A suit was instituted for the administration of the estate of the deceased but to such suit the executors alone were defendants, and a decree was made charging the son, and the surviving partner, who was an executor, in respect of the profits of the bank from the death of the deceased, paid to the son, so far as such profits had accrued from the assets of the deceased employed in the partnership. This part of the decree was appealed from and reversed, and one of the grounds for the reversal was that the profits acquired after the death of the deceased could not be attributed to the use made of his capital. If the debt due from him to the bank were omitted from its assets, the bank was at his death insolvent. The deceased had no capital in it in the ordinary sense of the word, and all the profits which had accrued were attributable to the connection and reputation of the bank. It was urged that the son, who had received one-third of the profits, and who could not distinguish how much of them was attributable to his character of executor, and how much belonged

[1] 4 De G. Mac. & G. 154.

to him in his individual character as partner, ought to be charged with the whole. But it was held that this principle did not apply, inasmuch as he did not carry on the business as an executor, but in his own separate and individual right, conceiving that he was entitled so to carry it on.

The other case above referred to was Wedderburn v. Wedderburn.[1] There three persons were partners as merchants; one died, leaving the other two and his widow his executors. The surviving partners alone proved the will, and they drew up an account of the partnership assets and credited the estate of the deceased with a certain sum as his share in the concern, but this share was never separated from the assets of the continuing firm. Several changes afterward took place in the new firm, and then a suit was instituted by persons interested in the estate of the deceased partner, against the executors and surviving partners of the deceased, praying for an account of his estate, and for an account of the gains and profits made by carrying on the partnership after his death. A decree was made directing an account of the personal estate of the deceased partner; and of the dealings and transactions of the firm up to his death; and of what at that time was the value of his interest in the concern; and of the profits of the trade carried on by the succeeding firms; and of the moneys which were from time to time taken out of the concern and applied on account of the estate of the deceased; and of the amount of capital from time to time employed in the said firms respectively.[2] It appeared that, at the death of the deceased, the assets of the firm consisted almost entirely of debts due to it; that it was impossible, except at a great sacrifice, to get in these debts in a short time; that if an attempt had been made to wind up the affairs of the concern at the death of the deceased, the assets of the firm would not have sufficed to discharge its liabilities; and that the ultimate solvency of the firm was attributable to the cautious and prudent conduct of the surviving partners, and to their having, from time to time, provided large sums of money to meet pressing liabilities.[3] It thus, in fact, appeared that the profits made since the death of the deceased were made by the credit and connection of the house, and by the reputation, skill, and ability of the surviving and later partners, and were not attributable to the surplus assets of the firm in which the deceased had a share. It further appeared that the share of the deceased had

[1] 2 Keen, 722; 4 M. & Cr. 41; and 22 Beav. 84.

[2] 2 Keen, 752.

[3] 22 Beav. 84.

been preserved entirely by the prudent management of the executors, and would have been certainly reduced to nothing if they had wound up the affairs of the house in the ordinary way, or had thrown the estate of the deceased into chancery. Under all the circumstances of the case it was therefore held that, as by the partnership articles the plaintiffs had no interest in the good will of the concern, they were not entitled to participate in the profits made by the successive firms, so far as those profits were attributable to the good-will and connection in trade of the old firm, and that their share in any profits attributable to any other source was covered by interest on the amount at which the share of the deceased had been valued.

The law upon the subject under consideration is still in an unsettled state. Undoubtedly a person ought not to be permitted to retain for his own use gains acquired by the unlawful employment of another's property, and it would certainly not be conducive to justice if there were no power to compel a discovery of the amount of the gains so made, and payment of that amount by the wrong-doer.[1] At the same time, owing to the extreme difficulty of taking an account of subsequent profits, so far as they are attributable only to one particular source, the tendency of the courts, in modern times, appears to be rather in favor of not exercising than of exercising the power alluded to, except in cases of gross fraud or breach of trust. In such cases, however, the court will exert itself to the utmost, and the efforts which it will make in order to prevent persons from deriving advantage from their own wrong, cannot be better illustrated than by the recent case of Featherstonhaugh v. Turner,[2] which has been already alluded to. The profits of the partnership business there arose entirely from the skill and reputation of the partners, who were medical gentlemen. In order to ascertain the share of the deceased in the profits made after his death by the surviving partner, an inquiry was directed whether any and what profits made since the death of the deceased were attributable to or derived from persons who had become customers by reason of the deceased having been a partner, and it was considered that the surviving partner was liable to pay what might be found due on taking that account, after deducting a liberal allowance to him for his time, knowledge, and expenses in realizing the profits in question.

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[1] See the admirable judgment of Lord Brougham in Docker v. Somes, 2 M. & K. 672.

[2] 25 Beav. 382.

With respect to the evidence upon which the accounts are to be taken.

SEC. 305. As regards the partnership books. These being accessible to all the partners, and being kept more or less under the surveillance of them all, are *prima facie* evidence against each of them, and, therefore, also for any of them against the others.[1] But entries made by one partner without the knowledge of the other do not, of course, prejudice the latter as between him and his copartner;[2] and where a surviving partner drew up an account which he furnished to the executors of his late partner, it was held that such account was admissible against the partner who furnished it, and that the executors were not bound, by using it against him, to admit its correctness throughout.[3]

Where, in consequence of the loss of books and documents, an account cannot be taken in the usual way, special directions will be given as to the mode in which the accounts shall be taken and vouched.

Prior to the above enactment the court would, if necessary, direct the master to make a special report in case he should be unable to take an account by reason of the non-production of books, or other circumstances;[4] and the court would, it seems, declare that, for certain purposes, vouchers should not be required.[5]

The decree for an account usually directs that all parties shall produce on oath all books and papers in their custody relating to the taking of the accounts. If any partner has kept accounts relating to the partnership in private books of his own, he must produce such books; for he should have kept his private accounts elsewhere if he did not want them to be seen.[6] After a dissolution new books are generally opened, but if they relate to the accounts which have to be taken, they must be produced,[7] and even if a partner not before the court objects to their production, it is by no means clear that his objection will prevail.[8] As between partners and their representatives material documents must be produced, though they may be privileged as between them and other persons.[9]

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[1] See Lodge v. Prichard, 3 De G. Mac. & G.. 906, and Smith v. The Duke of Chandos, 2 Atk. 158, and Barn. 412.

[2] See Hutcheson v. Smith, 5 Ir. Eq. 117, as to how far the books of companies are evidence against their shareholders.

[3] Morehouse v. Newton, 3 De G. & Sm. 307.

[4] See Rowley v. Adams, 7 Beav. 395; Millar v. Craig, 6 id. 443; Turner v. Corney, 5 id. 515.

[5] Adley v. The Whitstable Co., 17 Ves. 327. See the decree in Stainton v. The Carron Co., 24 Beav. 363.

[6] Toulmin v. Copland, 3 Y. & C. Ex. 655; Freeman v. Fairlie, 3 Mer. 43.

[7] Hue v. Richards, 2 Beav. 305.

[8] See Freeman v. Fairlie, 3 Mer. 43. But see *ante*, p. 816.

[9] See Brown v. Perkins, 2 Ha. 540, where the excuse of professional confidence was set up.

The foregoing from and including Section 285 *a*, is from Lindley on Part. vol. 2, pp. 803–839.

Outlays and advances.

SEC. 306. "In taking a partnership account," says Mr. Lindley, in his work on Partnership, vol. 1, p. 639, "each partner is entitled to be allowed every thing he has advanced or brought in as a partnership transaction, and to charge the other in the account, with what that other has not brought in, or has taken out, more than he ought, and nothing is to be considered as his share but his proportion of the residue on the balance of the account.[1] Although, therefore, a partner is not entitled to compensation for trouble, he is entitled to charge the partnership with sums *bona fide*, expended by him in conducting the business thereof.[2] Thus when the managing director of a cost-book mining company advanced money for the purpose of enabling the business of the company to be carried on, it was held that he was entitled to be reimbursed by the company, there being no question made as to his authority to carry on the business on credit.[3] So where the directors of a mining company advanced money to keep the mine at work, and it otherwise would have been drowned, they were held entitled to be reimbursed, although they had no power to borrow

[1] Per Lord Hardwicke, in West v. Skip, 1 Ves. Sr. 242. In Taylor v. Coffiny, 18 Ill. 422, the court held that where parties contribute unequal sums toward the capital of the firm, and are to share its losses equally, although the capital may be exhausted in paying debts, or destroyed, the right of contribution exists between the parties to make their losses equal. See, also, Payne v. Matthews, 6 Paige's Ch. (N. Y.) 19. Items of debt against a partner are to be deducted out of his share, and not out of the assets of the firm, Phelan v. Hutchinson, Phill. (N. C.) Eq. 116, and each partner has a specific lien on the partnership stock not only for the amount of his share, but also for moneys advanced by him beyond his share, to the use of the firm. Allen v. Hawley, 6 Fla. 142. In Lannan v. Clavin, 8 Kan. 17, the report of a referee stating a partnership account, showed that the interest of the plaintiff in the firm exceeded that of the defendant by a certain sum. It was held that it was error to enter judgment for the plaintiff in that amount, but that a sale of the entire partnership property should have been ordered with directions to pay the costs of court out of the proceeds, then to pay to the plaintiff the amount due him, and, lastly, to divide the residue equally between the parties. So where one partner is compelled to pay money occasioned by the default of his copartner, he is entitled to contribution. Noel v. Bowman, 2 Litt. (Ky.) 46.

[2] Burden v. Burden, 1 V. & B. 172, where a surviving partner, who was also executor, was allowed to charge expenses actually incurred, but not for time and trouble. In King v. Hamilton, 16 Ill. 190, the law will allow a claim for the expenses and charge of trustees and partners, but not for their services, unless there is a special agreement to that effect. See, also, Roach v. Perry, 16 Ill. 37, where a partner pays for the necessary services of others in performing services for the firm, he is entitled to have the amount passed to his credit. Savage v. Carter, 9 Dana (Ky.), 418. In O'Reilley v. Brady, 28 Ala. 530, it was held that the surviving partner was entitled to an allowance and deduction for tavern bills and other expenses incurred in the adjustment and settling up of the affairs of the firm. So, where one partner pays taxes, clerk hire, rent, and for advertising, they were held proper items of charge against the firm, as necessary expenses. Foster v. Goddard, 1 Blak. (N. S.) 506. So, where a partner pays commissions to others for selling the goods of the firm, he is entitled to be reimbursed by the firm. Pratt v. McHatton, 11 La. An. 260.

[3] Ex parte Sedgewick, 2 Jur. (N. S.) 949.

money on the credit of the company.[1] And in another case, the directors of a company, who borrowed money on their own responsibility, and *bona fide* applied it in keeping the company at work, were held to be creditors of the company for the amount expended, although the shareholders insisted that the directors had no power to borrow except upon mortgage, and under certain restrictions, to which no attention had been paid.[2]

So a partner is clearly entitled to charge the firm with whatever he may have been compelled to pay in respect of its debts;[3] or in respect of obligations incurred by him alone at the request of the firm, as where he is compelled to pay a bond given by himself alone, but for the benefit of the firm and as a trustee for it,[4] or where he sacrifices a debt due to himself in order to enable the firm to obtain a debt due to it.[5]

Liability for useless outlays.

SEC. 307. An outlay made by one partner with the approbation of his copartners, and for the benefit of the firm, must be made good by the firm, however useless the outlay may have been. For example, if a firm or company purchases a patent which is paid for by one member individually, he is entitled to charge the purchase-money to the firm or company, however worthless the patent may ultimately prove to be.[6] On the other hand, if a partner or director makes an improper outlay or advance on behalf of a firm or company, he cannot charge it to the firm or company, unless his conduct is ratified by it. Thornton v. Proctor[7] may be referred to in support of the doctrine that an outlay which may have been very proper and even necessary for the conduct of the partnership business, cannot be charged to the partnership account, if so to do would be inconsistent with the agreement into which the partners have entered. In the case in question, the plaintiff and the defendant had become partners as wine merchants, and the plaintiff, who for some time had principally conducted the business, had expended considerable sums of money in treating

[1] Ex parte Chippendale, 4 De G. Mac. & G. 19.

[2] Ex parte Bignold, 22 Beav. 143.

[3] Prole v. Masterman, 21 Beav. 61. A partner who pays a debt claimed, but not due, cannot charge the payment to the firm. Re Webb, 2 B. Moore, 500; M'Ilreath v. Margetson, 4 Doug. 278.

[4] Croxton's case, 5 De G. & S. 432; Sedgwick's case, 2 Jur. (N. S.) 949, V. C. W.; Gleadow v. The Hull Glass Co., 13 Jur. 1020, V. C. E.

[5] Lefroy v. Gore, 1 Jo. & Lat. 571, where one partner released a witness whose evidence was essential to the firm.

[6] Gleadow v. The Hull Glass Company, 13 Jur. 1020, V. C. E.

[7] 1 Anstr. 94; see, too, Hutcheson v. Smith, 5 Ir. Eq. 117; East India Co. v. Blake, Finch, 117.

customers, and this was found to be necessary in that trade. The plaintiff had for several years kept the accounts of the partnership, and in such accounts he never made any charge for entertaining customers, or demanded any allowance on that account. He, nevertheless, afterward contended that he ought to be allowed, in taking the accounts of the partnership, to debit the firm with 50*l.* a year for entertainments, and this was proved to be a reasonable sum. But it was shown to be usual in cases of this sort to insert some special clause in the articles if an allowance was intended to be made, and the articles into which the partners had entered contained nothing more than a general stipulation, that all losses and expenses should be borne equally. It was accordingly held that the plaintiff was not entitled to any allowance, for he could only claim it as being a gross article of expenditure, and he was precluded from charging it in that way by not having included it in the yearly accounts.

Cannot charge for outlays of which he refuses to give particulars.

SEC. 308. A partner is not entitled to charge the firm with any moneys alleged by him to have been laid out for the benefit of the firm, if he declines to give the particulars of his outlays; he cannot charge for secret service money,[1] or for general expenses.[2] Nor can a partner charge the firm with traveling expenses unless they have been *bona fide* and properly incurred by him when traveling for the purpose of transacting its business.[3]

Again, a partner spending money for valuations to carry out a transaction between himself and copartners, which they afterward succeed in setting aside, cannot charge them with any part of what he may have so expended.[4]

With respect to advances by directors, it has been held that if a loan is *bona fide* made by them to the company for the purposes of the company, and the loan would, had it been made by strangers, have created a debt owing by the company, the company is bound to repay the loan.[5] But the attention of the shareholders should be specially called to the fact of the loan being made by the directors;

[1] See The York & North Midland Rail. Co. v. Hudson, 16 Beav. 485.

[2] The East India Co. v. Blake, Finch, 117.

[3] Stainton v. The Carron Co., 24 Beav. 356.

[4] Stockton v. Dawson, 6 Beav. 375.

[5] Murray's Executors' case, 5 De G. Mac. & G. 750; Ex parte Sedgwick, 2 Jur. (N. S.) 949; Ex parte Bignold, 22 Beav. 143. In re Baker's Claim, 6 Jur. (N. S.) 240, it was held that *bona fide* advances by the directors of a company governed by 7 & 8 Vict., c. 110, constituted a debt repayable by the company, although the formalities prescribed by § 29 of that act had not been complied with.

for the duties of directors and the interest of creditors may very possibly conflict with each other, and it ought not to be permitted to any director, without the sanction of the shareholders, to become a creditor of the company intrusted to his care.[1]

Of debts, liabilities and losses.

SEC. 309. In the absence of a special agreement to the contrary, partners are liable to share losses in the same proportion as they are entitled to share profits. As a general rule, therefore, if one partner has been compelled to pay more than his share of a partnership debt, or if, in properly conducting the affairs of the firm, he has personally incurred a liability, he is entitled to be indemnified by his copartners so far as may be necessary to place all on a footing of equality.[2]

Partners not always bound to contribute to losses.

SEC. 310. But it by no means follows that a person liable to be sued as if he were a partner is, as between himself and his copartners, bound to share the losses of the firm, for his copartners may have agreed to indemnify him altogether from losses, and if such is the case, they cannot require him to contribute thereto with them.[3] So, where the promoters of a company agree with the shareholders that certain preliminary expenses to be incurred in obtaining surveys, reports, etc., shall not exceed a certain sum, and the promoters spend more than that sum, they cannot require the shareholders to make good the difference, although the extra expenditure may have been caused by circumstances which were unforeseen, and over which the promoters had no control.[4]

The general principle, however, that partners must contribute ratably to their shares toward the losses and debts of the firm, is not open to question. Their obligation to contribute is not necessarily founded upon, although it may be modified and even excluded altogether by agreement. For example, where there is no agreement to the contrary, it is clear that if execution for a partnership debt con-

[1] See Murray's Executors' case, 5 De G. Mac. & G. 750, and compare Tevershan v. The Cameron's Coalbrook, etc., Co., 3 De G. & S. 296. Both these cases turned on 7 & 8 Vict. c. 110. In Pluck v. Malalue, 5 Jur. (N. S.) 1018, there was an express authority to borrow from the directors.

[2] Wright v. Hunter, 5 Ves. 792; and see Robinson's Executors' case, 6 De G. Mac. & G. 572; Lefroy v. Gore, 1 Jo. & Lat. 571, and Hamilton v. Smith, 7 W. R. 178, as to promoters of companies.

[3] See Geddes v. Wallace, 2 Bli. (N. S.) 270.

[4] Gillan v. Morrison, 1 De G. & S. 421; Re The Worcester Corn Ex. Co., 3 De G. Mac. & G. 180, noticed more fully *ante*. See, too, Mowatt and Elliott's case, 3 De G. Mac. & G. 254, and Carew's case, 7 Id. 43.

tracted by all the partners, or by some of them when acting within the limits of their authority, is levied on any one partner who is compelled to pay the whole debt, he is entitled to contribution from his copartners.[1] So, if one partner enters into a contract on behalf of the firm, but in such a manner as to render himself alone liable to be sued, he is entitled to be indemnified by the firm, provided he has not, as between himself and his copartners, exceeded his authority in entering into the contract;[2] and if in such a case he with their knowledge and consent defend an action brought against him, he is entitled to be indemnified by the firm against the damages, costs, and expenses which he may be compelled to pay.[3]

Parties must contribute when loss results from bona fide act.

SEC. 311. Even if a loss sustained by a firm is imputable to the conduct of one partner more than to that of another, still, if the former acted *bona fide* with a view to the benefit of the firm, and without culpable negligence, the loss must be borne equally by all. Thus, where A represented to his copartner, B, that shares in a certain company rendered the holders only liable to the engagements of the company to a limited extent, and B thereupon, and at A's request, authorized him to take shares on the partnership account, and it ultimately turned out that the liability of the shareholders was not limited, and A and B were made contributories, it was held that, as between themselves, B could not throw the loss on A alone.[4] Again, in Cragg v. Ford,[5] the plaintiff and the defendant were partners, and the defendant was the managing partner. The partnership was dissolved, and the winding up of its affairs devolved on the defendant. Part of the assets consisted of bales of cotton, and the plaintiff requested that these might be immediately sold. The defendant, however, delayed to sell them, and they were ultimately sold at a much lower price than they would have fetched if they had been sold when the plaintiff desired. The plaintiff contended that the loss sustained by the postponement of the sale ought to be borne by the defendant alone. But the court held that the plaintiff, if he had chosen, might himself have sold the cotton; and that as the defendant in delaying

[1] M'Owen v. Hunter, 1 Dr. & W. 347; Evans v. Yeatherd, 2 Bing. 133; Robinson's Executors' case, 6 De G. Mac. & G. 572. See, too, Lefroy v. Gore, 1 Jo. & Lat. 571, as to provisional directors.

[2] Gleadow v. The Hull Glass Co., 13 Jur. 1020, V. C. E.; Sedgwick's case, 2 Jur. (N. S.) 949, V. C. W.

[3] Browne v. Gibbins, 5 Bro. P. C. 491; Croxton's case, 5 De G. & S. 432.

[4] Ex parte Letts and Steer, 26 L. J. Ch. 455. See, too, Lingard v. Bromley, 1 V. & B. 114.

[5] 2 Y. & C. C. C. 280.

the sale, had acted *bona fide* and in the exercise of his discretion, the loss ought not to be thrown on him alone, but ought to be shared by the plaintiff.

Partner guilty of fraud or bad faith must bear the loss himself.

SEC. 312. But, if a partner is guilty of a breach of his duty to the firm, and loss results therefrom, such loss must fall on him alone. As was said by the court in Bury v. Allen,[1] "Suppose the case of an act of fraud, or culpable negligence, or willful default by a partner during the partnership to the damage of its property or interests, in breach of his duty to the partnership, whether at law compellable or not compellable, he is certainly in equity compellable to compensate or indemnify the partnership in this respect." In conformity with this rule, the justice of which cannot be disputed, it has been decided that if a claim is made against a firm for payment of a debt alleged to be due from it, but which is not so in point of fact, and one partner chooses to pay it, he cannot charge such payment to the account of the firm.[2] So, if one partner does that which, though imputable to the firm on the principles of agency, is in truth his act alone, and a fraud upon his copartners, they are entitled, as between themselves and him, to throw the whole of the consequences upon him.[3] So, if one partner, without the authority of his copartners, willfully does that which is illegal, he must indemnify them from the consequences.[4]

Firm responsible for losses resulting from wrongful acts of servants, though employed by one partner.

SEC. 313. In a recent case it was sought to make the directors of a company responsible for moneys of the company embezzled by its secretary, on the ground that the directors had neglected to obtain security for his good conduct, as they were required to do by the company's deed of settlement. The deed, however, only required the directors to take such security as they thought proper, and no collusion or dishonesty was imputed to them, and under these circumstances it was held that they were not liable to make good the moneys in question.[5] The argument that the directors were bound to take some

[1] 1 Coll. 604.

[2] Re Webb, 2 B. Moore, 500; McIlreath v. Margetson, 4 Doug. 278, where a payment was made *bona fide* and on the faith of false and fraudulent representations. *Quære* if the same rule would apply if the debt being due was barred by the statute of limitations. See Stahlsmidt v. Lett, 1 Sm. & G. 415.

[3] See Robertson v. Southgate, 6 Ha. 540.

[4] See Campbell v. Campbell, 7 Cl. & Fin. 166, stated *post*, p. 648.

[5] Evans v. Coventry, 2 Jur. (N. S.) 557, V. C. Kindersley.

security, that the deed only gave them a discretion as to the nature of the security which they should take, and that they had been culpably negligent in not taking any security at all, had not, it is submitted, sufficient weight with the court.

Losses arising from the unauthorized acts of directors or individual partners ought, it is submitted, to fall upon them alone, with whatever *bona fides* or good intention they may have acted, and were it not for the decisions in the cases of Ex parte Chippendale and Ex parte Bignold, the law might be said to be in conformity with this view of what is right. But the decisions referred to cannot be reconciled with it, and whilst they stand unexplained great allowance must be made for directors who exceed their powers, provided only they do so *bona fide*, and for what they believe to be the good of the shareholders at large.

Unauthorized, negligent or fraudulent act of partner ratified by firm binds it.

SEC. 314. When it is said that losses incurred by the unauthorized, culpably negligent, or fraudulent conduct of one partner, must be borne by him alone, it is assumed that his conduct has not been ratified by the firm, and that the loss has not been treated by the partners themselves as a partnership loss. A loss which is properly chargeable to the account of one partner only, becomes chargeable to the firm if the partners have knowingly allowed it to be so charged in their accounts, and thus taken it upon themselves. A strong instance of this is afforded by the case of Cragg v. Ford,[1] already referred to on another point. There the plaintiff and the defendant were partners; the defendant had engaged in adventures not authorized by the partnership articles. The plaintiff protested against this, but although the adventures ended in loss, and that loss was charged against the firm in the partnership books, the plaintiff did not at the time object or insist that the loss should be borne by the defendant. When, however, the partnership was dissolved, and its accounts made up, the plaintiff refused to allow the losses in question to be charged against the firm. But the court held that under all the circumstances of the case the master who had charged the losses against the partnership had not done wrong, and exceptions which had been taken to his report by the plaintiff were overruled.

The same principle must apply to companies; and if losses not chargeable to them are placed to their debit in the accounts and

[1] 1 Y. & C. C. C. 285; but see, as to losses arising from illegal acts, the observations of Lord Eldon on Watts v. Brook, in Aubert v. Maze, 2 Bos. & P. 371.

reports in such an open and fair way as to enable the shareholders to see and understand what is done, and these accounts and reports are not objected to, but are, on the contrary, approved and adopted by the shareholders, it will be too late for them afterward to dispute the propriety of what they may thus have sanctioned.[1] Moreover, those shareholders who do not choose to attend meetings of which they have notice, cannot complain of their ignorance of what they might have known had they attended.[2]

Doctrine denying contribution among wrong-doers does not apply to partners.

SEC. 315. There is a saying that there is no contribution amongst wrong-doers;[3] but this doctrine is certainly inapplicable to partners in the general form in which it is enunciated. It is true that if a partnership is itself illegal, no member of it can, in respect of any transaction tainted with the illegality which infects the firm, obtain relief either in law or in equity against any other member; but there is no authority whatever for saying that if one of the members of a firm sustains a loss owing to some illegal act not attributable to him, but nevertheless imputable to the firm, such loss must be borne entirely by him, and that he is not entitled to contribution in respect thereof from the other partners. Even at law, the doctrine in question is not carried so far as this;[4] and in equity it is not recognized to the extent to which it is at law.[5]

Firm liable for illegal acts of partners.

SEC. 316. The claim of a partner to contribution from his copartners in respect of a partnership transaction cannot be defeated on the ground of illegality, unless the partnership is itself an illegal partnership or unless the act relied on as the basis of the claim is not only illegal, but has been committed by the partner seeking contribution, under circumstances such that he must have known of its illegality.[6] In either of these cases he can obtain no assistance against his copartners, and must abide the consequences of his own willful breach of the law. Upon this ground was often held (before

[1] Both Ex parte Chippendale, 4 De G. Mac. & G. 19, and Ex parte Bignold, 22 Beav. 143, might perhaps have been properly decided on this ground alone.

[2] See 22 Beav. 165.

[3] Merryweather v. Nixan, 8 T. R. 186, and 2 Sm. L. C.; Colburn v. Patmore, 1 Cr. M. & R. 73; A. G. v. Wilson, Cr. & Ph. 1.

[4] See Betts v. Gibbins, 2 A. & E 57, E. C. L. R. 29; Adamson v. Jarvis, 4 Bing. 66.

[5] See Lingard v. Bromley, 1 V. & B. 114; and Baynard v. Woolley, 20 Beav. 583.

[6] See Adamson v. Jarvis, 4 Bing. 66, E. C. L. R. 13; Betts v. Gibbins, 2 A. & E. 57.

it became lawful for partners to carry on the business of marine insurance) that if one of a firm of marine insurers paid money in respect of a loss insured against by the firm, he could not recover any part of the payment from his copartners.[1]

But if the partnership is not itself illegal, and if the partner claiming contribution has not himself been knowingly guilty of a breach of the law, his claim will prevail, although the loss in respect of which it is made may have arisen from an unlawful act. This appears from Campbell v. Campbell,[2] where a firm of distillers had incurred a penalty in consequence of a purchase of illicit whisky. The purchase was made by the managing partners, and one of the members of the firm, who took no part in its business, was entirely ignorant and innocent of what had been going on. The firm was convicted for the full amount of the penalties claimed, but the crown, on being memorialized by the innocent partner and the principal of the acting partners, remitted the penalties except to the amount of 3,000*l*. This sum was levied partly on the property of the firm and partly on that of the innocent partner only. He then claimed to have the whole of what he had been compelled to pay made good to him by his copartners, on the ground that they alone had been guilty of the illegal purchases. The innocent partner obtained a verdict for the whole amount claimed, with interest; and his copartners were adjudged liable, jointly and severally, to indemnify him. A motion for a new trial was refused. An appeal to the Lords was dismissed with costs, for technical reasons, to which it is not necessary to allude; but the Lord Chancellor, in giving the judgment of the house, expressed a strong opinion that the defense of illegality which was set up could not be supported. His Lordship said, "If this objection could prevail, that because these parties were all guilty of a common offense, therefore out of such a transaction no contribution could arise, it would be an answer to him (*i. e.* the innocent partner) if he had paid the whole, and demanded contribution only against the other parties.

Again, in a recent case where a company had illegally commenced business before the amount of capital required by statute to be paid up had been paid up, it was held that the shareholders were nevertheless liable amongst themselves to contribute to the discharge of the debts of the company.[3]

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[1] Aubert v. Maze, 2 Bos. & P. 370.

[2] 7 Cl. & Fin. 166. See, too, Woolley v. Bate, 2 Car. & P. 417; Pearson v. Skelton, 1 M. & W. 504.

[3] Ex parte Longworth's Executors, 1 Johns. 765, and on appeal, 6 Jur. (N. S.) 1.

When all are in pari delicto.

SEC. 317. The case which presents most difficulty is one in which an unlawful act has been knowingly performed by all the partners, so that all are *in pari delicto*. There is a dictum of Lord Cottenham to the effect that in such a case each partner must bear all the loss he may happen to sustain, and that he cannot require his copartners to share that loss;[1] but, on the other hand, there is a recent decision which goes far to show that the loss ought to be apportioned between all the partners, unless the illegal act in question is a pure tort,[2] or a direct violation of some statute, or unless the contract of partnership is itself void on the ground of illegality. It is apprehended that if all the members of a firm were equally guilty of a breach of trust, and one of the firm alone had made it good out of his own moneys, he would be allowed, in taking the partnership accounts, to charge his copartners, ratably with himself, with the amount paid by him.

Of interest.

SEC. 318. The principles upon which, in taking partnership accounts, interest is allowed or disallowed, do not appear to be well settled. The state of the authorities is, in fact, not such as to justify the deduction from them of any general principle upon this important subject.

By the common law, in the absence of a special custom or agreement, a loan does not bear interest;[3] and notwithstanding many dicta to the contrary, the same rule appears to prevail in equity.[4] But by the custom of merchants interest is payable in cases where, by the general law, it is not; and mercantile usage and the course of trade dealings have been held to authorize a demand for interest on moneys *bona fide* advanced by one partner for partnership purposes, even where the advance was made without the knowledge of the other partners.[5]

Inasmuch as what is fair for one partner is so for another, and the firm when debtor is charged with interest, it seems to follow that if one partner is indebted to the firm either in respect of money borrowed, or in respect of balances in his hands, he ought to be charged

[1] See A. G. v. Wilson, Cr. & Ph. 1.

[2] See Baynard v. Woolley, 20 Beav. 583.

[3] See Calton v. Bragg, 15 East, 223; Higgins v. Sargent, 2 B. & C. 349; E. C. L. R. 9; Shaw v. Pickton, 4 id. 723; E. C. L. R. 10; Page v. Newman, 9 B. & C. 738; E. C. L. R. 17; Gwyn v. Godby, 4 Taunt. 346.

[4] See Tew v. The Earl of Winterton, 1 Ves. Jr. 451; Creuze v. Hunter, 2 id. 157; Booth v. Leycester, 1 Keen, 247, and 3 M. & Cr. 459.

[5] See Ex parte Chippendale, 4 De G. Mac. & G. 36; Ex parte Bignold, 22 Beav. 176, and Omychund v. Barker, Coll. on Partn. 231, note; Denton v. Rodie, 3 Camp. 496. But see, contra, Stevens v. Cook, 5 Jur. (N. S.) 1415.

with interest on the amount so owing, even though on the balance of the whole account, a sum might be due to him.[1] In practice, however, it would appear that interest is not charged on money belonging to the firm, but outstanding in the hands of one of the partners;[2] unless fraud in its retention can be imputed to him.[3] Nor in taking a partnership account, will interest be computed on the capital of the partners unless there is some agreement to that effect, or the partners have themselves been in the habit of charging such interest in their accounts.[4]

Where one partner claims a benefit obtained by his copartner, and succeeds in establishing his claim, he is charged, as the price of the relief afforded, not only with the amount actually expended by his copartner in obtaining the benefit, but with interest on that amount.[5] On the other hand, if one partner has, in breach of the good faith due to his copartners, obtained money which he is afterward compelled to account for to the firm, he will be charged with interest upon the amount at the legal rate.[6]

Where a partnership has been dissolved by the death of one partner, and the surviving partner keeps the accounts in such a way as to render it impossible, until after the lapse of a considerable time, to ascertain the balances due to himself and his deceased partner, it is clear that neither the surviving partner nor his representatives can claim interest on the sum ultimately found due to him or his estate.[7]

Of the division of profits and of dividends.

SEC. 319. The realization and division of profit is the ultimate object of every partnership, and the right of every partner to a share of

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[1] See Beecher v. Guilburn, Moseley, 3. In Rhodes v. Rhodes, 8 W. R. 204, the court held that a partner could not be charged with interest on moneys of the firm drawn out by him in excess of what had been drawn out by his copartner. There were no articles of partnership.

[2] See Webster v. Bray, 7 Ha. 591, where interest on balances in the hands of the defendant was asked for but not given. See, too, Stevens v. Cook, 5 Jur. (N. S.) 1415.

[3] As in Hutcheson v. Smith, 5 Ir. Eq. 117, where, however, the partner retaining the money was also a receiver appointed by the court.

[4] See Miller v. Craig, 6 Beav. 433, where interest was allowed.

[5] See Hart v. Clarke, 6 De G. Mac. & G. 254; see, too, Perens v. Johnson, 3 Sm. & G. 419.

[6] See Fawcett v. Whitehouse, 1 R. & M. 135.

[7] Boddam v. Ryley, 1 Bro. C. C. 239; 2 id. 2; and 4 Bro. P. C. 561; Mumford v. Murray, 6 Johns. Ch. (N. Y.) 111; Taylor v. Young, 2 Bush (Ky.), 432; Bowlings v. Dobyns, 5 Dana (Ky.), 438. No general rule in reference to this matter exists, but the question must be determined by the facts and circumstances of each case. Gyger's Appeal, 62 Penn. St. 80. Generally, interest is not allowable upon advances unless there is an agreement to that effect. Day v. Lockwood, 24 Conn. 186. But such an agreement may be implied from their former course of dealing. Pond v. Clark, 24 id. 384.

the profits made by the firm to which he belongs is too obvious to require comment. Where there is no right to share profits there can be no partnership, and almost all the other rights possessed by partners may be said to be incidental to the right in question. Where there is no express agreement to the contrary, and nothing from which a tacit agreement to the contrary can be inferred, the profits realized by an ordinary partnership are divisible among its members in equal shares. The times at which the profits are to be divided, the quantum to be divided at any one time, the sums, if any, which are to be placed to the debit of the firm in favor of any particular partner for salary, interest on capital, etc., before any profits are to be divided, these and all similar matters are usually made the subject of express agreement; but where no such agreement has been made, and no tacit agreement relative to them can be inferred. With respect to the times of division and quantum to be divided at any given time, it is conceived that the majority must govern the minority where no agreement upon the subject has been come to;[1] for these are matters of purely internal regulation, and with respect to such matters a dissentient minority have only one alternative, viz., either to give way to the majority, or, if in a position so to do, to dissolve the partnership.

A resolution on the part of a majority of partners, or on the part of the directors or shareholders of a company, to exclude a partner or shareholder from his share of the profits, can only be defended where the right to make such a resolution has been clearly conferred by the agreement of all the partners, or, in the case of a company, by the act, charter, or deed of settlement by which it is governed. A resolution to exclude a partner or shareholder from his share of profits is very like a resolution to forfeit his share, and this, speaking generally, is illegal.

A court of equity will interfere to protect a partner or shareholder whose share of profits is wrongfully withheld, and to compel his copartners or co-shareholders to account to him for such share.

In Adley v. The Whitstable Company,[2] an incorporated company of oyster fishers and dredgers made a by-law to the effect, that if any member should sell oysters, except those taken from the company's grounds, he should forfeit 10*l.*, and be excluded from all share in the

[1] See Stevens v. South Devon Rail. Co., 9 Ha. 326, as to declaring dividends before paying debts; Browne v. Monmouthshire, etc., Co., 13 Beav. 32, as to paying dividends before works are finished.

[2] 17 Ves. 315; 19 id. 304, and 1 Mer. 107.

profits which the company might make after the penalty was incurred and before it was paid. A member infringed the by-law and refused to pay the penalty, and was thereupon excluded from all share of the profits of the company. But on a bill filed by him against the company, it was held that the by-law was invalid;[1] that the company had no right to exclude any of its members from their share of profits on any such ground as that in question; and that it was no defense that the profits of which the plaintiff sought a share were actually gone, having been divided amongst the other members. An objection that the parties, if any, accountable to the plaintiff, were the officers of the company who paid those profits, and not the company itself, was also overruled, and a decree was made in the plaintiff's favor.

The profits of a company divisible amongst its shareholders are usually called dividends, and except on a dissolution, nothing is properly divisible amongst the shareholders, except profits *bona fide* made by the company. With a view, however, to induce shareholders and the public to believe that the affairs of a company are in a favorable position, recourse is often had by directors and others to the scandalous expedient of declaring dividends when there are no profits wherewith to pay them, and to pay the dividends declared, either out of the capital of the company or out of money borrowed for the purpose. In order to prevent these and similar dishonorable practices, and to punish those concerned in them, several enactments have recently been made by the legislature, which will be found in the Appendix.[2] But independently of any statute, directors who, knowing that there are no profits, declare dividends, and pay them out of the funds of a company, are compellable to replace not only the amount of dividends which they themselves have actually received in respect of their own shares, but also the whole amount of the dividends which they have caused to be paid to the other shareholders.[3]

It must not, however, be supposed that there can be no profits to divide so long as a company is in debt, or that it is improper for a company to declare dividends if any of its debts remain outstanding. The creditors of a company may be willing to allow their principal moneys to continue unpaid, provided they are punctually paid the interest upon them, and if a company, after defraying all current expenses and the interest of its debts, has a surplus arising from its

[1] An action was directed to be brought to try this question.

[2] Burnes v. Pennell, 2 Ho. Lo. Ca. 497, as to such offenses at common law.

[3] See Evans v. Coventry, 2 Jur. (N. S.) 557, V. C. Kindersley.

current receipts, there is no principle either of law or morality which requires that such surplus shall be accumulated, or forbids its division as profit amongst the shareholders. Whether dividends shall be paid whilst debts remain unpaid, or whether the whole or any part of the surplus of receipts over expenditure shall be accumulated or divided, are questions which it is competent for the majority of shareholders to decide.[1]

As a rule, all the shareholders in a company are entitled to share profits *pari passu* in proportion to the number of shares they respectively hold, and a resolution by a majority that dividends shall be paid to some of the shareholders in preference to, or to the exclusion of the others, is clearly illegal unless it is warranted by something more than the will of those who make it.[2] But it is by no means unusual for companies who have expended their original capital to raise (under some power specially conferred upon them for the purpose) further capital by the issue of "preference shares," *i. e.*, of shares, the holders of which are to be entitled to share profits, up to a given amount, in preference to the other shareholders. Where such shares have been issued by competent authority, the terms upon which they have been issued must of course be adhered to, and it has been decided in several recent cases that preference shareholders are entitled to be paid their dividends to the amount guaranteed, before the other shareholders receive any thing, so that if the profits divisible at a given time are not sufficient to pay the guaranteed dividends in full, the deficiency must be made good out of the next divisible profits, the ordinary shareholders taking nothing until all arrears of guaranteed dividends have been paid to the preference shareholders.[3]

Foundation of the right to contribution.

SEC. 320. Whether a person, who has suffered loss, is entitled to be indemnified wholly or partly by others, is a question which cannot be decided in the negative merely upon the ground that no agreement for contribution or indemnity can be proved. An agreement may undoubtedly give rise to a right to indemnity or contribution, but the absence of an agreement giving rise to such a right is by no means fatal to its existence. The general principle which prescribes equality of burden and of benefit is amply sufficient to create a right of con-

[1] See Stevens v. South Devon Rail. Co., 9 Ha. 313; see, too, Browne v. Monmouthshire, etc., Co., 13 Beav. 32, as to declaring dividends what works are unfinished.

[2] See Adley v. Whitstable Co., 17 Ves. 315, and the cases in the next note.

[3] See Stevens v. South Devon Rail. Co., 9 Ha. 313; Henry v. Great Northern R. R. Co., 4 K. & J. 1.

tribution in many cases in which it is impossible to found it upon any genuine contract, express or tacit. The common feature of such cases is, that one person has sustained some loss which would have fallen upon others as well as upon himself, but which has been averted from them at his expense; for example, where one tenant in common repairs the common property and so saves it from destruction;[1] where one of several sureties pays a debt for which all are liable;[2] where one person has his goods thrown overboard in order to save the ship and the rest of its cargo.[3] In all these cases a right of contribution arises, not by virtue of any contract, but because the safety of some cannot justly be purchased at the expense of others; and all must therefore contribute to the loss sustained.[4]

But although a right to contribution may exist where there is no contract upon which it can be founded, it cannot exist if excluded by agreement; and it is so excluded whenever those who would otherwise be contributories have entered into any contract, express or tacit, amongst themselves, which is inconsistent with a right on the part of one to demand contribution from the others.[5] This is too obvious to require comment, but it must be borne in mind as qualifying the common saying that contribution is independent of agreement.

Again, a right to contribution may be excluded by fraud, as is the case where a person induces another by false and fraudulent representations to join him in partnership. In such a case the person defrauded has a right to rescind the contract of partnership, and, as between himself and copartner, to throw all the partnership losses upon the latter alone.[6]

Of the right of an agent to indemnity from his principal.

SEC. 321. In order to clear the way for the discussion of the right of a partner to be indemnified by his firm, and of the right of directors to be indemnified by the company of which they have the management, it is necessary to advert shortly to the right of an agent to be indemnified by his principal.

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[1] F. N. B. 162, b.

[2] Dering v. Winchelsea, 1 Cox, 318.

[3] Abbott on Shipping, part 4, c. 10.

[4] Lefroy v. Gore, 1 Jo. & Lat. 571; Spottiswoode's case, 6 De G. Mac. & G. 345. See, too, the cases in 1 Eq. Ca. Ab. Contribution and Average.

[5] As in Gillan v. Morrison, 1 De G. & S. 421; Re the Worcester Corn. Ex. C., 3 De G. Mac. & G. 180, which will be noticed hereafter.

[6] See Pillans v. Harkness, Colles, 442; Rawlins v. Wickham, 4 Jur. (N. S). 990, and 5 id. 278, noticed more fully hereafter. See, too, Carew's case, 7 De G. Mac. & G. 43.

When agent executes instruction.

SEC. 322. With respect to the first of these three classes of cases, nothing is clearer than that an agent who has instructions to act in a certain manner is entitled to be reimbursed by his principal for all outlays made in pursuance of these instructions, and to be indemnified for any loss sustained by executing them.[1] Even if what the agent does is unlawful, he is entitled to indemnity;[2] unless, indeed, the act be one which the agent must have known his principal could under no circumstances justify; for then the maxim *in pari delicto melior est positio defendentis* applies, and the agent can obtain no indemnity from a court of justice.[3]

Acts contrary to instruction.

SEC. 323. It is equally clear that, speaking generally, an agent who acts *contrary* to his instructions is not entitled to any indemnity or reimbursement for losses or expenses incurred whilst so acting.[4] Even although the instructions may have been given by the principal under a misapprehension of facts, and the agent, being aware that such was the case, may have acted *bona fide* for the benefit of his principal,[5] still the agent will not be entitled to indemnity; for it is the duty of an agent to obey and not to disregard his orders. But if the principal chooses to ratify the agent's conduct, the latter acquires a right to be considered as having acted in pursuance of instructions, and to be entitled to reimbursement and indemnity accordingly; for the principal cannot, while ratifying the agent's conduct, so far as it is beneficial, repudiate it so far as it is onerous.[6]

The position of an agent who has already acted on his instructions, and has thereby incurred a legal obligation to third parties, is different. The better opinion is that in this case he is not bound on the command of his principal to stop short and refuse to perform the obligation incurred. There is no doubt that, as between himself and his principal, an agent is *entitled* to obey the counter order, and to obtain a full indemnity from the consequences of so doing. But it is apprehended that he is at liberty so far to carry out the instruc-

[1] Story on Agency, § 335, *et seq.*; Paley on Agency, chap. 2; Smith's Merc. Law, 114, 115, 4th ed.; Curtis v. Barclay, 5 B. & C. 141.

[2] Adamson v. Jarvis, 4 Bing. 66, E. C. L. R. 13; Betts v. Gibbins, 2 A. & E. 57; per Tindal, C. J., in Collins v. Evans, 5 Q. B. 830.

[3] See Merryweather v. Nixan, 2 Sm. L. C. 297; Collins v. Blantern, 1 id. 164; Josephs v. Pebrer, 3 B. & C. 639; Schackell v. Rosier, 2 Bing. N. C. 634.

[4] See Stokes v. Lewis, 1 T. R. 20; Galway v. Smithson, 10 East, 264; Child v. Morley, 8 T. R. 610; Warwick v. Slade, 3 Camp. 127.

[5] Howard v. Tucker, 1 B. & Ad. 712.

[6] Story on Agency, § 250.

tions on which he has begun to act, as may be necessary to relieve himself from all legal liabilities incurred before notice of the countermand, and having done so, to insist upon indemnity and reimbursement as if the principal had not changed his instructions. *Nemo potest mutare consilium suum in alterius injuriam* is the maxim of the civil law, and expresses the correct principle for the decision for these cases.[1]

When he acts without instructions.

SEC. 324. There remains the third class of cases, viz., where the agent having no instructions to guide him, acts for his principal and then seeks to be indemnified by him. Now, here, as in the last class of cases, ratification by the principal removes all difficulty, and may be excluded from consideration. Again, an agent having no specific instructions may yet have an implied authority to act in a given way for his principal; and in the absence of orders to the contrary, an agent always has implied authority to act in the manner in which he has been accustomed to act with the approval of his principal; and to act with respect to any matter as other persons situate like himself usually act with respect to similar matters; and to take all those steps which are usual and necessary to enable him duly to execute his instructions.[2] It may, therefore, well happen that an agent who has no positive instructions may nevertheless act within the limits of his implied authority; and so long as he keeps within those limits he is entitled to reimbursement and indemnity.[3] The principle applicable to the first class of cases applies here; but if the agent claims an indemnity against loss sustained by the commission by him of an illegal act, he must be prepared with very strong evidence to show that such act fell within the limits of his implied authority. In a case of doubt no authority to commit an unlawful act would be inferred.

The greatest difficulty arises when an agent acts without any authority, express or tacit, but *bona fide* for the benefit of his principal.

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[1] The subject is not, however, free from doubt. The position in the text is supported by Pothier, Mandat. No. 121, and Story on Agency, § 465, etc., and by Balsh v. Hyam, 2 P. W. 453; Sutton v. Tatham, 10 A. & E. 27, E. C. L. R. 37. On the other hand, see 2 Kent's Com. 644. In Child v. Morley, 8 T. R. 610, and Warwick v. Slade, 3 Camp. 127, the agent was only bound in honor.

[2] Story on Agency, c. 6.

[3] Curtis v. Barclay, 5 B. & C. 141, E. C. L. R. 11; Sutton v. Tatham, 10 A. & E. 27, E. C. L. R. 37; see, too, Wms. Saund. 264 b; Pettman v. Keble, 15 Jur. 38; Wolfe v. Horncastle, 1 Bos. & P. 323, per Buller, J. This was also the principle applied in R. v. Essex, 4 T. R. 591, and referred to by Lord Cottenham in A. G. v. The Mayor of Norwich, 2 M. & Cr. 424.

There is a leaning in many minds in favor of the agent in such cases, and it cannot be denied that circumstances may occur which render officious conduct justifiable, and even benevolent. On the other hand, it cannot be denied that, as a general rule, *culpa est immiscere se, rei ad se non pertinenti;*[1] and by the law of England a person who chooses, unasked, to incur expense for another, must, speaking generally, trust rather to gratitude than to judicial aid for reimbursement.[2] The only established exceptions to this rule seem to be, 1, where one person alone sustains a loss or incurs expense for the relief of himself and others from some risk or obligation common to all; and, 2, where one person does for another that which the latter is legally bound to do, but either cannot or will not do himself. The first class of exceptions has been already alluded to. The second may be illustrated by those cases in which executors and husbands are held liable for the expenses of funerals, although they gave no orders for them, and took no part in them.[3]

The general rule, certainly, is that the officious conduct of one person imposes no obligation on another to compensate him for, or indemnify him from, the consequences of his own spontaneous act; and even although the other may be benefited, he cannot on that ground alone be compelled to pay for what he never sought to obtain.[4] A very strong illustration of this is afforded by the case of Edmiston v. Wright.[5] There the defendant was the owner of some estates in Georgia, and of some negroes in Jamaica. The plaintiff's partner was the defendant's agent, and the general manager of his West Indian estates. The negroes in Jamaica were shipped for Georgia, and seized by custom-house officers in consequence of the captain of the ship having neglected to procure some necessary documents. The plaintiff, for the purpose of redeeming the negroes from the authorities who had seized them, paid the sum of 1,200*l.*, and the negroes were then allowed to proceed to the defendant's estates in Georgia. The plaintiff sued the defendant for this sum of 1,200*l.* as money paid to his use, but Lord Ellenborough held that it was a voluntary payment made by the plaintiff, and one which he could not recover from the defendant.

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[1] Dig. T., tit. 17 De Reg. Jur. 1, 36.

[2] See as to the *negotiorum gestor* of the Roman law, Dig. III, tit. 5, De Negot. Gest., Thibaut's System, des Pand. Rect. § 558, ed. 9.

[3] See Ambrose v. Kerrison, 10 C. B. 776; Rogers v. Price, 3 Y. & J. 28; Jenkins v. Tucker, 1 H. Bl. 91.

[4] 1 Wms. Saund. 264 a; 6 B. & C. 444, per Bayley, J.; Stokes v. Lewis, 1 T. R. 20; Child v. Morley, 8 id. 610.

[5] 1 Camp. 88.

Of the right of partners and directors to contribution and indemnity.

SEC. 325. Passing now to contribution and indemnity between partners, it is to be observed that every member of an ordinary firm is, to a certain extent, both a principal and an agent. He is liable as a principal to the debts and engagements of the firm, and he is entitled to contribution from his copartners, for they have no right to throw on him alone, the burden of obligations which, *ex hypothesi*, are theirs as much as his.[1] Again, each member as an agent of the firm is entitled to be indemnified by the firm against losses and expenses *bona fide* incurred by him for the benefit of the firm, whilst pursuing the authority conferred upon him by the agreement entered into between himself and his copartners. On the other hand, a partner has no right to charge the firm with losses or expenses incurred by his own negligence or want of skill, or in disregard of the authority reposed in him.

Similar observations apply to directors of companies. As members, they are entitled to contribution in respect of such debts and liabilities of the company as they may be compellable or have been compelled to pay; and as agents they are entitled to be indemnified by the company against all losses and expenses *bona fide* sustained and incurred by them in the exercise of the trust reposed in them. But if directors exceed their authority, and thereby incur loss, such loss must be borne by them and not by the company, unless the company ratifies what they have done.

The cases illustrating these general statements will be examined in the subsequent sections of the present chapter, but before proceeding to notice them, it is requisite to allude to a doctrine established recently by courts of equity, and opposed, as the writer conceives, to the principles of agency which have been alluded to above. The doctrine in question may be stated thus:

Where directors of a company, acting *bona fide* and to the best of their judgment for the company, incur expenses in so doing, they are entitled to be reimbursed those expenses by the company, although the directors may have had no authority to incur such expenses, and could not have rendered the company liable to third persons for them.

This doctrine is apparently established by the cases of The German Mining Company and The Norwich Yarn Company. It was held in The German Mining Company's case,[2] that directors who had no power to borrow money on the credit of the company, but who never-

[1] See Robinson's case, 6 De G. Mac. & G. 572; Spottiswoode's case, b. 345; Lefroy v. Gore, 1 Jo. & Lat. 571.

[2] 4 De G. Mac. & G. 19; Ex parte Chippendale.

theless did borrow money, and themselves advance money, and *bona fide* apply the whole for the benefit of the company, were entitled, having themselves repaid the money borrowed, to be reimbursed by the shareholders the whole amount borrowed and advanced. The circumstances of this case were somewhat peculiar; the partnership was a mining partnership; it was absolutely necessary to work the mines in order to preserve them from rapid deterioration and destruction; the directors did not exceed their authority in carrying on the mines, and would not have exceeded it if they had carried them on on credit; and the money borrowed and advanced was wholly applied in paying miners' wages and other expenses necessarily incurred in carrying on the works, and so preserving the mines. The decision was based upon the principle that directors are not only agents, and in that character incapable of binding their companies beyond the limits of their authority, but are also trustees, and in that character entitled to be indemnified for expenses incurred by them within the limits of their trust; and it was thought that the directors had not exceeded the limits of their trust by borrowing and advancing money, although it was admitted that the borrowing was an excess of authority, and that the company was not bound to repay the money to those from whom the directors had obtained it.

It is difficult to understand the correctness of this view, or to see how that which, as between the directors and the shareholders, is a clear excess of authority, can as between the same persons be deemed warranted by any trust.

The authority of the foregoing decision was, however, recognized and acted upon in The Norwich Yarn Company's case.[1] There the company's deed of settlement was prepared with an anxious view to limit the liability of the shareholders, as between themselves, to the amount of their shares in the capital of the company; and there were certain provisions for increasing that capital, and for borrowing money on mortgage of the company's landed property. The capital being all expended, the directors, instead of raising money by increasing the capital, or by mortgage, from time to time borrowed money of a bank, and applied the money in carrying on the company. It was held that they were entitled to charge this money against the company, although the consequence was to render each shareholder liable to a considerable extent beyond the amount of his share.[2]

[1] 22 Beav. 143, Ex parte Bignold.

[2] It is very difficult to reconcile the company's deed in The Norwich Yarn Company's case with the notion that the directors had, as between themselves and the shareholders, power to borrow

The principle on which these decisions are based requires reconsideration; it is at variance with the established doctrine that an agent who exceeds his authority is not entitled to indemnity against the consequences of his unauthorized acts, and it goes far to place shareholders at the mercy of their directors, however carefully the powers of the managing body may have been defined and restricted. It is not a little remarkable that, whilst the courts have gone great lengths in protecting shareholders against *bona fide* creditors, comparatively little protection is afforded them against *bona fide* directors; and yet one would have supposed it to be more in accordance with the established principles to prevent directors rather than creditors from holding shareholders liable beyond the limits imposed by company's deeds of settlement.

It may be urged, in support of the decisions in question, that as, if gain had resulted from the outlays made by the directors, the shareholders would have had the benefit of it, so it is only fair that if loss has unfortunately ensued they should sustain that loss. But in answer to this, the shareholders are surely entitled to say, "As you chose to act without authority, it rests with us to adopt or repudiate what you have done, and we are not to be deprived of our right of repudiation, on the ground that if we elect not to repudiate your acts, we shall be bound to indemnify you." Neither has the maxim *qui sentit commodum sentire debet et onus*, any application, unless the shareholders had some opportunity either of objecting to the outlays before they were made, or of rejecting the benefit and the burden at some subsequent period. If the shareholders, having had an opportunity of objecting to the proposed outlay, did not object, or if, having had an opportunity of rejecting the benefit derived from the outlay, they have declined to do so, then, indeed, the maxim may apply; but in the absence of any such opportunity it is impossible to hold them liable to indemnify the directors on the ground of having had the benefit of the expenditure. No liability can be established on this ground, unless it is to be held that a benefit is to be paid for, because it cannot be got rid of.

In order to show the difficulty of reconciling the decisions in the cases of the German Mining Company and the Norwich Yarn Company, with the law as previously settled, reference may be made to

in any other way than that pointed out in the deed; and yet if this were not so, the decision ought to have been against the directors, as in the case of The Worcester Corn Exchange, 3 De G. M. & G. 183.

Gillan v. Morrison, Re the Worcester Corn Exchange Company, and Re Cropper.

In Gillan v. Morrison,[1] a company was formed for purchasing land in Segovia, and establishing a colony there. It was agreed at a meeting of the directors and proposed shareholders that an expedition should proceed to Segovia, to examine and report upon the land which it was proposed the company should purchase; that the expense of the expedition should not exceed 1,200*l.*; that the expense to that amount should be defrayed out of the shareholders' deposits; and that if the expense should exceed 1,200*l.*, the difference should be raised by a new issue of shares. Certain persons were appointed trustees to direct the fitting out of the expedition, to nominate the persons who were to conduct it, and to manage the fund supplied for defraying its expenses. The persons composing the expedition proceeded to Segovia, and arrived at the place where the lands in question were situate; and were then arrested and imprisoned. The object of the expedition was thus frustrated; the expenses incurred by its members greatly exceeded the fixed sum of 1,200*l.*, and an attempt was made on behalf of the trustees to compel the shareholders to make good the excess. But it was held that, as between the trustees and the shareholders, the liability of the latter was limited to 1,200*l.*, and that they were not bound to contribute more.

In the Worcester Corn Exchange Company's case,[2] a company was formed for the purpose of building a corn exchange. The deed of settlement of the company limited the amount of each shareholder's subscription, and authorized the directors to create new shares and to raise money by borrowing, under certain restrictions. The capital of the company being expended, and more money being required, the directors advanced money themselves, and expended it in payment of debts of the company. They also, but in excess of their powers, borrowed money of a bank which had notice of the company's deed. It was held that the directors were not entitled to charge the shareholders, either in respect of the advances or in respect of the bank debt, beyond the amount of the capital which each shareholder had agreed to subscribe.

Again, in Cropper's case,[3] a committee of directors, charged with the winding up of a company, was held not entitled to be repaid by the company expenses incurred in endeavoring to obtain the passing

[1] 1 De G. & S. 421. [2] 3 De G. Mac. & G. 180. [3] 1 De G. Mac. & G. 147.

of a public bill pending in Parliament, for facilitating the winding up of the affairs of insolvent companies generally, for to support bills in Parliament was not within the scope of the committee's authority.

These three decisions, and especially the two last, are strictly in conformity with the sensible rule that agents are not entitled to any indemnity from their principals in respect of unauthorized expenditure." Principles of the German Mining Company's case will not receive further countenance.

When an account will be decreed.

SEC. 326. An account will be decreed at the suit of any of the partners or their representatives,[1] showing a proper case for the inter-

[1] For early cases on the subject, see Wells v. Wells, Ventr. 40; Beaumont v. Grover, Eq. Ca. Abr. 8; Heyne v. Middlemore, Ch. Rep. 261; Holtscombe v. Rivers, 1 Ch. C. 127.

Cases illustrating the doctrine as to accounting.—The American cases relating to the proposition of the text are numerous. As to the right of a partner to an account, see Bracken v. Kenedy, 4 Ill. 558; Strong v. Clawson, 10 id. 346; Allen v. Hawley, 6 Fla. 142; Bass v. Taylor, 34 Miss. 342; Ketchum v. Durkee, 1 Hoffm. (N. Y.) 538; Fleming's Appeal, 67 Penn. St. 18. And where surviving partners unreasonably delay the closing of the partnership affairs, or waste the property, and the creditors of the partnership neglect to file a bill requiring them to account, the administrator of the deceased partner may do so. Miller v. Jones, 39 Ill. 54; see, also, Maxson v. Beazley, 27 Miss. 106; Wickliffe v. Eve, 17 How. 468; Warren v. Warren, 56 Me. 360. And a silent partner in a firm, whose interest was kept concealed to avoid his creditors, may maintain a bill for an account and settlement of the partnership affairs against the other partners who aided in the concealment. Harvey v. Varney, 98 Mass. 118. And an active partner may have his remedy against a dormant one, even where the latter has had no part in the management of the business, and has received none of the property or avails of the partnership, but owes a balance to the active member on account of losses sustained by the firm. Spear v. Newell, 13 Vt. 288. So, where a settlement and closing of partnership is void for unfairness or fraud, a court of equity will decree an account to be had on the application of the injured party. Abrams v. Hunt, 26 Penn. St. 49. So an assignee of a partner's interest in a firm may maintain a bill for an account. Mathewson v. Clark, 6 How. 122; see, also, Pendleton v. Wambersie, 4 Cranch, 73. But such party, or one who acquires an interest under an execution or commission of bankruptcy, comes into nothing more than an interest in the partnership. But he is entitled to an account between the partnership and the partner. Bank v. Carrelton R. Co., 11 Wall. 624. And where a surviving partner used the partnership funds in the business of a new partnership which he entered into with another, it was held that an action would lie by the administrator of the deceased partner for an accounting against the survivor or his representative after his decease and his last partner, and that the administrator might recover from the latter the amount found due to the first partnership. Costley v. Towles, 46 Ala. 660. It is the duty of a surviving partner of a firm to account to the representatives of the deceased partner for the property of the firm as it was at the time of the deceased partner's death. Cheesman v. Wiggins, 1 Thomp. & C. (N. Y.) 595. Nor can a partner refuse to account to his copartner, on the ground that the partnership transactions are against public policy, and even illegal, where the objects and purposes of the corporation have been executed, and the partner against whom the accounting is claimed has received and holds the profits of the undertaking. Brooks v. Martin, 2 Wall. (U. S.) 70; see, also, Anderson v. Powell, 44 Iowa, 20.

Parties.—In a bill to settle the concerns of a partnership, and for an ac-

ference of the court. But as the rule is that he who seeks equity must do equity, it seems clear that where the plaintiff is a private debtor to the partnership, he cannot insist upon an account without paying the amount of his debt into court. Thus, in an early case it is laid down that, if one partner borrows any money out of the partnership trade, his own share shall be answerable for it, and he shall not be permitted to come into equity and pray an account, without making satisfaction for the debt.[1] So, in a case before Lord Nottingham, one partner having sued the other for money had and received, and the latter having filed his bill for an injunction to stay proceedings at law, and an account, the court entertained the suit and decreed an account, the plaintiff having first paid into court the money in question.[2] Upon similar principles, it should seem that, if the defendant could by any means show that a specific sum was due from the plaintiff to the partnership as a private debt, that sum would be ordered to be paid into court by the plaintiff before an account was decreed. But one partner, whether plaintiff or defendant, may receive *partnership* money and effects, and insist on not paying in the amount, unless all the other partners will pay in what they have in their hands;[3] and it has been laid down by Lord Eldon that if a partner receives money belonging to the firm and, admitting that he has received it, insists that there is a balance in his favor, there is no pretense for making him pay it in.[4]

count, all the members of course should be made parties. Fuller v. Benjamin, 23 Me. 255; Wells v. Strange, 5 Ga. 22; Francis v. Lavine, 21 La. An. 265; McKaig v. Hobb, 42 Md. 227. And in an action by a partner against a copartner for a dissolution and account, on the ground of a fraudulent sale of the partnership property by the latter, it is proper to make the fraudulent vendee a party. Webb v. Helion, 3 Robt. (N. Y.) 625. As to the rights of third parties to an account, though not partners, but having an interest in the partnership matters, and in the amount of the profits, under peculiar circumstances, see Katsch v. Shenck, 13 Jur. 668. So the heirs of deceased partners and the administrator may be joined as defendants in a bill in equity for an account and contribution by a surviving partner, if the estate of the decedent is composed partly or wholly of real estate. Cannon v. Copeland, 43 Ala. 201. And it has been held that where the complainant in chancery, who sues as administrator of a deceased partner, praying an account of partnership concerns, alleges that he is the sole heir of the deceased partner, the fact that he is not so does not make the bill abate for want of necessary parties, since a decree in his favor as administrator would not interfere with the rights of others who might claim a distribution, after the complainant received the money decreed to him. Moore v. Huntington, 17 Wall. 417. And a suit was held maintainable by a partner of a dissolved partnership against the vendee of his former partner, of property in which he claimed an interest that the vendor could not convey, and where the former partner was not made a party. Hogendobler v. Lyon, 12 Kan. 276. Under the Gen. Stat. of Mass., ch. 113, s. 2, any one entitled to a share of the net profits of a business may maintain a bill in equity for an accounting. Hallett v. Cumston, 110 Mass. 32.

[1] Vin. Abr. Partners, (E), 5; Melioruc chi v. Royal Exch. Ass. Comp., 1 Eq. Ab. 8.

[2] Gold v. Canham, 2 Swanst. 325; 1 Ch. Ca. 311.

[3] 1 Jac. & W. 253.

[4] Id. 252.

Of the payment of partnership money into court.

SEC. 327. This leads us to the consideration of the principles on which a court of equity will order the payment of partnership money into court in a suit between partners, where no final account has been taken in the cause. Where property is in the hands of stakeholders, factors, or trustees, who do not themselves claim any title to the money in their hands, the court will, on their bare admission of the possession of it, order it to be paid into court, because here the court does not disturb the possession of the party claiming title, or direct payment, before the liability to pay is established,[1] though, even in this case, the court will take notice of any circumstances stated by the defendant in his answer, which may essentially qualify his admission. But where partnership money in the hands of a defendant partner is required to be paid into court, here, as the defendant has a *prima facie* title to the money, the order for payment will not be made, unless there be a clear admission apparent on the face of his answer, not only that he has the money, but that he is liable to pay it.

Thus, in Richardson v. The Bank of England,[2] the bill, which was brought by the personal representatives of Esdaile, a banker, against his surviving partners, for an account, charged that the defendant Thomas had been introduced into the firm, without capital, in 1828; that the firm had afterward become embarrassed, and that on the occasion of a general arrangement in January, 1837, Esdaile appeared a creditor on the books in the sum of 90,816*l.*; that, upon accounts subsequently taken in the same year by an accountant it appeared that a sum of 35,844*l.* was due as between the partners to Esdaile from the partnership, of which Thomas' share was 31,468*l.*; that Thomas had likewise overdrawn his account to the extent of 21,591*l.*, and that these sums, together with a balance due from him on a profit and loss account, left him a debtor to the firm, at the lowest, in the sum of 54,042*l.* The bill also charged that, upon the introduction of Thomas into the firm, Esdaile advanced for Thomas, who had married Esdaile's daughter, a sum of 20,000*l.*, which was placed in the books to the joint account of Esdaile and Thomas, where it had remained ever since; but that this sum was, in fact, merely an advance from Esdaile to the partnership, and had never been drawn out.

The defendant, by his answer, admitted that Esdaile, at the time mentioned in the bill, stood as a creditor in the books, to the amount

[1] See 4 Myl. & Cr. 171.

[2] 4 Myl. & Cr. 165.

of 90,816*l.*, but he denied the accuracy of the accounts taken by the accountant, and, though he admitted at advances had been made to him by the house to the extent of 21,591*l.*, he denied that his account was overdrawn to that amount, or that he was indebted to the firm in that or any other sum, claiming, on the contrary, a balance in his favor of 275*l.* As to the 20,000*l.*, he admitted that that sum had never been drawn out, but he denied tha it was an advance by Esdaile to the partnership; insisting that it was an advance by Esdaile to him, the defendant, as his capital for the partnership, though he admitted he gave no consideration for it, except joining the partnership; and that he brought no capital into the concern.

Under these circumstances, Lord Langdale, M. R., upon a motion made by the plaintiffs before the hearing for that purpose, ordered the defendant Thomas to pay the sum of 21,591*l.* into court, but, upon appeal to Lord Cottenham, C., his Lordship reversed the order of the Master of the Rolls. After stating that, in order to support a motion of this nature, two things were necessary — first, a clear liability in the defendant to pay, and, secondly, an admission of the facts from which such liability arises, his Lordship proceeded to observe, that, in the present state of the partnership affairs, it could not be considered that the money received by Mr. Thomas constituted a debt due from him to the partnership, for that his answer contained no admission of such a debt, or of any facts from which his liability, as a debtor to the partnership, could be inferred; that, on the contrary, there was a positive denial of some of the material facts, which might operate as a substitute for a direct admission. And his Lordship took occasion to advert, at some length, on the inaccuracy of considering partners, in these cases, in the light of debtors or creditors to the concern; for that, before any settlement of account, and before the payment of the joint debts or the realization of the partnership estate, neither advances by one partner, nor receipts by another, could be considered as any thing more than items in the account. Upon these grounds, his Lordship decided in favor of the appellant.

When defendant must pay money into court.

SEC. 328. But if the answer of the defendant partner contains an admission of facts, from which it appears clearly that he is liable as a debtor to the partnership in a specific sum, it is immaterial

that he does not, in words, admit the liability, or that he even insists that he is not liable. In such case, therefore, he must pay the money into court. Thus, in Mills v. Hanson,[1] where there was no express admission, Lord Eldon ordered the defendant partner to pay money into court, on the ground of admission derived from a comparison of the facts admitted by the answer with accounts contained in schedules and books referred to by the defendant, and which accounts were cast up by an accountant. So in Domville v. Solly,[2] the same learned Lord held that, upon a motion of this nature, the plaintiff was not bound by the defendant's denial of the plaintiff's interest in the money in question, but that the plaintiff was at liberty, notwithstanding such denial, to show, upon the case stated in the answer, that he had an interest in the sums in question. So in Toulmin v. Copland,[3] Lord Abinger, C. B., ordered a surviving partner to pay into court a certain sum which he admitted to have received on account of the late partnership, although, by his answer and examination, he alleged that partnership debts, to a large amount, were outstanding, for which he was liable, and also that his copartner had drawn out of the partnership sums to the amount of double the sums drawn out by himself, it appearing from the defendant's admission, that there was a sufficient sum in court to pay the outstanding debts, and that, taking into consideration the true shares of the partners, which the defendant had not done, but which appeared from an order of the House of Lords in the same cause, the copartner had not overdrawn his copartnership account.

When money in hands of partner is debt to the firm.

SEC. 329. There is another class of cases connected with this subject, in which it is unnecessary to consider the question whether money in the hands of a defendant partner constitutes a *debt* from him to the concern. The class referred to is that where the partner has received the money fraudulently, or, to use the milder expressions of Lord Eldon, "under circumstances from which you can infer that he had agreed not to receive it, and that his receiving it was contrary to good faith;" in such cases he may be ordered to bring it into court. Thus, in Foster v. Donald,[4] the plaintiffs and the defendant David Donald, carried on business together in the North of England. It had been proposed to dissolve the partnership, and the terms of the dissolution had nearly

[1] 8 Ves. 68. [2] 2 Russ. 372. [3] 3 You. & Coll. 643. [4] 1 J. & W. 252. See Jervis v. White, 6 Ves. 738.

been arranged, when the defendant said that, before finally acceding to them, it would be proper for him to go to London, for the purpose of consulting a friend residing there. In the course of his journey he went round to several customers of the firm, in different parts of the country, and collected of them debts due to the partnership to the amount of about 2,318*l.* In one instance, a debt due by himself had been set off against a debt due to the firm, and he received the difference. Upon a bill filed for an account of the partnership transactions, the defendant, though by his answer stating his belief that the balance of the account would be in his favor, was ordered to pay the 2,318*l.* into court.

To this class of cases, that of Costeker v. Horrox[1] may be referred, though that was not a suit between living partners, and not a case of positive fraud. A, B and C, being in partnership, A, who had nearly the whole of the capital, retired, taking a warrant of attorney from B and C to secure to him 12,500*l.*, but leaving his whole capital in the firm. The accounts of the partnership were not then made up. Soon afterward A, who still interfered in the business, mortgaged certain leaseholds, his private property, and certain policies of assurance on his life, for the purpose of paying off a partnership debt. A month or two afterward A died, having made B and C his executors, and having, by his will, directed that they might apply the moneys to be received from the policies in carrying on the trade, provided they gave such security to his residuary legatees as W might approve. W refused to act, and, according to their own admission contained in their answer to a bill filed against them by A's residuary legatees, B and C omitted to give security pursuant to the will, and applied the money arising from the policies, amounting to 7,000*l.*, in discharge of the mortgage. They, however, alleged that A's share in the capital, at the time of his retirement, was far below 12,500*l.*, and that the warrant of attorney was given merely to secure what, upon an account taken, might be found to be his share. Upon motion for payment of the 7,000*l.* into court, Lord Abinger, C. B., was of opinion that the motion must be granted, as the defendants could only employ that money in the trade upon the terms of the will, and that, having omitted to do so, they were guilty of a misapplication of it.

It may be remarked in conclusion, that, although the court will not, generally, entertain motions of this nature before the coming in of the defendant's answer, because such motions depend only on

[1] 8 You. & Coll. 530.

admissions and not on *evidence*, yet if the plaintiff makes such a motion founded on affidavits, and the defendant answers the affidavits by counter-affidavits, the court will treat his affidavits as an answer.[1]

Of sale under a decree.

SEC. 330. There are many cases in which a court of equity will assist the settlement of partnership accounts, by decreeing in the first place a sale of the property.[2] Where no provision is made for the disposition of the partnership property upon a dissolution, this exertion of equitable jurisdiction seems to arise necessarily from that general principle, that the retirement of one partner is the dissolution of the whole society. In the words of a learned writer,—"The effect of dissolving the company is different from that of mere renunciation, for in the latter case the partners willing to proceed with the contract would be left in possession of the premises, good-will, etc., paying for them a price by valuation, while in the former case all these matters must be settled on the footing of the whole connection being dissolved."[3] Hence the decision in Marshall v. Marshall.[4] There the court of session held that a partner who was pursuer in the cause was entitled to withdraw from the company, and that the effect of his doing so was to dissolve the copartnership. The cause came before the Lord Ordinary to settle the effects of the dissolution; and it was contended by the partner not wishing to dissolve that the other must take his departure and leave him in possession of the shop at valuation; but it was held that the lease should be disposed of by public sale.

When firm is dissolved by bankruptcy or death.

SEC. 331. The same principles have frequently been acted upon in our courts of equity, in cases where a partnership not under articles, or under articles not providing for a dissolution, has been dissolved by death or bankruptcy. Upon the death of a partner under such circumstances, his executor has a right to have the partnership affairs wound up by a sale. "In the case of an executor," said Lord Eldon, "the question is whether the surviving partners, instead of settling the account, and agreeing with the executor as to the terms upon which his beneficial interest in the stock is still to be continued, subject still to the possible loss, can take the whole property, do what

[1] Jervis v. White, 6 Ves. 738; 3 Daniell's Ch. Pr. (Perkins' ed.) 2024; Vann v. Barnett, 2 Bro. C. C. 158.

[2] In the instance of a trading partnership actually dissolved, the court orders a sale on motion. 1 Swanst. 523.

[3] 2 Bell's Comm. 641.

[4] 17 Fac. Coll. 101.

they please, and compel the executor to take the calculated value. That cannot be without a contract for it with the testator. The executor has a right to have the value ascertained in the way in which it can be best ascertained, by sale."[1]

The same right in this respect, which attends the executors of a deceased partner, belongs likewise to the assignees of a bankrupt partner. In Crawshay v. Collins[2] where there were no articles, the plaintiffs, assignees of a bankrupt partner, by their bill filed against the copartners, prayed that three-eighth parts of the partnership stock and profits might be sold for the benefit of the bankrupt's estate. It was argued for the defendants that the plaintiffs could not insist upon a sale of the entirety of the leasehold premises, but only of the individual interest; that in every instance of a separate bankruptcy the right of the assignees was only to an account, and to have a value set upon the specific chattels at the time of the bankruptcy; that it never was held, that upon the bankruptcy of one partner there must necessarily be a sale of the whole. But, Lord Eldon considered the case of the assignees to be similar to that of the executor of a deceased partner. His Lordship said, "As to the case now before the court of the bankruptcy of one partner, supposing it the simple case of profit made by the mere sale of the property, there must be an account. It is said a duty was imposed upon the assignees to call for the account. That is true. It is, however, no more the duty of the assignees to settle with the others, than it is their duty to settle with the assignees. Is it possible then to say that upon any rule of law the other partners can take, as sole owners, all the houses, buildings, and stock in trade? The consequence of the destruction and dissolution of the partnership is, that they become tenants in common in each and every article embarked in it, under an obligation to deal with the whole stock and every article, as the equitable title of the bankrupt and themselves requires; and, according to the case of Fox v. Hanbury,[3] the right is not to an individual proportion of a specific article, but to an account, the property to be made the most of, and divided."

So, in Featherstonhaugh v. Fenwick,[4] where there had originally been articles of partnership, and by those articles it was stipulated that upon the retirement of a partner his share should be

[1] 15 Ves. 227. And this sale should be effected with as little delay as possible. Evans v. Evans, 9 Paige's Ch.(N.Y.) 178.

[2] 15 Ves. 218; and see Crawshay v. Maule, 1 Swanst. 495.

[3] Cowp. 445.

[4] 19 Ves. 298; 2 Hov. Supp. 478.

taken at a valuation, yet, inasmuch as the partnership had been continued beyond the term limited by the articles, and so had become a partnership at will, Sir William Grant held that the share of the retiring partner was not to be taken at a valuation, without his consent, but that a court of equity might decree a sale of the whole property. In the case just mentioned, upon the retirement of the plaintiff, some time after the expiration of the articles, from the partnership concern, the offer of the copartners was to take the contracts with the workmen off the plaintiff's hands, and to give him an indemnity, or to divide the workmen. They also offered to take the partnership property and utensils at a valuation, and desired the plaintiff, if he would not comply with that proposal, to take his share off the premises. It was insisted for the plaintiff, that he was entitled to a sale of the partnership property, and an account. On the other hand, it was said that, where partnership property is capable of a division, it ought to be divided and not sold. Sir William Grant held that the plaintiff might insist upon a sale. "The proposition," he said, "was that a value should be set on the partnership stock, and that they should take his proportion of it at that valuation, or that he should take away his share of the property from the premises. My opinion is, clearly, that these are not terms to which he was bound to accede. They had no more right to turn him out, than he had to turn them out, upon those terms. Their rights were precisely equal to have the whole concern wound up by a sale, and a division of the produce."

In Wilson v. Greenwood,[1] the partnership was founded in articles, and a special proviso was made as to the assignment of each partner's share, upon his death, retirement, or bankruptcy. Upon the bankruptcy of one of the partners it was found to be impracticable, if not illegal, to act upon the proviso. The partnership, therefore, being *pro tanto* a partnership at will, a sale of the whole property was decreed, without hesitation.

Again, in Cook v. Collingridge,[2] a proviso was contained in the articles of partnership, specifying the mode of distribution of the stock at the expiration of the term. It was held, however, that the articles could not be literally acted upon, and, therefore, that upon the expiration of the term the stock was to be sold, and the accounts taken, as in the case of a partnership at will.[3] "The case," said Lord Eldon, "depends upon the will of the testator, and upon articles of

[1] 1 Swanst. 471; 1 J. Wills. 228.
[2] Jac. 607.
[3] There were, however, other circumstances sufficient to warrant a sale.

partnership not very capable of being literally carried into execution. The articles, dated in 1812, begin in the usual manner, with stating their agreement to become partners, and their shares of the capital, and then follow clauses providing for what was to be done upon the determination of the partnership, or upon the death of any of the partners. They first put the case of its ending by the expiration of the term of seven years, or other sooner determination; in that event, the property of every description belonging to the business was to be divided, received, and taken by them respectively, according to their respective interests. Now, the property of the partnership consisted of leasehold premises, of materials necessary for the manufacture, and other stock in trade, and, of what would be still more difficult to deal with according to these articles, a number of agreements with customers to provide them with carriages for certain periods, at specified rates. It is difficult to conceive what was to be done, according to the articles, with these engagements, unless they happened to end at the expiration of the seven years. This, however, was the agreement on which the partnership was formed. Another case is then put of the death of one or more of the partners during the term of seven years; the trade was then to be carried on till the end of the term, and in the meantime the outstanding debts to be collected and divided with as much expedition as could be, reserving enough to carry on the trade. This, again, would not be very easy to manage, as it would be very likely to be a matter of dispute how much would be necessary for that purpose. Another case is then put, that of the death of all the partners within the term; and then it was provided that the same course should be pursued, to assign the proportion of each, as in a case of a determination by effluxion of time. The other circumstances of the case make it not very material what is the meaning of the articles. It might be the meaning, literally, that the leases, stock, and engagements were to be divided, and that the partners were to take a share of every article. The Vice-Chancellor thought the division was to be by means of a sale. Being myself of opinion that it is impossible to act upon the articles, taken literally, the general law of partnership must be applied, which appears to me to be properly laid down in Featherstonhaugh v. Fenwick. To the doctrine there laid down by Sir W. Grant as to the adjusting the affairs of a partnership on its dissolution, I entirely accede." The stock was then decreed to be sold, and it was referred to the master to inquire what would be the most beneficial manner of disposing of it.

Rule upon dissolution of partnership at will.

SEC. 332. It appears, therefore, that in all cases of partnership at will, whether the contract was originally of that nature or has become so by effluxion of time or other circumstances, a court of equity will, upon a dissolution, decree a sale of the entirety of the partnership effects, at the desire of any of the parties. And even in the case of a partnership *with articles*, supposing it to be dissolved for the misconduct of one partner, a case might be stated where a court of equity would decree a general sale and account, as of a partnership at will, notwithstanding express provisions in the articles as to the proceedings to be had upon a dissolution.

From what has preceded it is obvious that there may be many cases, perhaps, indeed, a majority of cases, in which the surviving or solvent partners are interested in resisting a sale of the property; on the other hand, while it is the object of the executors of the deceased partners or the assignees of the bankrupt partner, to promote a sale, this consideration renders it highly inexpedient for any person to stand in the situation of surviving partner and executor of a deceased partner, at least where the parties for whose benefit he acts as executor are incapable, by reason of infancy or otherwise, of indemnifying him for his conduct in the character of partner. The unfortunate consequences arising from the same persons acting in these inconsistent characters have been already exemplified.[1]

When an account is decreed. Practice.

SEC. 333. When the account is decreed, the Master to whom the accounts are referred is generally at liberty under the decree to examine the parties in the cause. But at any rate it is his duty to go on with the accounts until he finds a difficulty arising from the want of sufficient powers, and if it be necessary, and he had no original authority to examine the parties, he may apply to the court for that purpose. Where a partner, defendant, is examined in the Master's office relative to his receipts and payments on the partnership account, although his admissions as to the receipts will be taken conclusively against him, he must prove his payments, unless they form one transaction with the receipts, by other evidence than his own oath. In Talbot v. Rutledge,[2] which was a suit between partners, Lord Hardwicke took notice of the distinction in this respect between entries made by a man in his books, and statements made by him in his

[1] See *ante*, p. 443. Smith's Chancery Practice, vol. 2, chap. 11.
[2] 4 Bro. C. C. 74, cited; see, also,

answer or his examination in the Master's office. "In this court,' said his Lordship, "if a man is to be charged by a book or other writing, he shall also be discharged if the entries are made for that purpose therein, but what is sworn by a man's answer or examination admits of a different consideration, for if a man admits by his answer that he received several sums at particular times, and in the same answer swears he paid away those sums at other times in discharge, he must prove his discharge; otherwise it would be to allow a man to swear for himself and to be his own witness." It is likewise a common direction in the decree that the parties shall produce before the Master, on oath, all books and papers in their custody, relating to the taking of the accounts.[1] This order comprehends not merely the original partnership books, but all books in which entries relating to the partnership concern have been made since the dissolution. In Toulmin v. Copland,[2] one of two partners, carrying on the business of navy agents, having died, the surviving partner continued the business, and without the consent of the directors took upon himself certain of the debts due to the firm, at the same time transferring the accounts of those debtors to new books, which he had opened on his private account. He also transferred to the new books the account of the debtors whose debts he did not undertake. He, however, swore, in conjunction with an accountant, that the entries made in the new books for the last class of debtors was uniformly and without alteration transferred to the partnership books, which were open for the executor's inspection. It was held by Lord Abinger, C. B., that, in taking the accounts of the partnership before the master, the defendant must produce his private books, in order to show the entries of both classes of debts; of the first class, because he might have made a profit of the debts which the executors had a right to share; and of the second class, because he might have made an improper appropriation of the payments made from time to time in their discharge, by applying those payments in discharge of his own advances, and not in discharge of the balance due to the partnership.

How the accounts must be taken, when articles provide for accounting.

SEC. 334. The accounts of the partnership must be taken according to the method prescribed by the articles, if there be special clauses to that effect, and the parties have acted upon them;[1] and this will be the

[1] See Daniell's Chancery Practice, vol. 2, p. 807; Seton on Decrees, 23.

[2] 3 You. & Coll. 655.

[3] 1 Swanst. 469.

In settling partnership accounts, it should first be ascertained what each

rule where the articles are not actually executed. Thus, where articles were entered into for a partnership, and two of the partners being esquire beadles of the University of Cambridge, it was agreed to conceal the partnership from the University, and therefore that the

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has put into the concern by way of capital and advances, and then make them equal in this respect, and then divide the balance between them. Frigerio v. Crottes, 20 La. An. 351. If one partner has advanced more than his share of the capital, he is a creditor of the firm to the extent of such excess, but, being equally liable for all the debts, his claim is postponed until all the other debts are paid, when he is entitled to be re-imbursed out of the surplus. Simreal v. O'Bannon, 7 B. Monr. (Ky.) 608. If he goes out of the firm he is entitled to be re-imbursed for his share out of the partnership property, and if there is not enough to pay him, each member is liable to him to the extent of his interest. Perkins v. Currier, 3 W. & M. (U. S. C. C.) 69; and a surviving partner has a right to proceed against the estate of a deceased partner for a balance due him on account of a payment by him of firm debts, *pari passu*, with the individual creditors of such partner. Busby v. Chenault, 13 B. Monr. (Ky.) 554. It is a universal rule that no allowance can be made to one partner for extra services, or any services, rendered to the firm, unless there is a special agreement to that effect. Drew v. Ferson, 22 Wis. 651; Reybald v. Dodd, 1 Harr. (Del.) 401; Butter v. Lumley, 5 Jones' (N. C.) Eq. 148; Zimmerman v. Huber, 29 Ala. 379; Bradford v. Kimberley, 3 Johns. Ch. (N Y.) 431; Levi v. Karrick, 13 Iowa, 344; Lyman v. Lyman, 2 Paine (U. S. C. C.), 11; Phillips v. Turner, 2 D. & B. (N. C.) Eq. 123; Lewis v. Moffet, 11 Ill. 392. In Lee v. Lashbrooke, 8 Dana (Ky.), 214, the court held that one member of a firm is not entitled to charge for extra services rendered by him for the firm in the absence of a contract to that effect, when it did not appear that he did more than he was expected to do when the partnership was entered into, or that there had been an unexpected change in the condition of the partners. In the same case, however, there was a species of allowance made, as it was held that interest on advances made by one partner would not be allowed against the other, when it appeared that the value of the other's services more than compensated the interest. In Cunliff v. Dyerville Manfg. Co., 7 R. I. 325, a similar doctrine was held. In that case one of the partners made a charge against the firm for personal services in preparing and superintending a mill for the firm, but the court held that no allowance could be made therefor unless it was shown that such services were outside of the joint dealings of the firm, and that the question was not affected by the fact that the title to the land, on which it was located, was in one of the partners. See, also, Franklin v. Robinson, 1 Johns. Ch. (N. Y.) 164; Campbell v. Beath, 2 Wis. 34; Dougherty v. Van Nostrand, 1 Hoff. Ch. (N. Y.) 69; Piper v Smith, 1 Head (Tenn.), 94; Gyger's Appeal, 62 Penn. St. 80; Patton v. Calhoun, 4 Gratt. (Va.) 138; Washburn v. Goodman, 17 Pick. (Mass.) 519; Trump v. Buttzell, 3 Md. 296. The fact that the partner is the active, managing partner, and has the entire charge of the business, does not affect the question. If he expects to be allowed for such services he must stipulate therefor in the contract, or he cannot be allowed therefor. Hutchinson v. Smith, 5 Ir. Eq. 123. But for matters outside the partnership business he may charge for services. Thus in Vanduzer v. McMillan, 37 Ga. 311, one of the partners was an attorney, and it was held that for services rendered as an attorney in collecting bills due the firm, he was entitled to charge the firm. And in all cases for services rendered in winding up the affairs of the firm after its dissolution by death or other cause, he is entitled to a reasonable allowance. Nuvell v. Humphrey, 37 Vt. 265; O'Reilly v. Brady, 28 Ala. 535; Hite v. Hite, 1 B. Monr. (Ky.) 179. So where one partner is made a special agent for the firm to dispose of partnership property, it has been held that he was entitled to charge a reasonable compensation. Bradford v. Kimberley, 3 Johns. Ch. (N. Y.) 434; and of course he is entitled to charge for services when there is an express agreement to pay him therefor. Pond v. Clark, 24 Conn. 370.

Expenses.—Each partner is entitled to be reimbursed his reasonable expenses in the prosecution of the business of the firm. Thus, if one partner travels from

articles should not be executed, Lord Cowper decreed an account of the partnership according to the terms of the draft of the articles, so far as the same were reduced to a certainty.[1]

When no provision for accounting is contained in the articles.

SEC. 335. But where no provision for taking the account is set forth in the articles, the principle of a court of equity is that

place to place to sell goods, or to collect the bills of the firm, or to secure orders for the firm, or upon any necessary business of the firm, his expenses are a proper charge against the firm. Withers v. Withers, 8 Pet. (U. S.) 357; and in the case last cited it was held that reasonable traveling expenses, as well as hotel expenses, were a proper charge against the firm, when incurred upon the business of the firm, even though the articles of partnership provided that each partner should pay his own expenses, it being evident that such expenses were not included within the meaning of the parties. So any reasonable expenses incurred in pursuance and furtherance of the partnership business incurred by one partner are a proper charge against the firm, and the question as to whether they are reasonable expenses must be determined from the circumstances of each case. Thus, in Tillotson v. Tillotson, 34 Conn. 335, Giles, Oliver and Chauncey and Shubael Tillotson formed a partnership in the business of peddling clocks in the southern states. In 1815, Shubael Tillotson, with the knowledge and assent of the other partners, bought with partnership funds a plantation in Louisiana, but took the title in his own name, and from that time until his death in 1854, the plantation was treated and considered as partnership property. The title to portions of some real estate was taken in the names of other partners. Each partner had confidence in the other, and took out funds for his support without any charge being made, and no regular books were kept. The property in Connecticut was held in the same way. Shubael died in November, 1854, leaving a will giving to his wife half of all his property, and the other half to his three children, and desiring the partnership to be continued until the debts were paid or both parties wished to dissolve. The business was afterward continued in the same way as before, the family expenses paid by company funds for several years, with the assent of the parties in interest. Shubael expended large amounts of money in improving the plantation, and paying expenses of the families, all of his expenditures being honestly expended for the interest of the concern. He paid the support of a minister on the plantation; also for the relief of distressed people occasioned by a crevasse in the Mississippi river. In taking the account, allowances to Shubael Tillotson for the support of the minister, three thousand twenty-three dollars and fifty-eight cents, and for repairs to the meeting-house, one hundred and seventy-three dollars were allowed. It was held also, that although it is the duty of the surviving partner to close up the business in a reasonable time still, as Shubael's will, under which the plaintiffs claim, directed the business to be continued, and it was so continued by the consent of all the parties, they could not complain that he had not closed the business. So the articles given in charity were allowed, as within the proper expenditures. So the expense of erecting a large barn, the moneys expended in visits to Washington, to protect the title to the land, which was attacked by legislation, although the particular items expended were not stated. It was also held the plantation was partnership property, although the law of Louisiana required a writing to that effect. Compensation for services was disallowed because no agreement for any allowance therefor was made.

Debts paid by one partner.—Debts paid by one partner out of his private funds are a proper charge against the firm. Thus in Lindell v. Lee, 34 Mo. 103, a partnership note was given for a firm debt, and to secure it one of the partners gave a mortgage on his individual property, which was paid by one of the partners who took an assignment of the note and mortgage. It was held that, while the mortgage could not be

[1] Worts v. Pertn, 3 Bro. P. C. 548.

each partner is entitled to be allowed against the other every thing he has advanced or brought in as a partnership transaction, and to charge the other in the account with what that other has not brought in, or has taken out more than he ought; and nothing is to be considered his share but his proportion of the residue or balance of the account.[1]

foreclosed, or the note sued by her, yet it was a proper charge against the firm. So, where one partner borrows money upon his own note, but really for the use of the firm, another partner paying the note and taking an assignment of it, he cannot, as indorsee, sustain an action upon the note, but he may charge it against the firm. Tucker v. Pease, 3 N. H. 177. And the same is true as to money paid by one partner upon a judgment against the firm. He cannot keep the judgment on foot against the firm, but the amount paid is a proper charge against it. Miller v. Jones, 39 Ill. 55.

Partner having debt against firm, entitled to preference over creditors of individual members.—Where one partner is compelled to pay a debt against the firm, he becomes a creditor of the firm, and thereby acquires a preference over the separate creditors of an individual member of the firm, upon all the property of the firm, real or personal. In Rainey v. Nance et al., 54 Ill. 30, this doctrine was well illustrated. In that case it appeared from the bill and pleadings filed in the case, that Richard A. and Z. Nance were the owners in fee of some lots in Menard county, and were erecting a steam flouring mill. On the 20th day of August, 1867, they entered into an agreement with the plaintiff, binding themselves for a certain sum to complete the mill and put it in running order, with all necessary machinery, and to convey to Rainey one undivided third part of the lots and mill, free from incumbrance, and an undivided third interest in certain enumerated personal property, and a third of the business, on or before the 15th day of October, 1867; that the Nances completed the mill and executed to Rainey a deed for the third of the property, with covenants of warranty, and the parties then formed a partnership under the name of Nance, Bro. & Co., and commenced the milling business; that the business had continued until the bill was filed. Rainey paid the purchase-money, which was used by the Nances in their separate business, and not in that of the firm. The bill alleges that the Nances, on the 27th of July, 1867, with their wives, executed a mortgage to William Meyer, on the property, to secure the sum of $1,500, due in nine months, with ten per cent interest; that before Rainey purchased the Nances agreed to have this mortgage discharged and to give a new one on their interest in the property; that there were secret mechanics' liens on the property unknown to Rainey when he purchased and received his deed; that the mechanics filed a bill against the Nances, Rainey & Meyer, to enforce their lien, for the sum of $3,858.84, obtained a decree for that sum and directing the sale of the premises, without noticing or in anywise protecting Rainey's interest under his purchase. That, after the partnership of Nance, Bro. & Co. was formed, the firm borrowed $3,540.53 on December 21, 1867, of Brahm & Green, and on the 12th of February, 1868, the further sum of $2,307.28, for which they gave their notes drawing ten per cent, and on the 23d of March following, executed a mortgage on the mill property to secure the same; that on the 2d of July, 1868, the sheriff of Menard county, by virtue of an execution in favor of W. H. Cushman, and against the Nances, levied upon all of their interest in the mill property, and filed a certificate thereof in the recorder's office; he also levied the execution upon a quantity of personal property belonging to the firm. That the Nances executed a mortgage on their interest in the property, to secure John Bennett, Robert T. McNeeley and John Tice, against loss, by reason of their having become securities for the Nances for the payment of $2,500, to Shipley. This mortgage was dated on the 3d of July, 1868, that Shipley recovered a judgment on the note thus given, and execution was in the hands of the sheriff for the collection of the same; that the firm of Nance, Bro. & Co. were indebted

[1] Per Lord Hardwicke, West v. Skip, 1 Ves. 242. See Cory on accounts, chap. 5.

How account is to be taken.

SEC. 336. In taking the account the Master is to begin from the last settled balance, but if there be no settled balance, then from the commencement of the partnership.[1] But the account of the partnership dealings should be brought to a close at the day of the death of the deceased partner, for the further account which is to wind up the concern, is not an account of profits, and differs essentially from a partnership account.[2]

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to various persons in the sum of $9,500; that the debt to the mechanics and the debt to Meyer were specific liens on the property; that Rainey had a lien on the property to reimburse his loss by reason of the incumbrance of the mechanics' lien; that the property is insufficient to pay the firm debts and refund Rainey the capital he put into the firm, and that there was no interest of the Nances in the firm property liable to their separate individual debts, of which they owed large amounts, aside from the firm indebtedness, and they were insolvent; that the Nances are indebted to the firm for funds drawn out by them. The bill prayed an injunction to restrain sale of property, and that the partnership property be applied to pay firm indebtedness; for a dissolution of partnership, and, if any thing remains from a sale of the mill on the decree in favor of Crosier, Baxter & Co., to enforce their mechanics' lien, after paying the same, that it be applied to refund the money advanced by Rainey to become a partner subject to the payment of the firm debt to Brahm & Green. On the first day of April, 1869, Brahm & Green filed a cross-bill against Rainey and the several defendants to the original bill. They set up their mortgage and notes, and prayed a foreclosure out of funds in court, and appropriation out of firm assets to payment of firm debts. On the 5th of April, in the same year, Bennett, McNeeley, Tice & Shipley filed a cross-bill, setting up and relying upon their mortgage, and praying for its foreclosure. There were answers to the original and cross-bills, but they do not controvert the material allegations of the original bill. Replications were filed to the various answers in the case.

The court, by interlocutory order, appointed a receiver, who took charge of the partnership property, and reported his acts to the court, and the amount of firm assets which he had received, and debts due the firm which could, as well as those that could not be collected, by which it appeared there was a considerable sum over and above the price received on the sale of the mill, and that other debts owing to a considerable amount beyond those named in the bill existed against the firm. On a hearing on the original and cross-bills, answers thereto, replications, pro-confesso orders and proofs, the court rendered a decree by which it was found that the mill, and lot four on which it is situated, had been sold under a decree in favor of Crosier, Baxter & Co., to enforce their mechanics' lien, for the sum of $3,858.84, and that the property had been sold for $12,200, and after paying their decree there remained in the hands of the master the sum of $7,800.90, after deducting $1,752.87, paid to William Meyer, under an order of court. The decree proceeds to distribute the fund; first to Brahm & Green, $6,882.34, out of that fund, and $1,060.44 out of the general assets of the firm, after paying the specific liens of Bennett, Tice, McNeeley and Shipley; second, that of the proceeds of the sale of lots three and four, and after Brahm and Green shall be paid, William H. Cushman shall be paid the two-thirds belonging to the Nances; third, that Bennett, McNeeley, Tice and Shipley, as to $2,213.65, the proceeds of the sale of flour and grain levied on by execution in their favor to the extent of the interest of the Nances therein, being $1,475.75, be paid from that fund, they to receive the balance of their claim out of the interest of the Nances in the fund remaining after the claims of Brahm & Green and Cushman shall be paid; fourth, the general creditors of Nance, Bro. & Co. to be paid as follows: After deducting from the proceeds of the sale of the goods levied by Shipley the sum of $1,475.75, out of the proceeds of the balance of the partnership assets, including the third interest

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[1] Beak v. Beak, Rep. temp. Finch, 190.

[2] Per Sir A. Hart, 1 Molloy, 465.

Where partners have carried on business in the nature of a banking business, it will frequently be necessary to take the partnership accounts on the principles of the rule in Clayton's case, which will be discussed more at length hereafter.[1] It has been sometimes doubted whether that rule is applicable to cash accounts between the partners themselves, though it has been frequently adopted as between partners and their creditors. That point, however, has been settled by the case of Toulmin v. Copland,[2] in which, upon a change of the members of

of Rainey in the funds arising from the sale of the lots, after paying Brahm & Green's mortgage, and also any of the other two-thirds, after payment of Brahm & Green, Cushman, Bennett, etc., until they are paid in full; fifth, that Rainey was entitled to receive one-third of any balance of the firm assets of Nance, Bro. and Co. after the payment of all the partnership debts of the firm, and the specific liens above described, and also one-third of the real estate fund, after payment, as above ordered; sixth, that the costs and expenses of the suit be first paid out of the general fund. It also orders the sale of lot three for money, and report the same to the court. To reverse this decree, Rainey and Brahm & Green prosecuted this appeal. "In case of a dissolution of a copartnership by death, or by the insolvency of any portion of the members of the firm," said Walker, J., "questions are presented as to the manner in which the assets of the firm shall be appropriated to the payment of the debts. As to the order in which debts against the firm, and those against the individual members of the firm, shall be paid, it is the settled rule that no one partner has a right or share in the firm property, except the portion which remains after full payment of all debts and liabilities of the partnership; and it thence follows that each partner has a right to have the same applied to the due discharge and payment of all such debts and liabilities, before any one of the partners or his personal representatives, or his individual creditors, can claim any right to the same. Story on Part., § 97; Coly. on Part., book 2, chap. 1, p. 64. It is also said that, as between the partners themselves, the debts and liabilities of the firm to creditors and third persons, they are a fund appropriated in the first instance to the discharge and payment of such debts and liabilities, and there is, properly speaking, as between them, a lien thereon, or at least an equity, which may be enforced through the partners, in favor of creditors, although it may not directly attach in the creditors, by virtue of their original claims, in all cases. Story on Part., § 360.

It is again said, by the same author, it is only in cases where there is a dissolution by death, or bankruptcy of one partner, that the right of the joint creditors can attach as a *quasi* lien upon the partnership effects as a derivative, subordinate right, under and through the lien and equities of the partners. In case of death, the personal representatives of the deceased partner have a right, whether the estate be solvent or insolvent, to insist upon a due application of the joint effects to pay the joint debts, and fulfill the other purposes of the trust. At law, the creditors have no remedy, except against the surviving partners for their debts, but it is otherwise in equity. Id., § 361. In equity, the joint creditors are entitled to a priority or payment out of the joint effects, and the separate creditors to a like priority out of the separate effects, before the other classes of creditors shall be entitled to any portion of the surplus. Id., § 363.

It thus appears that, in equity, in cases of insolvency or death of a partner, thus terminating the partnership, the joint creditors must look to the joint fund, and the separate creditors to the separate property, for the payment of their claims. But, in case of a surplus in either fund, the creditors of the other class may participate in such surplus. Where the separate property of either partner proves insufficient for the payment of his individual debts, and there is a surplus of the joint property after payment of the firm debts, such separate creditors may resort to the

[1] 1 Mer. 575.

[2] 3 You. & Coll. 625.

the firm, the balances of the customers of the old partnership were transferred from the books of the old firm to those of the new, without any special agreement as to the manner in which the particular payments made by the customers were to be applied, but under a general

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share of the partner thus indebted to them, in such surplus. In this case, then, the firm property must be applied in the discharge of the firm indebtedness, before it can be applied to pay the debts of the individual members of the firm, and the separate property of each member of the firm must be left as primarily liable to the payment of his individual debts, unless specific liens may have been acquired on each class of property.

It then follows that the decree of Baxter, Crosier & Wempel, for their mechanics' lien, was properly first paid out of the joint fund, as it was a joint debt, and became a prior specific lien on the firm property.

The court below finds that the Nances executed a mortgage on the mill property, and the same was recorded before Rainey purchased a third of the same. It, therefore, became a second specific lien on that property, and if not satisfied, it was entitled to payment next in order to the mechanics' lien. And as the mortgage to Brahm & Green was the next specific lien in the order, it is entitled to be next paid out of that fund, so far as the money is adequate to that purpose, and that the balance of their mortgage debt should be a prior lien on the unsold lot. Of this, there can scarcely be a doubt. The mortgage was given by the firm, on property held by the members for firm purposes, and only used or designed for the use of the business of the firm, and must be regarded as firm property, and primarily liable to the debts of the firm. As to their debts, however, not secured by mortgage, they are on the same footing as other creditors of the firm having no specific liens, and must share with them in the general fund in its payment.

We now come to consider the question, whether a separate creditor of one member of the firm may acquire a specific lien on the interest of such partner in the firm property, to the exclusion of firm creditors, who have not acquired such a lien. It is a familiar rule of law that one partner cannot appropriate the property or funds of the firm for the payment of his individual debt. It is held to be a fraud upon the other partners, and if the vendee or creditor can be held chargeable with notice, the sale or payment will be held void. And it is for the reason that the other partners have a superior lien on the partnership funds, and may insist that they shall be applied to the payment of the partnership indebtedness, and other firm purposes. The Nances could not, therefore, have sold the firm property to pay their individual debts.

The law now seems to be well settled, that an execution may be levied upon the interest of a partner in the firm property, and it may be sold for the payment of the judgment. But the purchaser only acquires the interest of the debtor, subject to the settlement of the debts and liabilities of the firm. He can only hold such interest as the partner has on a final settlement and account of the affairs of the firm, and the rights of the partners on such accounting. It is also a rule that the representatives of a deceased partner only take the interest that the deceased had in the firm on a final settlement of its affairs. In all these cases equity holds the lien of the other partners to have the joint property applied to the payment of the firm indebtedness superior to that of the vendee, the purchaser under the execution, or the title which the law casts upon the legal representatives. If, then, the law will not permit a partner, as against his copartners, to apply the firm property to his individual indebtedness, or a legal sale, or the title by administration, to divest them of title, we are at a loss to understand how such a partner may produce such a result by mortgage, pledge, or otherwise. To so hold would be to permit that to be done indirectly, which the law has prohibited from being done directly. This doctrine fully accords with the rule announced by Story on Part., §§ 132 and 263, and the authorities there cited. It follows that Cushman, by the levy of his execution, did not, as against Rainey, acquire a superior lien, or the right to have the interests of the Nances in the firm property applied to the payment of their individual debt to him. He only, by the levy, acquired a prior lien to their other separate creditors to their share of the fund that should remain after all the firm debts should be paid, and Rai-

understanding that the new house was to be responsible for the debts due from the old house. The new house having appropriated in their own favor certain payments made by the customers since the change in the firm had taken place, instead of appropriating them in liquida-

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ney should receive his share of the surplus. All the creditors of the firm hold, through Rainey, a superior equity to him, or any other of their separate creditors to have their debts paid out of the remainder of firm assets, after paying the specific liens first, either in whole or *pro rata*. The same is true of the levy under the execution in favor of Shipley, on the interest of the Nances in the firm property, which is a junior lien to the levy of Cushman's execution. It is, however, contended that Cushman's levy ceased to be a lien, because a sale was delayed some months after the certificate of levy was filed with the recorder. We see no grounds for so holding. The statute has declared that the filing of the certificate of levy, under an execution from a foreign country, with the recorder, shall create a lien on real estate. The law is silent as to the duration of such a lien, but it is only reasonable to suppose that such lien was intended to have the same, and no greater, effect than the lien of the judgment, had it extended to and embraced the land thus levied upon under the execution. It is but reasonable to hold that such a lien would continue for the period of seven years from the time when the judgment became a lien, and no longer. Tenney v. Hemenway, 53 Ill. 97. Cushman's levy, then, became a lien on the interest of the Nances after the payment of the firm debts, and, so far as we can see, it still remains. And Shipley's levy on their interest in the personalty became a lien, subject to the payment of the firm debts and what should remain to them on a final accounting with Rainey, with the same limitations to which Cushman's is subject. After these liens are satisfied out of the portion the Nances are entitled to receive on a final accounting with Rainey, if any portion of their share of the assets of the firm shall remain, then their other separate creditors might participate in whole or *pro rata*. A question has been raised whether Rainey is entitled to be reimbursed for the interest he had in the mill property, which was appropriated to the payment of the mechanics' lien and Meyer's mortgage, which was an incumbrance on the mill property when he became a partner. We have seen that, although real estate, it became firm property, and Rainey, having paid one-third of the value of the property, became the owner of one-third of the same, and held it, whether it was free from incumbrance, or the surplus over and above the incumbrances existing when he received his deed. In equity, he held a third interest in the property, as against the Nances and their creditors, subject, however, to the payment of all subsequent firm debts. Had a dissolution taken place, and there had been no debts, on the statement of an account, Rainey would have been allowed one-third of the value of the mill property, and these prior incumbrances would have been deducted from the share of the Nances, and their creditors would have no claim on the share of Rainey. So, after the firm debts are paid Rainey is entitled to receive, out of the fund remaining, his share, without deducting from it any portion of the decree for the mechanics' lien, or Meyer's mortgage, before the separate creditors can participate in the share of the Nances. Rainey, to the extent of his third interest in the firm property, must be considered as a creditor of the firm, whose debt is deferred to all the other creditors of the firm, but preferred to the separate creditors of the Nances."

In Holme v. Hammond, L. R., 7 Ex. 218 by articles of partnership, T. F., W. F. and S. agreed to carry on the business of auctioneers in partnership for seven years; they were to contribute capital and to share profit and loss equally, and, if either died during the partnership term, the surviving members of the firm were to continue the business, and were to pay to the personal representatives of the deceased partner the share of the profits to which he would have been entitled if living. T. F. died during the partnership term. At the time of his death the firm had no capital, except office furniture and fittings, worth about 100*l*. They had in their hands a sum of between 400*l*. and 500*l*., which was the proceeds of debts due to a former firm in which T. F. was a member, and left in the hands of the new firm for collection; and this sum belonged beneficially to T. F.; T.

tion of the balances due from the old firm, Lord Abinger, C. B., overruled the Master's report, which allowed of such application.

Where a person appoints his copartner to be his executor in India, the executor in passing his accounts before the Master is entitled,

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F. was also entitled in respect of his share of profits, beyond the amounts which he had drawn, to a sum of about 200*l*. After the death of T. F., the surviving members of the firm continued to carry on the business, to collect the debts due to the old firm and to earn profits. The executors of T. F. never interfered in the business, but they claimed, under the articles of partnership, the share of profits to which T. F. would have been entitled if living. No settlement of accounts in respect of T. F.'s interest in the partnership business was made between his executors and the surviving partners. Sums of money, amounting in the whole to about 625*l*., were from time to time paid by the firm to the executors; these payments were made generally, and not on any particular account. After the death of T. F., the firm were employed by the plaintiff to sell property; they sold the property and received the proceeds, but did not pay over the same to the plaintiff. In an action brought (after the death of S.) against the executors of T. F. and W. F., held, that the executors of T. F. were not liable as partners. In Ibbotson v. Elany, L. R., 1 Eq. 188, a partnership was formed to continue five years, notwithstanding the death of any partner, the profits to be divided annually, and before any division of profits, each partner at the end of each year to be credited with interest on his capital at the beginning of the year. One partner having died before the expiration of the five years, it was held that the interest on his share of capital was apportionable, so much as accrued in his lifetime being *corpus* and the remainder income of his estate, but that his share of the profits, divided at the annual division next after his death, was all income. In Moore v. Huntington, 17 Wall. (U. S.) 417, it was held that, on a bill by the representatives of a deceased partner against surviving partners, for an account, the surviving partners should not be charged with the value of the partnership assets at the exact date of the deceased partner's death, but only with such sum as, by the use of reasonable diligence, they might have obtained for them in closing the partnership business. Nor should they be charged with the value of real estate of the partnership, the title to which is left, by the decree, in the heirs of the deceased partner. In Taylor v. Taylor, V. C. W. 28, it was held that the right of a surviving partner to the partnership assets is absolute. There is no fiduciary relation between him and the representatives of his deceased partner; but he is liable to account for the partnership assets, and, in taking such account, the statute of limitations is applicable, and that in the absence of fraud or collusion, or some other circumstance creating a privity between the parties, the only person who can file a bill against a surviving partner for an account of the partnership assets is the legal personal representative of his deceased partner.

Where articles of partnership contained a stipulation that on the dissolution of the partnership a general account should be taken, and the interest of the outgoing partner being ascertained, by agreement or by arbitration, should be paid over to him, at fixed times; and one of the partners retired and the other retained the possession of the property and continued the business, and it appeared that the parties did not agree upon the mode of carrying their stipulation into effect, and that a reasonable time was not allowed for that purpose before the filing of a bill for a receiver, an account and sale,—it was held that an account should be taken and stated upon the basis of allowing one of the partners to receive and retain the property to his use at a valuation, and to ascertain the balance of account due the other partner, and that upon the failure of the partner taking the property at the valuation, a sale of the property should be effected. Quinlivan v. English, 42 Mo. 362. After the death of one of three equal partners in the business of a flouring mill, his two survivors, without either the assent or dissent of his administrator, erected a granary which a successful continuation of the business required, and carried on the business nearly a year, under an arrangement with the administrator, without rendering any account. On a bill by the administrator for a discovery

unless he have a legacy given to him in the character of executor, to a commission of 5*l.* per cent on all the assets collected in India, including the moneys of the testator in the hands of the partnership.[1]

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and account, it was held that the partnership being dissolved, his survivors had no lawful right thereafter to expend any of its funds in the conduct of the business, however necessary; and that in stating the account the survivors should disclose the state of the stock as it was at the death of the partner, and the proceeds thereof up to the time of rendering it; that each surviving partner should be charged with what he had failed to bring in to the partnership, or had drawn out more than his just proportion; that each be allowed whatever he had advanced to the partnership, and the balance remaining be divided into three equal parts, one equal part to be accounted for to the complainant, and two be retained by the two survivors. Remick v. Emig, 42 Ill. 342. In Wood v. Scales, L.R., 1 Ch. 369, the articles of partnership between A and B provided that they should carry on business "for the mutual and common benefit of the partners, and risk of profit and loss in equal shares." A's capital to be 750*l.*, B's 1,500*l.*, the capital of each to carry interest at 5*l.* per cent, to be allowed yearly, before making up accounts. Sums brought in by either above those amounts to bear interest at the same rate, payable before any other interest, and to be withdrawable at three months' notice. The partners were to be at liberty to draw certain sums on account of their shares of profits. The remainder of each partner's share of profits to be added to his capital, and bear interest at 5*l.* per cent, to be paid before division of net profits. On dissolution, after payment of debts, "the remaining capital, stock, moneys, and credits, belonging to the partnership shall be divided, or received, or taken by the partners according to their respective shares or interests therein." On dissolution, the capital standing to A's credit was not much increased; that of B's greatly so, partly by accumulation of profits, and partly by cash brought in by him. After paying debts, the assets were insufficient to replace the capitals in full. It was held that B should be repaid with interest the additional capital brought in by him in cash, and the residue should be divided between the partners in proportion to their capitals.

The mere fact that one partner has funds belonging to the firm in his hands, does not necessarily entitle the other to an accounting. Thus, in a suit by one partner against another for the settlement of a partnership and partnership accounts, after dissolution, where it appears that a large amount of the partnership debts and liabilities are unpaid, and for some of which there are judgments against the partners, and that one of the partners has collected more of the partnership funds than the other, ordinarily it is error for the court to decree personally for the money so collected, or any part thereof, in favor of one partner against the other, until the payment of the partnership debts are first provided for. Generally, each partner has the right to apply any of the partnership moneys in his hands to the satisfaction of the partnership debts. But the court may, in a proper case, direct a partner who has partnership moneys in his hands to pay the same into court to be applied to the payment of the debts, and in his relief or otherwise, as may be just. Carper v. Hawkins, 8 W. Va. 291. Two partners agreed that the partnership should be dissolved and the business closed, and that the partnership accounts should be considered and taken as if the partnership had never existed, and that the amount already received by one partner from the partnership should be his compensation paid by the other partner to him as an employee, and that the other partner should collect the debts due the firm, and pay the debts due by the firm, and the agreement was acted on. It was held that the partner who received the compensation as an employee had no further interest in the partnership accounts, and could not maintain a suit for an accounting. Wagner v. Wagner, 50 Cal. 76. A valid ground for an accounting must exist. Thus on a bill brought by a partner against his copartners for account and settlement as to a branch of the business which had been discontinued, and in respect to which the partnership had been dissolved, and also for a share of profits in a second branch of the business, not discontinued but in active progress, and in respect to which the partnership still

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[1] Cockerell v. Barber, 1 Sim. 23.

Principles relating to accounting.

SEC. 337. In a recent case in New York the following rules were laid down on the subject of accounting. In taking or stating the final accounts of a copartnership it is to be escertained —

1. How the firm stands as to non-partners, including coadventurers.

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subsisted, the jury having found, in effect (and this finding being supported by the evidence), that the suit, when commenced, was groundless as to both branches of the business, a verdict in complainant's favor for a share of the profits, which, pending the suit, accrued from the latter branch was held illegal, more especially as the bill did not seek, nor the verdict provide for a dissolution of the subsisting partnership, a final settlement of the accounts, a discontinuance of the business. So on a disposition of the assets. 1875, Wadley v. Jones, 55 Ga. 329. A bill in equity was brought to have a certain purchase declared a joint one, and for a share of the profits realized by the defendant, the bill also showing some other partnership dealings. It was held that it was not error to dismiss the bill on finding the question of the purchase for joint benefit against the complainant, instead of retaining it for an account, where the proofs taken failed to show any thing due to the complainant. Adams v. Gaubert, 69 Ill. 585. Where a partnership intrusts money to a member of the firm to be used in the partnership business, and he, without the fnowledge or consent of his copartners, korms a new partnership relation with another person to engage in like business, and pays over the money to the new firm, whereby it is lost, he thereby becomes liable to account to the members of the old firm, as for money converted to his own use. Reis v. Hellman, 25 Ohio St. 180. But a partner, who has withdrawn assets and invested them in a new enterprise without his copartners' consent, is chargeable only with their proportionate share of the profits thereof. 1873, Brown v. Shackelford, 53 Mo. 122. An attorney, who is also a partner of a mercantile firm, is not entitled to charge commissions for collecting the notes and accounts of that firm as against his copartner, in the absence of any special agreement to that effect; the legal presumption is that he was to collect the debts due the firm, as partner, for the benefit of the concern. Vanduzer v. McMillan, 37 Ga. 299. A partner defrauded of his rightful portion of the partnership receipts by false entries, etc., of his copartner, is entitled to a dissolution and accounting, no matter if the term has not expired. Cottle v. Leitch, 35 Cal. 434. All purchases made by one partner for partnership purposes inure to the benefit of the partnership, although made with his private funds, and the concern must account to him only for the actual cost, and not for its real value. Thus, in an action for an accounting between the parties as partners in the lumbering business, it appeared that shortly after the formation of the partnership, the plaintiff purchased a tract of land, under a sale for taxes, for a trifling sum. He afterward conveyed an undivided half of the same to the defendant, on condition that he should loan the plaintiff $800 for a year, and furnish money to carry on the partnership business. The referee found that the actual value of the land was $1,000, and he credited the plaintiff this amount in the partnership accounts. It was held that as the land had cost the plaintiff only a trifle, and he was willing to put it into the firm upon the terms stated by him, it was erroneous to credit him with its actual value. Leonard v. Martin, 52 Barb. (N. Y.) 113. But where one of a firm purchased in his own name a lot and leased it to the firm, and the firm erected its oil refinery thereon, it was held that his copartners could not, in an equity proceeding, afterward claim that the lot should be treated as firm property, although he had acted in bad faith in procuring the conveyance to himself rather than to the firm,—his act having been long acquiesced in by the others, without an investigation of the false and flimsy reason he had assigned therefor. Slemmer's Appeal, 58 Penn. St. 168. Where for the convenience and by the consent of the firm, one partner deposits the funds of the firm in his own name and to his own account, and they are charged upon the firm books to such partner, in order to indicate in whose hands they are, the firm, and not the partner holding the funds, must

2. What each partner is entitled to charge in account with his copartners, each being entitled as against the other to every thing he has advanced or brought in as a partnership transaction, and also to what the other has not brought in, or has taken out more than he ought; and then —

bear the loss resulting from the insolvency of the bank in which they were deposited. Campbell v. Stewart, 84 Ill. 151.

In Meserve v. Andrews, 106 Mass. 419, the plaintiffs sublet part of their store to the defendant, to carry on a certain business. Afterward an agreement was entered into whereby the plaintiffs were to assist the defendant in his business, the latter to assume the whole rent, furnish the capital, defray the expenses, and pay the plaintiffs one-fourth of the net profits. It was held that, in ascertaining the profits, the defendant was entitled to a credit for loss of stock by fire, but not for expenses incurred, without the knowledge of the plaintiffs, in defending a criminal prosecution for carrying on the business, which did not arise through any act directly or indirectly of the plaintiffs. In Newdecker v. Kahlberg, 8 Daly (N. Y. C. P.), 407, it was held that an accounting between copartners is to be governed by the special provisions of the copartnership agreement; and the right to a return of capital invested by each partner is only to be destroyed by express stipulation to the contrary. Unless waived or extinguished by express agreement, the return of capital or of other means furnished by each party for use and employment in the business for their mutual advantage, although a debt of a secondary character, is, as between them, an obligation of the partnership which should be discharged before any final distribution of the profits. Where the original articles of copartnership contain no such provision, it is not proper, in taking an account, to charge each partner with interest on his individual account, and to credit each one with interest on moneys paid in, unless a subsequent agreement to that effect is clearly and satisfactorily proved. But an agreement between partners that interest shall be computed on each one's account, and on the moneys paid in by him, will not justify computing interest on the individual accounts from the dates of the several charges up to the close of the business, independent of whether the amounts drawn out exceed the just share of the profits to the respective dates, due to several partners. Such an agreement will be understood to mean that each partner shall be charged with the interest on his individual account in excess of his share of the profits, and credited with interest on moneys advanced over and above his indebtedness to the firm. Moss v. McCall, 75 Ill. 190. Two persons made an "arrangement" to carry on the cabinet making business, one to furnish the capital and receive two-thirds of the profits, the other to superintend the business and to have one-third of the profits. They so conducted their business and kept their accounts through a series of years as to show that they intended by their arrangement to divide the net profits of the business. It was held that losses by fire of furniture, manufactured under the arrangement, must be deducted from the profits before either party would be entitled to his share thereof. There being no provision as to the time when the accounts should be settled between the parties, and no settlement having been made until the close of the business, the profits must be ascertained from a full settlement of the whole business as it stood at the close. Gill v. Geyer, 15 Ohio St. 399.

Partners *inter sese* are trustees as to firm property held by them after dissolution, but the trust is implied, not express. Hence, actions between them, relating thereto, are subject to the statute of limitations. The statute does not necessarily begin to run from date of dissolution. Its operation commences with a breach of trust by the partner having partnership property or accounts in charge. And as a general rule the breach takes place after a failure to account and settle within a reasonable time after dissolution, and must be ascertained from the particular circumstances of each case. Where an account has been stated between them at the close of the partnership, the statute, as to the items embraced therein, runs from the time of the statement. Where mutual arrangement, after dissolution, delegates to one member the collection of debts due the firm, no cause of action accrues against him in favor of his copartner, nor does the statute begin to

3. To apportion between them the profits to be divided, or the losses to be made good, and ascertain what, if any thing, any partner should pay to the other, in order that all cross claims should be settled.

It was also held that, in the absence of express provisions in the copartnership agreement on the subject, each partner was entitled to a return of the capital invested, and that as between them it was an

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run, so long as a faithful discharge of that duty postpones a final settlement. Condrey v. Gilliam, 60 Mo. 86. There can be no liability from one partner to another by virtue simply of the partnership relation, which can be made the subject of set-off or counter-claim, until there has been a settlement; and where the answer sets up no connection between the debt sued on and the partnership, and makes no allegation of the insolvency of plaintiff or of any other fact calling for the interposition of equity, the court will not in such action decree a dissolution of the partnership and settlement of partnership accounts. Leabo v. Renshaw, 61 Mo. 292. One cannot sustain action against his partner for an account and recovery of profits made in Confederate money transactions; nor can such an action be sustained in respect of profits which may have been realized on dealings of a lawful character, when the latter were so blended with Confederate money dealings that it is impossible to so separate the one class from the other as to give effect to the legal transactions alone. Lane v. Thomas, 37 Tex. 157. See to the contrary, Pfeiffer v. Maltby, 38 Tex. 523. In Smith v. Hazleton, 34 Ind. 481, three persons became partners. The capital stock agreed upon was nine thousand dollars. The partners were each to pay three thousand dollars. Two of the partners paid in substantially their shares of capital stock. The other paid one-half of his stock, and agreed to pay the residue at the end of twelve months. The partners purchased real estate, machinery, and materials, and engaged in business. The partnership debts and liabilities were paid out of the personal property belonging to the firm. The real estate was left unincumbered of partnership debts. The partners sold the real estate belonging to the firm. It was held that the partner who had paid only one-half of his stock was not entitled to share equally with his copartners in the partnership assets, but only in proportion to the rates that the sum paid in by him bore to the whole capital employed.

In a proceeding to obtain an account of partnership affairs, all the partners are necessary parties, and a partner, though not a party of record, cannot testify in reference to partnership transactions, his copartner being dead and his executors being parties to the cause. Although it is the general rule, where a partnership is alleged and admitted, to order an account of the partnership affairs, as a matter of course, unless the right of the complainant to relief is barred by the lapse of time, such account should not be ordered where it manifestly appears, from the proof, that the party asking the interposition of the court has no real cause of complaint, and that no good purpose or end can be accomplished by directing an account to be taken. McKaig v. Hebb, 42 Md. 227.

Distribution of capital on dissolution.—Two persons entered into partnership for manufacturing purposes, contributing to the capital stock in certain unequal amounts. The partner who contributed the smaller amount was to take charge of the business and devote to it his personal labor; the other was not to give his personal attention to the business. At stated periods an account was to be taken, and the profits and losses were then to be shared equally, the agreement being silent as to the relative interests of the partners in the capital stock, and no definite time being fixed for the continuance of the partnership. After suffering loss, the partnership property was sold, and the debts having been paid, a surplus remained. It was held in a suit by one of the partners against the other, to recover the plaintiff's share of such surplus, that the partners were entitled to share therein, not equally, but in proportion to the amounts contributed by them to the capital stock. Jackson v. Crapp, 33 Ind. 432.

obligation of the partnership to pay and discharge it before making any final distribution of the profits.[1]

Where three persons entered into a partnership and by the terms of the agreement each was to furnish $3,000, and two of them furnished their share of the capital stock, but the other paid in only one-half of the stipulated sum, it was held that the partner who had not paid his share was not entitled to share equally in the assets of the partnership with the others.[2]

So, where the plaintiffs sublet part of their store to the defendant to carry on a certain business, and afterward an agreement was entered into between them, whereby the plaintiffs were to assist the defendant in his business, the latter to assume the whole rent, furnish the capital, defray the expenses, and pay the plaintiffs one-fourth of the net profits, it was held that, in ascertaining the profits, the defendant was entitled to a credit of a loss of stock by fire, but not for expenses incurred without the knowledge of the plaintiffs, in defending a criminal prosecution for carrying on the business, which did not arise through any act directly or indirectly of the plaintiffs.[3]

And again it has been held that, when the original articles of copartnership contain no provision in reference to accounting, it is not proper in taking an account to charge each party interest on his individual account or to credit each one with interest on moneys paid in, unless there is a subsequent agreement to that effect. And that an agreement that interest shall be computed on each one's account, and on the moneys paid in by him, will not justify computing interest on the individual accounts from the dates of the several charges up to the close of the business, independent of whether the amounts drawn out exceed the just share of the profits to the respective dates, due the several partners. Such an agreement will be understood to mean that each partner shall be charged with the interest on his individual account in excess of his share of the profits, and credited with interest on moneys advanced over and above his indebtedness to the firm.[4]

And where four persons entered into a partnership, and by agreement C was to contribute to the business $25,000 and "such time as he may be able to give," and receive interest on the $25,000; and W $50,000, and all his time, receiving interest on the $50,000; and B and S were

[1] Neudecker v. Kohlberg, 8 Daly (N. Y.), 407; see, also, Seighortner v. Weissenborn, 20 N. J. Eq. 172; Pearce v. Pearce, 77 Ill. 284.

[2] Smith v. Hazelton, 84 Ind. 481.

[3] Meserve v. Andrews, 106 Mass. 419.

[4] Moss v. McCall, 75 Ill. 190.

to give all their time to the business; and each partner was to receive one-fourth of the net profits; and the business resulted in a loss, and B became insolvent, it was held that the capital constituted a debt of the partnership to which all were bound to contribute equally, and that the loss was to be borne equally by C, W, & S.[1]

Where a partnership owns real estate, a surviving member is something more than a mere tenant in common with the representative of the deceased. For the purpose of winding up the affairs of the firm, and in relation to the real estate, he is also a trustee, and is accountable for the use and occupation of the landed estate of the partnership.[2] And as such trustee he cannot purchase the partnership property on a sale thereof at his own sale.[3] And where the surviving partner collected demands of the firm, and took therefor Confederate money, he was held liable to the representatives of the deceased, in lawful money, as it was his duty to collect the same in lawful money.[4] So, a partner who neglects and refuses to perform personal services which he has stipulated to render the partnership, should account to the firm for the value of those services in the settlement of the partnership accounts. One who is to receive a percentage of the business may maintain a bill in equity for an account thereof.[6]

Matters to be considered in taking an account.

SEC. 338. In taking the partnership accounts, it is mainly to be considered what was the value of the joint property, and what the amount of the joint debts at the time of the dissolution ; what was the share of the retired deceased or bankrupt partner in the joint property; whether, and to what extent, the joint capital has been employed, or joint debts incurred, since the dissolution ; whether any of the joint property *in specie* has been sold since the dissolution; if so, what the gross amount, and what the interest of the profits; on the other hand, whether any of the joint property *in specie* having been sold, the profits have been applied to the purchase of other property *in specie;* and generally, whether, and to what extent, the joint property has been traded with since the dissolution. These, with many other considerations bearing on each particular case, must be duly weighed in the arrangement of complicated partnership accounts. And it may here be remarked that the account is founded on the

[1] Whitcomb v. Converse, 119 Mass. 38.
[2] Smith v. Walker, 38 Cal. 385.
[3] Nelson v. Hayner, 66 Ill. 487; see, also, Renfrow v. Pearce, 68 id. 125.
[4] Succession of Wilder, 21 La. An. 371.
[5] Marsh's Appeal, 69 Penn. St. 30; 8 Am. Rep. 206.
[6] Bentley v. Harris, 10 R. I. 434.

same principles, in whatever manner the dissolution may have taken place — whether, therefore, the affairs are to be adjusted between the remaining and retiring partner, the surviving partner and the executors of the deceased partner, or the solvent partner and the assignees of the bankrupt partner.

How the value of joint property is to be ascertained.

SEC. 339. In estimating the value of the joint property at the time of the dissolution, a question naturally arises, what *species* of property may constitute the joint property of a partnership? That question, however, inasmuch as it involves the general outlines and principles of the contract of partnership, has been discussed in a former chapter. Enough, perhaps, has been already said to show that not only movable, but real property, of whatever tenure, together with the good will of the partnership premises, may be comprised in the partnership stock. Another question, however, may here be noticed, namely, whether, upon dissolution of partnership, the right of a partner or his representative to call for a sale of the joint property would in any manner be affected by considerations as to the *nature* of that property. Now, although the cases in which a sale has been decreed have generally related to real estate, and, although it has been said *arguendo* that partnership property which is capable of a division ought not to be sold, yet it seems clear, upon authority as well as principle, that, whatever be the nature of the property, if it can be shown that a settlement of accounts on the footing of a general sale would be most beneficial to the parties, such a sale will be decreed. Thus, the household goods, furniture, etc., of a house, may be decreed to be sold as well as the house itself; and where a house which is partnership property is decreed to be sold, and several years have elapsed since the dissolution, the master will be directed to take an account of the particulars of the partnership property which was in the house *at the time of the dissolution*, and of the value of the property at that time, and to inquire whether any part of that property still remains in the house.[1]

Good-will, value of, how ascertained.

SEC. 340. But whatever may be the rule respecting the *chattels* of the partnership, which are certainly of a divisible nature, it is clear that of a privilege attending the partnership, which is not of a divisible nature, a court of equity will decree a sale. Thus, although the

[1] Nerot v. Burnand, 4 Russ. 261.

good-will of a trade is not a commodity upon which any definite price can be put,[1] yet it will be considered to enhance the value of the

[1] The partnership property consists of the original stock, and the additions made to it in the course of trade, and if the trade be carried on after the dissolution of the partnership, by one or more partners with the joint capital, they must account for the profits. Crawshay v. Collins, 15 Ves. 218; 1 Jac. & Walk. 267; 2 Russ. 325; Brown v. De Tastet, 1 Jac. 284; 4 Russ. 126; Featherstonhaugh v. Fenwick, 17 Ves. 298; Wedderburn v. Wedderburn, 2 Keen, 722, 4 Myl. & Cr. 41; Stoughton v. Lynch, 1 Johns. Ch. (N. Y.) 470; Long v. Majestrie, id. 395. If one partner pay a joint debt by a compromise with the creditor, the creditor cannot authorize him to keep the demand alive, and enforce it in the name of the creditor against the other partner; see Page v. M'Crea, 1 Wend. (N. Y.) 164. Real estates, as we have seen, purchased with partnership funds for partnership purposes, or brought into partnership by a partner under a certain agreement, are a partnership property, and it is the same thing, although they are conveyed to one partner. Smith v. Smith, 5 Ves. 189; Alder v. Farnace, 3 Swanst. 489. And a lease, a renewal of which has been obtained clandestinely by a partner, is partnership property. Featherstonhaugh v. Fenwick, 17 Ves. 298. Mines also are for many purposes partnership property. Fereday v. Wightwick, 1 Tam. 250; Jeffreys v. Smith, 1 J. & W. 298. A trade-mark has been held to be partnership property. Hine v. Lart, 10 Jur. 106. But property which may belong to one or more members of a firm but not to all, or in other words, the ownership of which is not co-extensive with the partnership, is not partnership property. Thus, if a partnership consisting of three partners were to sustain an accidental loss as by fire, and a gift were to be made to two of the partners in compensation of their loss, such gift would not be partnership property. 2 Swanst. 571, 572. And where two American citizens residing at Baltimore, and a French subject residing at St. Domingo, were in partnership, and owners of certain ships captured by British cruisers, and the commissioners under the 7th article of the treaty of commerce concluded in 1794, between this country and America, for awarding compensation to American subjects who had suffered losses by capture, for which they could obtain no redress in the ordinary tribunals, awarded, in compensation of the captured ships of the partnership, certain sums to the two Americans, with express exclusion of the French citizen, as an alien enemy; it was held that the sums so awarded were not partnership property, and that the creditors of the partnership had no claim on them, as against the separate creditors of the Americans. Campbell v. Mullett, 2 Swanst. 551. Thus also, in the recent case, Rowley v. Adams, 8 Jur. 994, already cited, where a father and his son H carried on a partnership business in a freehold house, purchased with partnership funds for partnership purposes, but on the admission of another son G, the partnership payed a rent for the house to the father and H, it was held that though previously to the admission of G, the house was to be considered as personalty, yet subsequently thereto it became real estate; in other words, that it ceased to be partnership property. Where a personal office or employment is purchased with the partnership funds for the benefit of the partnership, the partner in whose name it is purchased is not necessarily a trustee of the profits of the office for the other partners, after the term of the partnership has expired, unless it is clear that the intention was to purchase such office for the life of the party. Clarke v. Richards, 1 You. & Coll. 351. A bond given to one partner expressed to be for a debt due to the company belongs to the company. Block v. Bird, 1 Hayw. (N. C.) 274. A partner took money out of the funds of one partnership and carried it to those of another partnership, of which he was a member, and the latter firm become bankrupt; it was held that it could not be followed specifically, in the hands of the assignees, so as to give the former partnership a preference over the other creditors of the bankrupt partnership. M'Cauly v. M'Farlane, 2 Desau. (S. C.) 239. The several part-owners of a ship are not partners, but tenants in common. Scotlin v. Stantry, 1 Dall. (Penn.) 129; U. S. Co. v. Scott, 1 Johns. (N. Y.) 106. Vessels may, like other chattels, be held in strict partnership, with all the control in each partner incident to commercial partnerships. Nichol v. Mumford, 20 Johns. (N. Y.) 611; Lamb v. Durant, 12

effects on which it is attendant, and will, therefore, be included in a decree for the sale of those effects. Moreover, as it cannot be taken

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Mass. 54; Phillip v. Burryman, 15 Me. 425. Owning a ship employed in trade by several indistinct shares constitutes a partnership. Seabrook v. Rose, 2 Hill's Ch. (S. C.) 555; S. P., 8 La. 267; Vegers v. Sainet, 13 id. 303. The stock of the partnership is only to be employed in augmentation of the trade, for the mutual benefit of the partners; neither of them can make use of it for his private advantage. Therefore, if one partner borrows money of the other on his note, he shall pay interest, though he had more money in the stock than he borrowed. Stoughton v. Linch, 1 Johns. Ch. 470; 4 M'Cord, 590; Lesseps v. Architect Co., 13 La. 415; Beacher v. Grubaum, Mosely, 3. In regard to the question whether what is called the "good-will" of a trade is partnership property, which can be valued upon a dissolution of the partnership, Sir L. Shadwell, V. C., said in Lewis v. Langdon (7 Sim. 421): "It seems to me that if the good-will is to be considered as a salable article which belongs to the partnership, then this consequence must follow, namely, that the surviving partner must be under an obligation to carry on the trade for some time after his partner's death, in order that the thing which is said to be salable may be preserved until it can be sold. If a partnership were carried on between A and B, under the name of Smith & Co., and the surviving partner chose to discontinue the business and to write to the customers and say that his partner was dead, and that the business was at an end, the effect would be that that which is said to be salable would cease to exist. Now what power is there in a court of equity to compel a partner to carry on a trade after the death of his copartner, merely that, at a future time, the good-will, as it is called, may be sold? It is plain that, unless there is such a power in this court, it must be in the discretion of the surviving partner to determine what shall be done with the good-will, and if that is the case, it must be his property. I cannot but think, when two partners carry on a business in partnership together under a given name, that, during the partnership, it is the joint right of them both to carry on the business under that name, and that upon the death of one of them the right, which they before had jointly, becomes the separate right of the survivor." And see the observations of Sir Thomas Plumer, V. C., in Harrison v. Gardner, 2 Madd. 219. Good-will is defined by Lord Eldon to be "the probability that the old customers will resort to the old place." Cruttwell v. Lye, 17 Ves. 346. See Story on Part. And an injunction was granted to restrain the executor of the deceased partner from using the firm name until the right should have been tried at law. The parties afterward came to a compromise and the action was not tried. It may, therefore, be concluded that, unless the executor of the deceased partner can compel a sale of the stock and the premises where the business was carried on, the surviving partner will be entitled to use the name of the old firm. In Hammond v. Douglas, 5 Ves. 539, Lord Loughborough "was clearly of opinion that, upon a partnership without articles, the good-will survives, and a sale of it cannot be compelled by the representation of the deceased partner; being the right of the survivor, which the law gives him to carry on the trade, it is not partnership stock, of which the executor can compel a division." But Lord Eldon expressed a doubt of this doctrine in Crawshay v. Collins, 15 Ves. 227. But where a retiring partner contracts not to carry on the same trade or business at all, or not within a given distance, in this sense "good-will" is an interest which may be valued and assigned to the remaining partner. Kennedy v. Lee, 3 Meriv. 452; Harrison v. Gardner, 2 Madd. 198; Bryson v. Whitehead, 1 Sim. & Stu. 74; and see the cases cited 1 Sim. & Stu. 77 n. (b.) See, also, the very recent case of Rolfe v. Rolfe, 10 Jur. 61, V. C. of England; and Whittaker v. Howe, 3 Beav. 383, in which last case Lord Langdale, M. R., after considering the question what extent of restraint ought to be considered as reasonable in that particular case, and expressing his agreement with the Court of Common Pleas in Horner v. Graves, 7 Bing. 745, that in such cases "no certain precise boundary can be laid down within which the restraint would be reasonable, and beyond which excessive," held that an agreement by a solicitor, for valuable consideration, not to practice as a solicitor within any part of Great Britain for twenty years, was valid. In

at a separate valuation, the sale will be so adjusted that an accurate notion of its worth shall be impressed upon the mind of a purchaser. Therefore, in a case[1] where very extensive partnership premises were decreed to be sold, Lord Eldon drew up an extremely minute order, declaring the limited nature of the good-will; how far it might be

this sense also of "good-will," if one partner sells his share in a partnership business to his copartner, the retiring partner does not necessarily dispose of the good-will, so as to prevent his carrying on the same business in the immediate neighborhood, unless it be made a part of the agreement, and the retiring partner be bound not to carry on the business any longer, or within a certain distance of the place where the partnership business is conducted. Kennedy v. Lee, 3 Meriv. 441. The good-will of a professional partnership belongs, in the absence of express stipulation, exclusively to the survivor. In Farr v. Pearce, 3 Madd. 74, where F, in entering into partnership with P, who was much older than F, and had established himself in business as a surgeon and apothecary, paid a premium of 2,000*l.*, and died, and after his death P sold the good-will of the business for a considerable sum, it was held on the construction of the articles that the representative of F was not entitled to a share of the money, for which such good-will was sold. "In this case," said Sir John Leach, V. C., "the articles define the interest which the representatives of a deceased partner are to take, and there is no provision which gives them the benefit of the good-will of the concern. But if the general question had arisen here, I think it would have been difficult to maintain that where a partnership is formed between professional persons, as surgeons, and one dies, the other is obliged to give up his business, and sell the connection for the joint benefit of himself and the estate of his deceased partner. When such partnerships determine, unless there be stipulations to the contrary, each must be at liberty to continue his own exertions, and where the determination is by the death of one, the right of the survivor cannot be affected. Such partnerships are very different from commercial partnerships." Upon the same principles Sir John Leach held that the good-will of a business of a personal nature, as that of attorney, is not assets in the hands of an administrator. Spicer v. James, Rolls, M. T. 1830.

[1] Cook v. Collingridge, Jac. 607. The defendants, Rowley, Mansel, and W. Cook, presented their petition in this cause, dated the 16th November, 1824, stating that, immediately after the pronouncing of the decree (see Jacob's Reports, 623), an amicable arrangement between all the parties interested had been attempted, but without success. That afterward, the Collingridges and the petitioner Cook had left a proposal with the Master for the sale of the leasehold houses, shop, warehouses, and effects of the partnership, at a valuation. That the plaintiff John Cook, had also abandoned his previous proposal to have the whole premises sold by auction, and had consented to a valuation; insisting, however, that the good-will should form a part of such valuation. That the petitioners, on the other hand, had informed the Master that if any sum was to be given for profits under the name of good-will, then they must decline the purchase altogether. That the Master had made his report, whereby he certified that if good-will was to be estimated in the valuation, it would be most beneficial that the whole premises should be sold at a valuation; but if not, then by public auction. The petition then, after charging the plaintiff with an attempt to delay the proceedings, prayed that the premises might be sold by auction, with such directions as to the Lord Chancellor might seem meet.

His Lordship ordered that, with the following directions and declarations, it should be referred back to the Master, to review his report, namely, his Lordship did declare that in this case the partnership expired by efflux-ion of time, and that there existed no obligation restraining the petitioners, or any of them, from carrying on the same business or trade as that in which they were engaged in the partnership which had expired, and forming a new establishment in the same business or trade, after the sale of the business or trade of the late partnership was made. And his Lordship did declare that there existed no obligation upon any of the part-

abridged in the hands of a purchaser by the influence of the original partners; and by what means a purchaser might be made acquainted with the probable advantages or disadvantages arising from it. Accordingly, in the printed particulars of sale, the Master inserted a notice that the old partners were to be at liberty to bid, and that no estimated value was put on any subject as good-will. He likewise inserted the amount of the preceding three or four years' profits, with the names of the customers of the concern at the time of the dissolutio

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ners to restrain them from uniting in a new partnership in the business or trade, with any other persons after such sale. And his Lordship did declare, that the claim, therefore, to have any estimated value to be put upon any subject that could be considered as described by the term good-will, could not be supported upon the same grounds or principles as those upon which a compensation or value was in this establishment received from a partner buying the share of the partner going out of the business of this establishment, and retiring from trade or business altogether. And his Lordship did declare that in this case, if the property of the then present establishment were sold, and the then present partners, or any of them, with any other persons, engaged in a new establishment carrying on the same trade or business (which they were at full liberty to do), it was obvious, that if by good-will were meant the value of the chance that the customers of partners retiring altogether would deal with those who purchased from such retiring partners, and succeeded to their establishment, a good-will of that nature could not be valued on the same principles, as the persons retiring, but not retiring altogether from trade, had also a chance of conveying the old customers with their new establishment, which must most materially affect, if it did not destroy the chance that the persons purchasing the old establishment would retain many of the customers of the old establishment. And his Lordship did declare that, on the other hand, though the value of the chance, that such customers could be restrained by those who purchased the old establishment could not be the subject of estimation, it was going much too far to hold that that chance was to be treated as of no speculative value, of none sufficient to be regarded in the sale. And his Lordship did declare that it, therefore, appeared to be reasonable, that if the partners in the old establishment were to be allowed to stand amongst the proposed purchasers of its property, in order to bring the interests to sale fairly (which interests included the real property and leasehold, and all other tangible subjects, and the contracts for building coaches, and the contracts for jobbing coaches, and any interest besides that could be enumerated as belonging to the subjects of sale, not under the term good-will), other persons proposing to buy should have as reasonably good information as the present partners, if they proposed to buy; and (in addition to the specification of articles which could be enumerated), if they were informed of the last three or four years' profits, and who were the persons that were the customers of the present concern, they might then speculate (as far as the nature of the transactions could admit of their speculating prudently), what they would give for the chance of retaining the old customers or any of them, having regard to the fact that the old partners were, or some of them were, about to engage in the same business, and might attach to their new establishment those customers, many, or some of them. And his Lordship did declare that no court could prevent the late copartners from engaging in the same business, and, therefore, the sale thereof could not proceed upon the same principles, as if a court could prevent their so engaging. And his Lordship did declare that in this case, as it appeared to the court to be circumstanced, the said valuation or estimation was or could only be that which every bidder, according to his own speculations, could fancy to be worthy of his chance of retaining old customers, and their not following the old partners or any of them into a new establishment. And his Lordship did declare that it seemed to the court also, in the circum-

Contracts.

SEC. 341. Contracts which were complete during the partnership, but the events of which, by reason of their nature, were not known at the dissolution, must of course be taken into the account, and the partners or their representatives must abide by the event. In the

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stances of this case, to be advisable to allow the old partners or any of them, or any persons interested, to bid for or propose to be buyers of the said concern. And his Lordship did order that the said Master, in reviewing the said report, should proceed *de die in diem.*

The Master by his report, dated the 4th July, 1826, having stated that he had reviewed the former report, and having set forth the particulars of the estate and effects of the copartnership, proceeded to state that two proposals had been made to him, one by the petitioners, that the whole of the property and effects should be sold by public auction in one lot, the other by the plaintiff, that the same should be sold by auction in distinct lots, some of the lots to comprise the materials of the partnership, others the benefit of the unexecuted orders, others the leases, etc.; but the Master certified, that having regard to the declaration and directions contained in the said order of 5th January, 1825, and having disapproved of the proposal to sell the premises in one lot, he was of opinion that it would be most beneficial for all parties that the said partnership property and effects should be sold by public auction, with his approbation, on the premises in Liquorpond street, in the following lots and order, (to wit), that the carriages in building, and all the unwrought materials, etc., should be sold in such lots and such order as should be recommended by A, the auctioneer, and as the said Master should approve; that, secondly, all the carriages and harness let on jobs and engagements and jobs themselves, and all benefit thereof respectively, should be then sold, each carriage and harness and the engagement respecting it in a distinct lot; and immediately after the sale of the said stock and jobs, that the leasehold houses, shops, warehouses, buildings, etc., should be sold in distinct lots; and that the declarations and directions contained in the said order should be inserted in the printed particulars of sale, to the intent that every bidder might know that there existed no obligation in the then present partners, or any of them, to prevent them from carrying on the same business after the sale; and that the then present partners, or any of them, were at liberty to bid at such sale; and that no estimated value was put on any subject as good-will; and further, that the amount of the last three or four years' profits, and names of the customers of the present concern, should be also inserted in the printed particulars, for the purpose of giving to persons proposing to purchase as reasonably good information as the then present partners had; and that the said A should previously to such sale give security to pay all the money to be received by him into the Bank of England, with the privity, etc.

The plaintiff took exceptions to this report, which was overruled. Pending the exceptions, the former petitioners, partners, presented another petition, alleging the great detriment which was accruing to the premises from the suspension of the sale, and praying that the Master's report might be confirmed and carried into execution; that they might be allowed to become purchasers of the whole or any part of the premises; that the parts to be purchased by them might be duly assigned to them; and that one-fifth of the purchase-money might be paid to them. The order was as follow:

His Lordship doth order that the sale of the estate and premises mentioned in the said Master's said report, dated the 4th day of July, 1826, be made with the approbation of the said Master, according to the mode by the said report approved, regard being had to the declarations and directions contained in the order made in this cause, bearing date the 5th day of January, 1825. And for the purpose of settling the particulars of such sale, it is ordered that the plaintiff in the first-mentioned cause, and defendants, Charles Lloyd Grey, and Maria his wife, M. G., C. G., and E. G., do, on or before, etc., exhibit interrogatories before the said Master for the examination of all the other defendants, or either of them, as to what have been the amounts of the average profits of the copartnership concern in the pleadings mentioned for the last three or four

case of Smith v. De Sylva,[1] the claims of joint adventurers to the profits of outstanding adventurers were admitted to an extent inconsistent with the general doctrine regarding the specific lien of partners. There, one of three partners, in thirds, of an adventure, having advanced only *part* of his share of the expense, and given notes for the remainder and become bankrupt, his assignees were allowed to recover, in an action against another partner, his *full share* of the profits, leaving the creditor partner to take his chance of a dividend for the notes under the commission. But Lord Tenterden has observed that the case of Smith v. De Sylva is a very entangled case; that the facts are not very clear or perspicuous, and that it is a general principle of law that the assignees of a bankrupt partner can obtain *no share* of the partnership effects, until they first satisfy all that is due from him to the partnership.[2] But it is not inconsistent with this general principle to say that, subject to a set-off at law or to an account in equity, the assignees of a bankrupt partner, or the representatives of a solvent partner, possess the interest of the *quon-*

years, and as to the names of the present customers of the said concern. And for the purposes aforesaid, it is ordered that the said parties do produce before the said Master upon oath all books, papers, and writings in their custody or power, relating to the said concern, as the said Master shall direct. And it is ordered that all or any of the said parties be at liberty to bid for the said estate and premises, or any part thereof, as they may think fit.

[1] Cowp. 471.

[2] Holderness v. Shackles, 8 Barn. & Cres. 618. The case of Smith v. De Sylva, which was an issue out of chancery, may be shortly stated thus: Hague, together with the defendants, Birnal and Lara, agreed to purchase and fit out a ship for the slave trade, at their joint expense and for their joint account and risk, in thirds; and that the other defendant, De Sylva, should have the conduct and management of fitting out the ship as ship's husband. De Sylva was at the whole expense of fitting out the ship, supplying cargo, etc., to the amount of 4,658*l*. Of this sum the defendants, Lara and Birnal, paid him their respective proportions. Hague paid only 410*l*. in cash, and gave promissory notes for the remainder. De Sylva afterward purchased a share in the ship. Before the notes became due, and many months before the event of the voyage was known, Hague became a bankrupt. The plaintiff, one of the assignees, applied several times to De Sylva to take the bankrupt's share or interest in the ship, and in the profits and risk, to himself, and to pay the plaintiffs the 410*l*. De Sylva refused this offer, but he persuaded the two other defendants to pay him their respective thirds in discharge of the promissory note, and from that time the defendants considered the assignees as interested in the share of the ship, only as the sum of 410*l*. to 4,658*l*. The assignees claimed one-third of the profits. Lord Mansfield, "The question is, what was the right of the bankrupt at the time of the bankruptcy? The bankrupt, upon paying the full amount of his share was entitled to a third of the profits, as he would have been liable to a third of the loss if the adventure had been unprofitable. When I say upon payment in full, I mean payment according to law. If he had not become bankrupt, it must have been an actual payment of the whole of his share; but as he is become bankrupt, it must now be a payment according to the distribution made by law in that case, which is a proportionable dividend with the rest of the creditors. Therefore, whether it were a profitable or a losing adventure cannot vary the right. The consequence is that the assignees are entitled to one-third of the ship and adventure in question."

dam partner in the outstanding adventures of the firm. Thus, where A, B and C engaged in an adventure in pearls, in equal shares, and A advanced the money for the purchase, and B became bankrupt, being at the time of his bankruptcy indebted to A in a much larger sum than a third of the profits of this adventure, it was held that the assignees of B might well maintain an action against A for a third of the profits, though, under the circumstances, the set-off of the defendant was allowed.[1] So, in equity, in a suit[2] instituted between the surviving partners and the executors of a deceased partner, it appeared that the firm had engaged in various adventures by shipment of goods and otherwise, which at the time of the partner's death were depending, and the result of profit or loss unascertained. After the partner's death, loss actually occurred. Lord Eldon appears to have entertained no doubt that the balance of profit and loss at the time of the partner's death was to be ascertained by consulting the result of all engagements in which the firm was then engaged, and for which it was responsible, and that the losses sustained in consequence of such engagements should be brought into the account between them and the executor.

Where the remaining partners continue in trade.

SEC. 342. Where upon the dissolution of a partnership the partnership effects are not assigned, but the remaining partners continue to trade with the stock and capital of the original partnership, the profit and loss made by such trading must be brought into the account with the original firm. Thus, in an early case, Lord Keeper Harcourt declared that where one of two joint traders dies, and the survivor carries on the trade after the death of the partner, the survivor shall answer for the gain made by this trade.[3] And by the short note of Hammond v. Douglas,[4] it appears that Lord Loughborough decided the very point. So, in Hill v. Burnham,[5] A and B being partners, A died, having by his will appointed B his executor. A's children then filed a bill against B for an account, and Lord Eldon declared that the testator's trade having been carried on after his death with his capital, the plaintiffs were entitled to the profits in proportion to the shares they were respectively entitled to in his personal estate. So, where a dissolution

[1] French v. Fenn, 1 Co. B. L. 536; 3 Doug. 257.

[2] Jackson v. Sedgwick, 1 Swanst. 468.

[3] Brown v. Litton, 1 P. W. 224. A bequest of the interest of a person's property to A for life will not entitle A to the profits of the testator's trade carried on after his decease. Fearns v. Young, 9 Ves. 549.

[4] 5 Ves. 539.

[5] 15 Ves. 220, cited; Coxwell v. Bromet, id.

of a partnership for a term of years was set aside as fraudulent after the expiration of the term, the business having been in the meantime continued, it was held that the partner who had been improperly excluded had a right to an account, not only to the end of the term, but till a final settlement should take place.[1]

Right of assignee of bankrupt partner to profits.

SEC. 343. Generally, if one partner becomes a bankrupt, and the solvent partners continue the trade with the capital of the original partnership, in the absence of any provision to the contrary, the assignees of the bankrupt partner have a right to a share of the profits until the final adjustment of the affairs of the concern, and to a share of the money to be produced by the sale of what remains *in specie* of the capital and stock, such respective shares being proportioned to the bankrupt's share of the profits before the bankruptcy. In the case of Crawshay v. Collins,[2] Collins, Noble and Boughton were in partnership together as pump and engine manufacturers, and as such they were in possession of certain leasehold premises for the purposes of their trade, besides tools, goods, etc. They also possessed patents for inventions applicable to ship pumps, and by means of such patents entered into valuable contracts with government. Of this capital Collins had three-eighths, Noble three-eighths, and Boughton two-eighths. On the 7th October, 1803, Noble committed an act of bankruptcy. A bill was afterward filed by his assignees against Collins and Boughton, praying that the plaintiffs, as assignees of Noble, might be declared entitled to three-eighth parts of the profits which had arisen, and which should arise, from carrying on the said copartnership business, and which remained unaccounted for to Noble at the time of his bankruptcy, or had accrued since; and also to three-eighth parts of the said patents, and to all profits and emoluments to arise therefrom; and that the said three-eighth part thereof might be sold for the benefit of the bankrupt's estate; an account of all dealings and transactions, etc. The first decree made in the case directed an account of all dealings and transactions in partnership between Noble and the defendants down to the 7th October, 1803, the time of Noble's bankruptcy, without prejudice to the question whether the plaintiffs, as assignees of Noble, were entitled to a share of the profits of the partnership business subsequent to the 7th

[1] Brown v. Vidler, 15 Ves. 223; 2 Russ. 340. See Brown v. De Tastet, Jac. 284; Fearns v. Young, 9 Ves. 549, Wedderburn v. Wedderburn, 4 Myl. & Cr. 53.

[2] 15 Ves. 218, 2 Russ. 325.

of October, 1803. Upon the cause being heard on further directions, another decree was made directing an inquiry, whether there were any and what profits made since the 7th of October, 1803, by any and what use or application of, or by means of the stock in trade, and capital of the partnership business. The Master accordingly made two distinct reports, of different dates, by which he found that certain profits had been made with the partnership funds by the continuing partners to certain periods which he specified, and he ascertained the amount of those profits.[1] At the final hearing of the cause Lord Eldon held that the assignees were entitled to three-eighths of the profits, from the bankruptcy of Noble until the final adjustment of the partnership affairs of Collins, Noble and Boughton. Lord Eldon —"In this particular case, I take it to be established by the Master's report, and by the other documents before me, that, whether you call it stock, or whether you call it capital, the materials, with which the business was carried on after the bankruptcy of Noble, consisted in fact of the patents, the leasehold property, the tools and utensils, etc., of the old partnership, and were materials, which, though of course admitting of fresh supplies, were, as to what I may call the *substratum* of stock, alike the property of Noble, Boughton, and Collins, at the bankruptcy. And I cannot bring myself to think that, if it be clearly made out that a business is carried on with the property which belonged to a deceased partner, for instance, by the surviving partner, and no particular circumstances occur to vary the rule, the mere accident of one man surviving the other can authorize him to say, 'I shall carry on the trade by the application of the funds of the partnership, at hazard of the funds of the partnership, and I shall have the whole of the profits, and you shall have no share of them.' It is clear, upon what is before me in this case, that the patents of Noble and Collins were, in truth, part of the partnership property; that, whether those patents were worth any thing or nothing to the world, they were the *media* through which the parties procured the contracts with the government; that these contracts were made in the name of Collins, Noble, and Boughton, and, when the payments on account were made by government, they were made by bills payable to Collins, Noble and Boughton; that the contract went on for several years, producing fruits, which I consider

[1] At one period of the cause it was referred back to the Master to state, not only what was capital, but what was Collins' stock in trade at the time of the bankruptcy. 1 Jac. & W. 270.

fruits of the partnership property; and that all the property which belonged to the partnership at the bankruptcy of Noble was employed in carrying on the trade afterward. It appears to me also to be quite clear that Noble had an interest in the partnership, and that a sum would have been found coming due to him, even if the account had been taken immediately after the bankruptcy."[1]

In the preceding case it appears that Noble had drawn and indorsed various notes and bills in the name of the firm for his private accommodation, which Collins had been obliged to pay. Hence, at the time of the bankruptcy, Collins had increased. and Noble had diminished the actual balance due to them respectively, on the adjustment of all accounts. Nevertheless, the profits accruing after the bankruptcy were calculated both for Collins and for Noble, according to their respective original shares of *three-eighths*, the proportion of the profits of the one not being increased, and that of the other not being diminished. This result seems accordant with the general principle before stated,[1] that the stock is only to be employed in augmentation of the trade for the mutual benefit of the partners. Lord Eldon at first inclined to think that these advances were not even to be considered in the light of loans from the partnership to Noble, but as transactions between Collins and Noble in their individual characters.

[1] The decree, as far as is material to the present point, was as follows: "That, having regard to all the circumstances of this case, the three-eighth parts or shares of Mark Noble in the partnership ought to be considered as continuing, notwithstanding and after his bankruptcy; and it was ordered, that the master should inquire and state to the court what profits had been made by carrying on the said business since the date of his last report of profits made therein; and that the Master should inquire and state how much of the profits reported to have been made by his former report, and of the profits which he should find to have been made since his said last report, had been made in each and every of the several years in which such profits had been made; and the consideration of interest upon what profits should appear to have been made was reserved, till after the Master should have made such report; and it was declared, that the plaintiffs, as assignees, were entitled to three-eighth parts of the profits which had been already reported by the Master to have been made, and three-eighth parts of such further profits as should appear to have been made; and it was declared, that what, upon taking the account thereinbefore directed, should appear to be coming due to the plaintiffs, on the account of the profits already made and not satisfied, and also of the profits of which the account had not been taken, and which was thereinbefore directed, and of any interest that might be ordered to be paid in respect thereof, was to be paid to the plaintiffs, or one of them, by the defendant Collins; and it was further ordered that the partnership patents, and what remained in specie of the capital and stock in trade, should be sold to the best purchaser or purchasers that could be gotten for the same; and such sale was to be with the approbation of the Master, in case the parties should differ; and it was declared that the plaintiffs were entitled to three-eighth parts of the proceeds of such sale; and the Master, in taking the said accounts, was to make the defendant all just allowances for money expended in carrying on the trade."

Where a sum is advanced as a loan to an individual partner, his profits are first answerable for that sum; and if his profits shall not be sufficient to answer it, the deficiency shall be made good out of his capital; and if both his profits and his capital are not sufficient to make it good, he is considered as a debtor for the excess.[1]

It was said *arguendo* in Brown v. De Tastet,[2] that cases of the greatest hardship had occurred, flowing from the doctrine supposed to be established by Crawshay v. Collins; that it was supposed that if the representatives of a deceased partner could establish a balance of the smallest amount against the survivor, they were entitled to a participation in the profits, and, as a consequence, to an inspection of the books, and an account of all the concerns of the partnership; that an immediate settlement was often impossible; and where there were outstanding transactions, the surviving partner could not at once ascertain whether the balance was in his favor or against him; and he was left in doubt whether he was carrying on the trade for the benefit of himself or for that of others, who might start up at a distance of time, expose all his affairs, and involve him in the utmost vexation. Lord Eldon seemed to admit the force of these observations, but thought that such results arose from unavoidable necessity. He observed—"But it is asked, will you say that in all cases where there is a partnership such is to be the consequence of carrying on the business, that the profits shall be divisible in the same way as if the partner had not died, or had not become bankrupt? I say, no: I do not mean to say that it will be so in all cases; but on the other hand, I will not deny that it may be the law in some cases. The general principle, I should say, ought to be this: that as it is quite competent to the parties to settle the accounts, and to mark out the relation between themselves as creditors or debtors, so where there is a non-settlement of the account (though a settlement may sometimes introduce great hardships and difficulties), yet those who choose to employ the property of another for the purposes of their trade, exposing it to all the risks of insolvency or bankruptcy, have no right to say that the account shall not be taken, if it can be taken without incurring difficulties which might embarrass the house to such an extent as to make it unjust to demand it."

Allowance for skill and services of survivors.

SEC. 344. In the particular class of cases which we have just con-

[1] Beecher v. Guilburn, *ante*, p. 129. [2] 2 Russ. 347. [3] Jac. 292

sidered it seems clear, particularly where the partnership has been continued for any length of time since the death of a partner, that the survivors should be allowed something in regard to their skill and personal services. This is matter peculiarly for the consideration of the Master, and will be one of those just allowances which the decree usually directs him to make to the parties, the extent or necessity of which the court does not usually settle beforehand, it not being in the ordinary course for the court to say, in the first instance, what is a just allowance.[1]

Where, however, by articles of copartnership the children are to succeed to the share of their parent, the surviving partner is not entitled, unless the articles say so, to an allowance for his management, time, or labor in carrying on the trade. For as he has agreed that the partnership shall continue beyond the death of his copartner, his management after that event is in fact voluntary.[2] But he will be allowed expenses *bona fide* incurred since the death of his copartner, under an erroneous belief that he was the sole proprietor.[3]

Survivor's rights and powers.

SEC. 345. On the death of one of two partners, the survivor has a right, in the absence of partnership stipulations to the contrary, to control the real estate belonging to the partnership until the partnership debts are paid and the partnership matters finally settled; and until such time the widow of the deceased has no separate share in the property.[4]

In relation to compensation to the surviving partner it has been held that, where the firm was engaged in manufacturing implements of war, the survivor continuing the business was entitled to compensation for his personal services, furnished with the assent of the administrator of the deceased, to finish existing contracts with the

[1] Jac. 294. The court, at least, will decline to take this course in an order made upon exceptions not referring to the particular point, though, perhaps, in an original decree, it would direct the attention of the master to the equity in question. Id.

[2] Burden v. Burden, 1 Ves. & B. 170.

[3] Id.

[4] Cobble v. Tomlinson, 50 Ind. 550; Barry v. Briggs, 22 Mich. 201; Daly v. Ericsson, 45 N. Y. 786. And they have power to sell and convey real estate of the firm, without regard to whether it is necessary to pay the debts of the firm or not. Solomon v. Fitzgerald, 7 Heisk. (Tenn.) 552; McAlister v. Montgomery, 3 Hayw. (Tenn.) 94. This right is based upon the obligation of the surviving partner to pay the debts of the firm, and his deed will not convey the legal title, yet it will convey the equity to the purchaser, and through that he may compel the heir to convey the legal title. Andrews v. Brown, 21 Ala. 437. See also, as the general rights of a survivor, Anna v. Wray, 77 Penn. St. 27; in giving a firm note but applying proceeds to individual purposes, Lloyd v. Thomas, 79 Penn. St. 68; in selling real estate at private sale, Mauck v. Mauck, 54 Ill. 281; in using partnership funds in another partnership, Costley v. Towles, 46 Ala. 560.

government, and, in executing new contracts, by using the patents and machinery of the firm.[1]

And where a partner carries on the business of the firm after a dissolution, with the partnership stock, it has been held that he is liable to the outgoing partner for his full share of the profits. But it was also held that this rule would not apply when the outgoing partner drew out his capital and had no property in it, but was indebted to the firm.[2] In the surviving partner or partners is vested the legal title to all the personal property of the firm.[3] And he has a right to take possession of the copartnership assets and settle up the partnership affairs.[4] And he or they may proceed in equity, if necessary, to have control and to have partition of the real estate of the corporation standing in the name of the deceased.[5] He has a right to apply partnership funds to release real estate from an incumbrance, and to fulfill contracts for the purchase of real estate.[6] As has previously been stated, unless provision is made otherwise in the articles of partnership, the death of a partner operates as a dissolution of the firm, and the survivor or survivors at law become entitled to the care, custody and control of the firm property, and are the only proper parties plaintiff or defendant to an action in favor of or against the firm.[7] He is by law entitled to all the choses in action and assets of the firm, as well against the representatives of the deceased partner as all the rest of the world,[8] for the purpose only of winding up the affairs of the firm, which must be done in a reasonable time, and after the firm debts are paid the representative of the deceased partner is entitled to such deceased partner's share.[9]

The survivors hold the partnership assets in trust to satisfy the firm debts, and subject to the interference of a court of equity, if

[1] Schenkl v. Dana, 118 Mass. 236 S. P.; Ambler v. Boulton, 41 L. J. 783. See, also, Griggs v. Clark, 26 Cal. 427.

[2] Taylor v. Hutchinson, 25 Gratt. (Va.) 536; see, also, Condrey v. Gilliam, 60 Mo. 86.

[3] Andrews v. Brown, 21 Ala. 437.

[4] Marlatt v. Scantland, 19 Ark. 443; Allen v. Hill, 16 Cal. 113; Tillottson v. Tillottson, 34 Conn. 335; Miller v. Jones, 39 Ill. 54; Murray v. Mumford, 6 Cow. 441.

[5] Gray v. Palmer, 9 Cal. 616.

[6] Shearer v. Shearer, 98 Mass. 107.

[7] Hedden v. Hedden, 1 Penn. St. 62; Tracy v. Suydam, 30 Barb. (N. Y.) 115; Voorhis v. Baxter, 1 Abb. Pr. (N.Y.) 43; Osgood v. Spencer, 2 H. & G. (Md.) 133; Walker v. Galbraith, 3 Head (Tenn.), 315.

[8] Calvert v. Marlow, 18 Ala. 73; Daniel v. Stone, 30 Me. 386.

[9] Miller v. Jones, 39 Ill. 54. If the surviving partners unreasonably delay in closing the partnership affairs or waste the property, the administrator should, if the partnership creditors neglect so to do, file a bill calling the survivors to account, and pray for an adjustment of the partnership affairs, but although, by reason of the delay of surviving partners in the settlement of the partnership affairs, the administrator of the deceased partner is justified in filing a bill for the adjustment of partnership affairs, they will not, in the absence of fraud or gross negligence, be held personally liable for debts due for unpaid sales. Miller v. Jones, *ante*.

they deal improperly therewith.[1] He has no authority without the assent of the executor, or administrator, to sell the deceased partner's interest in the partnership property, or to assign it for the benefit of creditors;[2] but with his assent he may assign the same for the benefit of the partnership creditors;[3] and if he makes an assignment without such assent, it will be set aside upon application of judgment creditors of the firm, or of the deceased partner's representatives.[4] But he may sell the property or pledge it for the payment of particular debts, particularly *choses* in action.[5]

His power to sell the property to pay debts is unquestioned, and for that purpose he may assign it to an agent.[6] If any profits are realized from the sale, he must account therefor to the representative.[7] He may continue the business in the old name, but at his own risk. The representatives of the deceased partner are not liable for any act of his in the prosecution of the business, unless they elect to continue the business with him, and do so with his assent.[8] If any profits are realized the survivor must account to the estate therefor, or pay interest on the deceased partner's share, at the election of the representatives of such deceased partner.[9] But if the business is continued with the *assent* of the executor, or administrator, the surviving partner can only be called upon for a share of the profits, and if none were realized, or if a loss transpired, he is not liable for either, unless he was guilty of negligence or carelessness in the conduct of the business.[10] The rights of surviving partners, and of the representatives of deceased partners, are measurably regulated by statute in some of the States, and for any modification of the common law rules the statutes should be consulted.

Rights of executors of deceased partner.

SEC. 346. As has been stated elsewhere, the deceased partner may, by his will, provide for a continuance of the partnership by his representatives, or provision may be made therefor in the articles of part-

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[1] Case v. Abeel, 1 Paige's Ch. (N. Y.) 393; Roy v. Vilas, 18 Wis. 173.

[2] Ruckley v. Barber, 1 Eng. L. & Eq. 506; Bancroft v. Snodgrass, 1 Cold. (Tenn.) 441.

[3] Egbert v. Wood, 3 Paige's Ch. (N.Y.) 521; Hutchinson v. Smith, 7 id. 35.

[4] Loeschigk v. Addison, 3 Robt. (N. Y. Sup. Ct.) 331; Mygatt v. McClure, 3 Head (Tenn.), 437.

[5] Loeschigk v. Hatfield, 5 Robt. (N. Y. Sup. Ct.) 29; Peyton v. Stratton, 7 Gratt. (Va.) 381; French v. Lovejoy, 12 N. H. 461; Ray v. Vilas, 18 Wis. 173; Cannon v. Copeland, 43 Ala. 201.

[6] Bartlett v. Parks, 1 Cush. (Mass.) 82; Butchart v. Dresser, 4 DeG. M. & G. 545.

[7] Goodburn v. Stevens, 5 Gill. (Md.) 24.

[8] Booth v. Parks, 1 Mallory, 465.

[9] Goodburn v. Stevens, *ante*.

[10] Millard v. Ramsdell, Harr. Ch. (Mich.) 373.

nership, and in either case, if the business is thus continued by them, the estate of the deceased partner becomes liable for all the debts of the concern equally with the surviving partners.[1] But, unless provision is made in the will of the deceased partner, for a continuance of the business, the executor himself becomes liable as a partner. He cannot, at his option, even though the partnership articles so provide, continue the business on behalf of the estate.[2]

In any event, he is only liable for *actual profits*, after deducting a fair compensation for his services in conducting the business. In Brown v. De Tastet,[3] Lord Eldon made an order directing the Master to consider any claims of the surviving partner for services "on account of the management, transacting and carrying on the business or concern," after the death of the partner whom the plaintiffs represented, and this is the general rule. In Newell v. Humphrey,[4] the defendant and another person were partners in the business of buying and selling live stock on commission. The other partner died and the defendant completed the business on hand, and received the money for the stock, and the court held that, while the commissions received by him were to be treated as partnership assets, yet, the surviving partner was entitled to deduct therefrom a reasonable compensation for completing the business.[5]

He is not entitled to commissions unless stipulated for by contract, but is entitled to a reasonable compensation for his time, trouble and expenses in closing up the business, and as to what *is* reasonable is a question of fact to be determined from the peculiar circumstances of each case.[6] But he cannot charge for new stock purchased, nor for improvements made upon the real estate of the firm after the death of his copartner, although begun before he died.[7]

Although as a rule, a partnership, whether for a term or at will, is dissolved by the death of one partner, yet, as has been stated *ante*, it may be continued longer by express agreement between the executor and the survivors under the provisions of the will of the deceased partner so directing. But if the testator merely directs that the business be continued, the responsibility of his estate will be restricted to the funds already embarked in the business. But where the will evinces an intention on the part of the testator to actively embark

[1] Davis v. Christian, 15 Gratt. (Va.) 37; Milne v. Milne, 9 Hare, 141; Pitkin v. Pitkin, 7 Conn. 311.

[2] Kirkman v. Booth, 11 Beav. 273.

[3] Jac. 284.

[4] 37 Vt. 265.

[5] Hite v. Hite, 1 B. Monr. (Ky.) 179; O'Reilly v. Brady, 28 Ala. 535; Griggs v. Clark, 23 Cal. 430.

[6] Cooper v. Merrihew, Riley (S. C.), Eq. 166.

[7] Shelly v. Hiatt, 7 Jones' (N.C.) L. 509.

the estate in the business, and authorizes or directs the sale of his estate, real or personal, for that purpose, in whole or in part, in order to enable the executor to go on advantageously with the business, *the whole estate* becomes liable for the debts of the firm, and the executor and the surviving partners under such circumstances have power to sell the real estate belonging to the firm, purchased with its funds and for its use.[1] But the mere fact that the testator, by his will, directs the business to be continued by his executors, does not give the firm creditors any lien on the estate for the amount of their claims against the firm. Thus, three persons were partners in a manufacturing business. One of the partners, whom we will designate as A, died, and by his will directed his interest in the establishment to be continued therein for the term of four years after his decease, and at the expiration of that time all his interest in the firm was to be distributed to various persons named in the will. The business was carried on by the executor of A, and proved not only unprofitable, but a considerable loss was sustained. One of the partners absconded, and the other had a large claim against the firm, and filed a bill in equity against the executor and the devisees under the will, praying that his claim might be satisfied out of the assets of A's estate. The court denied the relief, holding that the creditors of the firm had no lien on the estate by reason of the right of the estate to participate in the profits of the business of the firm, and that they could claim nothing as capital or profits until dissolution; and that the general assets were not liable to the plaintiff by reason of any of the provisions in the testator's will, but that the claims, so far as the estate was concerned, must be pursued by the usual legal modes in which individual creditors must proceed, and that a court of equity will not, and has not the power, to give them an equitable preference over the separate creditors of the estate.[2] The fact that the partnership articles provide that the firm shall not be dissolved by the death of either of the partners, but that the heirs of such partner should be treated as succeeding to his rights, does not make it obligatory on the representative of such partner, and does not render it obligatory upon the executors to assume the position or responsibilities of a partner. He may exercise his election as to whether he will go on or not,[3] and if he elects not to go on, a court of equity will order the business to be wound up in the usual way.[4] And when an

[1] Davis v. Christian, 15 Gratt. (Va.) 87.

[2] Pitkin v. Pitkin, 7 Conn. 311.

[3] Jaquin v. Buisson, 11 How. Pr. (N. Y.) 387.

[4] Madgwick v. Wimkle, 6 Beav. 501.

election is given either by the articles or by law, it must be exercised, within a reasonable time,[1] and by a person duly empowered to make the election;[2] and after the election is once made it cannot be recalled, and the executor, if he elects to go on, becomes personally liable for all debts contracted by the firm after the testator's death, as well those accruing before as after he has made his election,[3] and the estate becomes liable to the new firm for debts of the old firm paid by it.[4] If the executor or representative of the deceased partner does not go on with the business, he may sell his testator's interest in the firm to third persons or to the survivor, if the sale is fair and honest,[5] or he may, after the firm debts are paid, agree with the survivor upon a division of the firm assets,[6] or in winding up the affairs of the firm, the court may, instead of decreeing a sale of the property remaining after the firm debts are paid, by the consent of the parties, but not otherwise, divide the assets between the estate and the surviving partners.[7] But the consent of all the partners must be given.[8] Where the surviving partner, or one of them, is executor, he cannot purchase the property either directly or indirectly, particularly when the property is purchased at less than its actual value, and upon terms not advantageous to the estate.[9] A suit cannot be sustained for a division of the property, but must pray for its sale, and either partner or representative of a deceased partner is entitled to such a decree in a proper case.[10] The estate of a deceased partner may in equity be charged with the payment of firm debts upon the same footing as individual debts.[11]

Dissolution by bankruptcy, accounts, how taken.

SEC. 347. Where the partnership is dissolved by the bankruptcy of one of the partners,,the accounts of the partnership will be taken in the bankruptcy court.[12]

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[1] Pigot v. Bagley, 1 Mc C. & G. 574.

[2] Holland v. King, 7 M. G. & S. 727.

[3] Creagh v. Creagh, 13 Ir. Ch. 46; Edgar v. Cook, 4 Ala. 588; Alsap v. Mather, 9 Conn. 587; Labauchere v. Tupper, 11 Moore's P. C. 221.

[4] Laughlin v. Lorenz's Administrators, 48 Penn. St. 282.

[5] Chambers v. Howell, 11 Beav. 13; Davies v. Davies, 12 Keen. 584; Cook v. Collingbroke, Jac. 607; Case v. Abeel, 1 Paige's Ch. (N.Y.) 497.

[6] McDougal v. Banks, 13 Ga. 452; Rays v. Vilas, 18 Wis. 174; Mechanics' Bank v. Hildreth, 9 Cush. (Mass.) 356.

[7] Harper v. Lamping, 33 Cal. 649.

[8] Casper v. Frederick, 4 Iowa, 403.

[9] Nelson v. Hayner, 66 Ill. 487.

[10] Crawshay v. Collins, 15 Ves. 227; Wild v. Milney, 26 Beav. 505; Dickinson v. Dickinson, 29 Conn. 607.

[11] Harvey v. Heath, 5 Ohio, 355; Waldron v. Simmons, 28 Ala. 631; Cocke v. Burnett, 6 Munf. (Va.) 464; Nelson v. Hill, 5 How. (U. S.) 133; Jackson v. King, 6 Leigh (Va.), 689; Wardlow v. Grey, 1 Dudley's Ch. (S. C.) 114; Emanuel v. Bird, 19 Ala. 603; Welsh v. Speakman, 8 W. & S. (Penn.) 260; Hammersly v. Lambert, 2 Johns. Ch. (N.Y.) 509; Fillyan v. Laverty, 3 Fla. 101.

[12] See Bankruptcy .

Dissolution by death of a partner.

SEC. 348. Where the partnership is dissolved by the death of a partner, the accounts of the partnership may be taken in a suit by the survivors against his executors, or *vice versa*; or even in a suit against the executors by the separate creditors of the deceased partner. In cases of the last description, the suit being instituted for the administration of the effects of one partner only, it has been objected, that the copartners, his creditors, ought not to be allowed to prove, in such a suit, the balance due to them on the partnership account, because, except under particular circumstances, they could not have maintained an action at law for the amount. An objection of this nature was made by the Master, in a case where Houston, who had been a partner in a banking-house, and had also been a separate trader, died, and the bankers claimed to prove the balance due to them from Houston in a suit instituted by his separate creditors against his executors. The Master objected to the proof, on the ground that the partnership including Houston could not at law have sued Houston in his separate capacity, but Lord Eldon overruled the objection. He said: "There is nothing more clear than that, where an account is decreed, the equitable creditors have a right to be satisfied; and that no distribution of assets can take place, until the accounts of all the creditors of every description have been gone into. Generally speaking, it is the duty of the Master to meet all the difficulties that may arise in the discharge of this office. In some way or other he must so provide as that all the accounts, both legal and equitable, shall be fully taken; so that the fact of Houston's having been a partner in the house, however it may alter the nature of his debt, is of no weight at all with reference to the right of the claimants to have their account taken." [1]

It appears, therefore, that the claims of surviving partners against the estate of the deceased partner, are to be treated in the same manner as the claims of the other creditors, and it may happen that the surviving partners are *specialty* creditors of the deceased; in which case they will take all the benefits of specialty creditors in general. Thus, where one partner retired, and the remaining partner covenanted to pay the partnership debts, and to indemnify the retiring partner against them, and died without having performed his covenant, and the covenantee was compelled to pay a portion of the debts, the latter was held to be a specialty creditor of the estate of the de-

[1] Paynter v. Houston, 3 Mer. 302.

ceased, it being settled that if a covenant is broken, though the damages are unliquidated, the covenantee is a specialty creditor. And it was likewise held that against this debt by specialty the administrator of ths deceased partner could not retain his own simple contract debt, though he might retain a debt in equal degree.[1]

Where the copartner is made executor.

SEC. 349. It frequently happens, as we have already had occasion to remark, that a partner appoints his copartner to be his executor. If the executor is indebted to the testator, his debt must be placed in the account, notwithstanding that it is extinguished at law. Generally speaking, this must have been the case even before the statute of 11 Geo. 4 & 1 Will. 4, c. 40; for except where the executor took the residue as being undisposed of, his debt, which was included in the residue,[2] was not extinguished in the consideration of a court of equity.[3] Now, however, even fewer cases can occur in the extinguishment of the executor's debt, because the above-mentioned statute gives the residue undisposed of to the next of kin, unless it appear by the will that the executor is to take it beneficially. A legacy by one partner to another of a certain sum, if he does not draw it out of trade, is a specific legacy.[4]

Just allowances—what are regarded as.

SEC. 350. We have already, in speaking of the claims of a surviving partner in certain cases, had occasion to mention *just allowances.* It should here be remarked that, although the court will not usually determine, in the first instance, what is a just allowance, yet it will direct that a positive allowance, fixed by the articles, shall be paid. Thus, in Hibbert v. Hibbert,[5] the Master was directed to take an account of all dealings between the parties, who were wine merchants, and state what was due from any or either of the parties to the other, and to allow 200*l.* agreed to be allowed by

[1] Musson v. May, 3 Ves. & B. 194.

[2] Per Lord Talbot, Brown v. Selwyn, Forrester, 242. But see Harg. Co. Litt. 264, b. (1).

[3] Phillips v. Phillips, Rep. temp. Finch, 410. In this case, A and B were partners. A died, having bequeathed to B and his nephew, the plaintiff, all his real estate and household goods, and all his shipping, and all his debts, goods in his shop, etc., and the remainder of all his personal estate, equally to be divided, and he made B his executor. At A's death, B owed A two several sums, one secured by bond, the other unsecured. Lord Nottingham was of opinion that the debts which the executor owed the testator were not discharged, but ought to come into the account. See Carey v. Goodinge, 3 Bro. 110; Berry v. Usher, 11 Ves. 87.

[4] Ellis v. Walker, Ambl. 309.

[5] Rolls, Trin. T. 1807.

the articles, to the person occupying the house in consideration of his entertaining the customers, but to the time only when the same had been allowed in the last account.

It is doubtful whether an allowance for treating the customers will, under any circumstances, or at any period of the cause, be sanctioned by the court, unless it be expressly provided for or referred to by the articles. In the case of Thornton v. Procter,[1] the plaintiff and defendant were partners in the wine trade. The plaintiff, for a space of nine years, and until the dissolution of the partnership, managed the whole business, and was at considerable expense in treating the customers, which was found to be necessary in that trade. The plaintiff had kept a cash account of all profits and expenses, and struck a balance every year. In such accounts there was no charge for entertaining customers. There was no proof of the plaintiff having ever, during the partnership, demanded any allowance on that ground. The plaintiff proved that 50*l.* *per annum* would be a reasonable allowance to him for such expenses in entertainments, and that such an allowance was usual in the trade; and it was admitted that an article of that nature is commonly inserted in the agreement of copartnership. On reference to the Master, he allowed the plaintiff the 50*l.* a year for entertainments of customers. Exceptions being taken to the Master's report, the Court of Exchequer held that there being no universal custom in the trade to make such an allowance to the acting partner, and it being, on the contrary, the common practice to insert such a clause in the agreement where it is intended to be made, this should have been inserted in the original articles of copartnership, and there being no such agreement, the court could not make one. If the plaintiff were entitled to any such allowance at all, he must claim it as being a gross article of expenditure, and therefore it should have been included in the account, but, having struck a balance yearly, without any such article in it, he should be concluded thereby. When the bill charges a specific loss, occasioned by the misconduct of a partner on particular occasions, an inquiry will be directed on that point.[2] This, however, is not of course, but upon a case made out of sufficient doubt to induce the court to direct the inquiry.[3] While in the absence of an express agreement to that effect one partner cannot under any circumstances charge for his personal services,[4] yet if he has furnished hands to labor for the firm,

[1] 1 Anstr. 94.
[2] Hibbert v. Hibbert, *supra*.
[3] Cooke's MSS.
[4] Anderson v. Taylor, 2 Ired. Ch. (N. C.) 420; Reybold v. Dodd, 1 Harr. (Del.) 401; Buford v. Neeley, 2 Dev. Ch. (N. C.) 481; Dougherty v. Van Nostrand, 1 Hoff. Ch. (N. Y.) 68; Bradford v. Kimberly, 3 Johns. Ch. (N. Y.) 431.

he is entitled to be credited with the full amount paid to them.[1] If one partner, after dissolution, keeps exclusive possession of real estate of the firm, he is bound to respond for the rent thereof.[2]

Interest on profits in the hands of a partner.

SEC. 351. Before we quit this subject it ought to be considered when and at what rate *interest* will be computed on the profits in the hands of any of the partners. It has been laid down by a learned writer that, in all cases in which it is thought that justice would not be satisfied by the mere payment to the party of the balances to which he is entitled in the hands of another, and that he ought to have the advantage which has, or which at the least, might have been made of the money, a court of equity in decreeing an account will direct interest to be calculated accordingly.[3] Therefore, in an account of the profits made by the remaining partners with the partnership stock in their hands after the dissolution, interest will be calculated on those profits.[4] And in a case where the sale of a partner's share by his executors was set aside as irregular, one of his executors, who was also a partner, being in fact the purchaser, though in a circuitous manner, interest at 5*l.* *per cent* was directed to be computed on the purchase-money advanced, although no fraud was intended by any of the parties.[5] In these instances the partner against whom interest[6] is decreed is considered by a court of equity as a trustee for the partnership; and with regard to a trustee, the general rule is that he is chargeable with interest, whenever he appears to have made interest, and with the whole of the profits, whenever, by trading or otherwise, he has derived profits beyond the rate of interest.[6] Where interest is decreed, it is usually simple interest only—5*l.* per cent in the case of mismanagement, otherwise only 4*l.* per cent.[7]

We ought here to notice another important question connected with the subject of interest, arising from a state of circumstances almost the converse of those which have just been considered; it is

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[1] Savage v. Carter, 9 Dana (Ky.), 480.

[2] Stoughton v. Lynch, 2 Johns. Ch. (N. Y.) 209.

[3] Jer. Eq. Jur. 543.

[4] 2 Russ. 348. This must surely mean profits invested, and not again employed in trade, for the party seeking relief must make his *election* between profits or interest. In Burden v. Burden, 1 V. & B. 172, it was declared that the infant children of the testator were entitled to an account of the profits made since his death; and it was referred to the Master to take the accounts, and inquire whether it would be most for the benefit of the infants to take the testator's share of the stock in trade and the profits, or the value of it at the time of his death, with interest. The Master reported the balance in favor of the profits, and the option was accordingly given for the larger sum. 1 Jac. & W. 134.

[5] Jac. 623.

[6] See 2 Fonbl. Eq. 186.

[7] Jer. Eq. Jur. 544.

this — whether, and under what restrictions, a partner winding up the affairs of the concern, and using due diligence for that purpose, is entitled to *charge* his copartner with interest on the excess of his payments beyond his receipts, on account of the late partnership? There seems to have been no express decision on this subject, and it is conceived that, if a partner have a right to interest under such circumstances, that right will be a legal, not an equitable right; and will depend, not on any general principles of law, for, generally, money lent does not carry interest, but upon the *usage of trade*, the usage raising an implied contract at law to receive interest on the principal advanced.

The usage of *bankers* to receive interest on advances made to their customers has been expressly sanctioned by the courts.[1] There is likewise sufficient authority for insisting that a similar usage extends to traders in general, upon an advance of capital for partnership purposes,[2] this at least has always been the opinion of traders and accountants in the city of London. On the other hand, it is manifest that a general custom of this kind might work great injustice, in cases where the party sought to be charged has not been regularly apprised of the advances made. The right, therefore, to demand interest under such circumstances, if it should ever be established by express decision, must be accompanied with some qualification in respect of notice to the party charged.

And it has been held that where partners agree to invest equal amounts of money in their common business, and one advances a larger sum than the other, he is entitled upon settlement to interest upon one-half of the amount of the excess so advanced by him from the date of its appropriation by the firm.[3] And where, on a dissolution of a partnership and settlement, a balance is found due to one of the partners, he is entitled to interest on it from that time until payment.[4] So a surviving partner is bound to pay interest on a bal-

[1] Wright v. Bonter, 3 Chit. Laws of Commerce, 310; Gwyn v. Godby, 4 Taunt. 346; Arnot v. Redfern, 9 Moore, 209. As to the custom of India, see Boddam v. Riley, 2 Bro. 2.

[2] See Denton v. Rodie, 3 Camp. 493; and the *dicta* in Higgins v. Sargent, 2 Barn. & Cres. 348: 3 Dowl. & Ryl. 613; Page v. Newman, 9 Barn. & Cres. 378. There is a short note in Ridgway's Rep. temp. Hardwicke, as follows: "If in a current account between merchants, one of them has laid out a gross sum of money, the Court (*i. e.* of Chancery) will allow interest, notwithstanding it is a current account." Omychund v. Barker, Ridgw. 285. But see 3 Price, 250. See, further, as to Interest, Stat. 3 & 4 Will. 4, c. 42, § 28. On this subject, see Washburn v. Goodman, 17 Pick. (Mass.) 519; Honore v. Colmesnil, 7 Dana (Ky.), 201; Stoughton v. Lynch, 2 Johns. Ch. (N. Y.) 209; Holister v. Barkley, 11 N. H. 501; Simpson v. Feltz, 1 McCord's Ch. (S. C.) 213; Moon v. Story, 8 Dana (Ky.), 233; Beacham v. Eckford, 2 Sandf. Ch. (N. Y.) 116.

[3] Reynolds v. Mardis, 17 Ala. 32.

[4] Honore v. Colmesnil, 7 Dana (Ky.), 199; Holden v. Peace, 4 Ired. (N. C.) Eq. 223.

ance in his hands, from the time the business might have been settled up.[1] Partners are also liable to interest on the sums taken out of the partnership funds.[2] And a partner is entitled to interest on advances to the firm, in the absence of an express agreement to that effect, when it can be collected from the circumstances, or from the usage between the parties, that there ought to be or was intended to be, such a computation of interest.[3] But where one partner agrees to furnish capital and the other personal services, and each is to receive a definite proportion of the profits of the business, the one furnishing the capital is not entitled to interest on it in the settlement of the partnership matters.[4]

Mr. Lindley observes that the principles upon which interest is allowed or disallowed in taking partnership accounts do not appear well settled.[5] In some cases it has been held that the period of the dissolution is the proper time to make a rest for this purpose.[6]

On this question Judge Story says: "Interest is not allowed upon partnership accounts, generally, until after a balance is struck after a settlement between the partners, unless the parties have otherwise agreed or acted in their partnership concerns."[7]

But Sanford, V. C., in Beacham v. Eckford,[8] reviewed all the authorities bearing on the question, and after a full consideration of it came to the conclusion that there is no general rule relating to it, but that the allowance or refusal of interest must depend upon the circumstances of each particular case. And Judge Sharswood, in Gyger's Appeal,[9] adopted the same doctrine, in view of the confidential relation of the parties and the variety and complication of such accounts.[10]

Costs.

SEC. 352. With regard to *costs*, the general rule is that the party, against whom the balance is reported, is *prima facie* the person to pay them. It has even been laid down that the plaintiff *always* pays costs where an account turns against him.[11] But Mr. Beames observes, that this passage expresses the rule too largely, for that, although

[1] Hite v. Hite, 1 B. Monr. (Ky.) 177.
[2] Gridly v. Connor, 2 La. An. 87; see, also, 1 Johns. Ch. (N. Y.) 467.
[3] Morris v. Allen, 14 N. J. Eq. 44; see, also, Harvey v. Varney, 104 Mass. 436, as to presumptions against a partner under certain circumstances.
[4] Tuft v. Land, 50 Ga. 339.
[5] 1 Lind. on Part. 649.
[6] Stoughton v. Lynch, 2 Johns. Ch. 209; Hollister v. Barkley, 11 N. H. 501.
[7] Dexter v. Arnold, 3 Mas. (U. S. C. C.) 289.
[8] 2 Sandf. Ch. (N. Y.) 116.
[9] 62 Penn. St. 73.
[10] See, also, S. C., 1 Am. Rep. 382; Pond v. Clark, 24 Conn. 384; Miller v. Lord, 11 Pick. (Mass.) 11; Dougheller v. Van Nostrand, 1 Hoffm. Ch. (N. Y.) 69.
[11] 8 Bro. P. C. 361; 11 Ves. 458.

costs usually follow the event of an account, yet it has been decided by the highest authority that, where the account is intricate and doubtful, there should be no costs;[1] and this remark seems applicable to partnership accounts. And even where a bill filed by a partner for an account is dismissed on a point of law which was previously doubtful, it may possibly be dismissed without costs, if he was morally justified in proceeding. In Sumner v. Powell,[2] the executor of a deceased partner had received from the survivors a joint covenant of indemnity from the partnership debts. Having afterward been compelled to pay partnership debts, he brought his bill for an account and repayment against one of the other partners, the rest having become bankrupt; it was held that, having disposed of his original equity against the firm, he had no equity against this partner severally, the covenant being joint and not several, but the bill was dismissed, without costs.

It is the usual course of the court, where mutual account is decreed, to reserve costs till after the report;[3] but, where a partner is guilty of fraud, or of excluding his copartners from a due proportion of the profits by means of a secret agreement, costs may be decreed against him up to the hearing, and the subsequent costs may be reserved.[4]

[1] Beames on Costs, 12.
[2] 2 Mer. 30; and see Jacobsen v. Hennekenius, 5 Bro. P. C. 488.
[3] Beames, 12; 3 Bro. P. C. 360.
[4] 1 Sim. 63.

CHAPTER XIII.

INJUNCTION.

SEC. 353. Of the right to an injunction.
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Of the right to an injunction.

SEC. 353. Although, as we have already seen, a court of equity will not interfere to restrain the violation of a particular covenant between partners, yet, where one party has committed such breaches of duty as would warrant a decree for a dissolution, the court will relieve against the future acts of the offender by injunction. Thus, where one partner has involved the partnership in debt, or has himself become insolvent, the court will restrain him from drawing, accepting, and indorsing bills in the name of the firm, and from receiving the partnership debts.[1] So, it will restrain an action

[1] Williams v. Bingley, 2 Vern. 278, Mr. Raithby's note; Master v. Kirton, 3 Ves. 74; Lawson v. Morgan, 1 Price, 303; Hood v. Aston, 1 Russ. 412; and see Seaton on Decrees, 306. In Williams v. Bingley, the bill prayed for an injunction and dissolution. On motion for a special injunction, "upon hearing the said affidavit, and the six clerks' certificate, his Lordship doth order that an injunction be awarded to restrain the defendant, Thomas Bingley, from nego-

brought by one partner against his copartner, on a separate and private account, upon payment by the latter of the money due into court.[1] So, it will restrain the overbearing and oppression of one partner,[2] or the application of partnership property to a use not warranted by the articles,[3] or an execution against the partnership property for the separate debt of one partner.[4]

Will enjoin negotiation of bills, when.

SEC. 354. The mere circumstance that a partner gives a partnership bill for his separate debt may or may not lay a ground for the issuing of an injunction against its negotiation, for the person who takes it may or may not have some reason for supposing that his debtor had a right or authority so to use the partnership name. But where it appears that an individual partner, indebted to the partnership, being unable to pay his separate bill holden by his bankers, substitutes for it by a negotiation with them a partnership security, made and

tiating or accepting any bill of exchange or promissory note, except for partnership purposes, or doing any thing in the name and firm of the partnership, except for partnership purposes; and from receiving and applying any money belonging to the said copartnership, except for partnership purposes, until the said defendant shall fully answer the plaintiff's bill, and this court make an order to the contrary." R. L. 1805, B. 51. It is believed that this suit was afterward compromised. The usual form of the order is simply, "that the defendant be restrained from entering into any contract or contracts, and from accepting, etc., any bills, etc., in the name of the copartnership." Seaton, 308. Where there has been collusion between a partner and a third person, an injunction may be awarded against the latter also. See Jervis v. White, 7 Ves. 412. In Master v. Kirton, one N, a debtor of the firm, had colluded with the defendant K. The bill prayed for an injunction against the debtor, to restrain him from paying, and against the defendant K, to restrain him from receiving the money. On motion for the injunction it was stated that since the coming in of the answers the partnership between the plaintiff and the defendant J K had been dissolved, and a deed of dissolution had been executed by all parties thereto, and the defendant K had assigned over his interest in the partnership stocks, deeds, moneys, securities, and effects, to the plaintiffs; and the plaintiffs, by virtue of the power contained in the assignment from the said defendant J K, had commenced an action against the defendant J N on the said bonds, in the name of the defendant J K, which action had been tried and a verdict obtained therein against the defendant J N. It was, therefore, prayed "that an injunction may be awarded, to restrain the defendant J N from paying to the said J K the moneys now due and owing from him upon and by virtue of the several bonds bearing date, etc., for securing the two several sums of, etc., and interest, or any part thereof, and that the defendant J K may in like manner be restrained from receiving the same, or any part thereof, and also from releasing or discharging the said J N from the payment thereof, or from the action commenced by the said plaintiffs in his Majesty's Court of King's Bench, in the name of the said defendant J K, against the said defendant J N, or the judgment to be obtained in such action, or any execution or executions, or other proceedings to be had or taken therein by the said plaintiffs in the name of the said defendant J K, against the said defendant J N," and it was ordered accordingly. R. L. 1796, B. 428.

[1] Gold v. Canham, 2 Swanst. 325.

[2] Charlton v. Poulter, 1 Ves. 429; 19 Ves. 148.

[3] Glassington v. Thwaites, 1 Sim. & Stu. 124.

[4] Taylor v. Field, 4 Ves. 396; Bevan v. Lewis, 1 Sim. 376.

given without the consent or knowledge of his copartners, and the bankers are aware that it is so given without their consent or knowledge, that is a case which comes within the principle upon which the court has always been in the habit of interfering by injunction.[1] Accordingly, in one case, an injunction was granted *ex parte*, to restrain the negotiation of a bill of exchange by a holder who had given valuable consideration for it, but who had notice that it had been improperly accepted by a partner of the plaintiffs in the partnership name.[2] And in another case, where the holder took the bill after the plaintiff's partner had obtained an injunction, but before the order was drawn up, the court not only extended the injunction to the holder, but ordered the security to be deposited with the Master, and it was afterward canceled by consent.[3]

When partnership has been dissolved.

SEC. 355. Where a partnership has been dissolved, and any of the quondam partners attempt to carry on the business for their own benefit, the court will interfere by injunction.[4] And if an account has been finally settled between the parties, and one partner is indemnified by the other from the debts of the copartnership, then, if the indemnified partner be afterward compelled to pay a partnership debt, he may retain money of the other partner of an equal amount, subsequently coming into his hands, although such money be paid on the separate account of the other partner. Hence, upon payment of the money into court, he may obtain an injunction to restrain all proceedings at law by the other partner to recover the money so retained.[5]

When a stranger purchases the interest of one partner in a firm, the firm is thereby *ipso facto* dissolved, and the destruction of the partnership in that way does not invest the remaining partner with the rights of surviving partner, and a court of equity will, upon application of the purchaser, alleging improper conduct on the part of the remaining partner, appoint a receiver and enjoin the remaining partner from collecting the debts due the company or otherwise disposing of the partnership effects,[6] and if the defendant demurs to the bill, or moves to dissolve the injunction, the allegations of the bill are to be taken to be true.[7]

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[1] Per Lord Eldon, 1 Russ. 415.
[2] Hood v. Aston, 1 Russ. 412.
[3] Jervis v. White, 7 Ves. 413.
[4] De Tastet v. Bordenave, Jac. 516.
[5] Gold v. Canham, 1 Ca. Ch. 311; 2 Swanst. 325; Fran. Max. 36.
[6] Ballard v. Collison, 4 W. Va. 32; Martin v. Van Schaick, 4 Paige's Ch. (N. Y.) 479; Wolbert v. Harris, 3 N. J. Eq. 605.
[7] Peatross v. McLaughlin, 6 Gratt. (Va.) 64; McClelland v. Kincaid, id. 352.

Upon application of executor of deceased partner.

SEC. 356. Upon the death of a partner, occasions will arise for injunctions between the survivors and the representatives of the deceased. Thus, where an agreement is entered into with one partner for a lease to that partner alone, but the lease is in fact for the benefit of the partnership, upon the death of the partner with whom the contract was made, the court will grant an injunction to restrain his executor from disposing of the lease when granted, except for partnership purposes.[1] On the other hand, upon motion by the representatives of a deceased partner, an injunction will be granted to restrain the surviving partner from bringing ejectment, upon his title as surviving lessee of the partnership premises.[2]

When injunction will be granted without dissolution.

SEC. 357. It seems clear that a court of equity will sometimes award an injunction against one partner, without dissolving the partnership; perhaps even where the delinquency of that partner is not sufficient to warrant a dissolution. At any rate, it certainly seems to have been held that a court of equity will restrain the gross personal misconduct of a partner without compelling a dissolution of the partnership before the expiration of the term. In Charlton v. Poulter,[3] a bill was filed by Richard Charlton, senior and junior, partners in a brewery, charging great misconduct by the defendant, the third partner, in disobliging and turning away the customers, prevailing on the servants to leave the brewhouse, assaulting and obstructing them, causing them to quit their service, locking up the books, retaining as servants (without the plaintiff's consent) bruisers and boxers who obstructed the trade, threatening to ruin the trade, and refusing to account. The bill prayed that, at the end of the partnership, the stock and utensils might be valued, and that the defendant might be compelled to receive one-third part of the value, and for an injunction restraining the defendant from any act to the obstruction or damage of the trade. On motion after answer for injunction it was ordered that the defendant be restrained from using force, either by himself or any other person or persons, to the obstruction or interruption of the brewing trade in question, and from removing or displacing any of the servants hired or employed by the partners, or the major part of them, in carrying on the trade, without leave of the court, and from carrying away or removing out of the counting-

[1] Alder v. Fouracre, 3 Swanst. 489. [2] Elliot v. Brown, 3 Swanst. 498, n. [3] 19 Ves. 148, n.

house belonging to the partnership any partnership books or papers relating to the said trade; and upon the plaintiff's submission, it was further ordered that the plaintiff be restrained in like manner.

Formerly courts of equity were so averse to interfering between partners, that they refused to interfere except where the bill sought a dissolution, or a dissolution had actually transpired. This rule, however, while assuming the position of a general rule, was never absolutely inflexible, and it has gradually been relaxed, until now there is probably no instance in which an absolute wrong is being done by one partner to another, in which its interference may not be obtained. Yet, the courts cling so closely to established rules, and abandon old precedents and old rules with such reluctance, that traces of the aversion alluded to may yet be found in the decisions of the courts, and especially in those which relate to the specific performance of agreements to form partnerships, and in those which relate to the appointment of receivers and managers. Indeed, notwithstanding the extent to which the rule has been relaxed in suits for an account, or for an injunction, one of the first points for consideration, even now, when one partner sues another in equity, is, can relief be had without dissolving the concern? Undoubtedly it may much more certainly than formerly, but not always when perhaps it ought. Without stopping to inquire how the question is to be answered in any particular case (for that will be discussed hereafter), it may be stated as a general proposition that courts of equity will not, if they can avoid it, allow a partner to derive advantage from his own misconduct by compelling his copartner to submit either to continued wrong, or to a dissolution;[1] and that rather than permit an improper advantage to be taken of a rule designed to operate for the benefit of all parties, the courts will interfere at the present day where formerly they would have declined to do so. At the same time they will not take the management of a going concern into their own hands, and, if they cannot usefully interfere in any other manner, they will not interfere at all, unless for the purpose of winding up the partnership.

Of the rule not to interfere in matters of internal regulation.

SEC. 358. A court of equity will not interfere between partners merely because they do not agree. It is no part of the duty of the court to settle all partnership squabbles; it expects from every partner a certain amount of forbearance and good feeling toward his co-

[1] See Fairthorne v. Weston, 3 Ha. 392.

partner, and it does not regard mere passing improprieties, arising from infirmities of temper, as sufficient to warrant a decree for dissolution, or an order for an injunction or a receiver.[1] And when partners have themselves agreed that the management of their affairs shall be intrusted to one or more of them exclusively, the court will not remove the managers, or interfere with them, unless they are clearly acting illegally and in breach of the trust reposed in them.[2]

This principle has been extended to companies, and, as a general rule, it may be stated that a court of equity will not interfere between members of companies for the purpose of enforcing duties arising out of matters which are properly the subject of internal regulation. It will not interfere to control a majority, unless it sees that the majority has been or is doing, or is about to do, that which is illegal even for a majority to do; and it follows from this, that the court will not interfere in matters of internal management until all reasonable attempts have been made to take the sense of the general body of partners on the matters in question, nor unless it is then called upon to interfere either by the majority to control a factious minority, or by a minority to control a majority that declines to perform its legal duties.

In Conlin v. Drury,[3] a large number of persons were partners in a concern called "The Bankside Brewery," and six of them, on behalf of themselves and as copartners, filed a bill against the managers and others, alleging circumstances of gross mismanagement and neglect on the part of the managers, and praying for the appointment of a receiver. By the deed of settlement the managers might be removed at any general meeting, and certain times were fixed therein for such meetings, and a committee was provided for whose duty was to audit accounts and advise with the managers; this committee, or a majority of them, was authorized, in case the managers should misbehave themselves, to call a general meeting of the shareholders to report thereon; and it was also provided that no dissolution should be made without the consent of the majority of three-fourths of the shareholders at a general meeting. The bill did not disclose any facts that show that this redress was not ample, and consequently an injunction and receiver was refused. Lord Eldon, however, intimated that, if necessary, the court could have compelled the managers to call meet-

[1] See Marshall v. Coleman, 2 J. & W. 266; Smith v. Jeyes, 4 Beav. 503; Lawson v. Morgan, 1 Price, 307; Cofton v. Horner, 5 id. 537; Warder v. Stilwell, 3 Jur. (N. S.) 9; Anderson v. Anderson, 25 Beav. 190.

[2] See Lawson v. Morgan, 1 Price, 307; Waters v. Taylor, 15 Ves. 10.

[3] 1 V. & B. 154; see, also, Waters v. Taylor, 15 Ves. 10; Ellison v. Bignold, 2 J. & W. 503; Beaumont v. Meredith, 3 V.& B.180; Miles v. Thomas, 9 Sim. 606.

ings, and if a delinquency in that respect had been made out, it would have acted without hesitation, but that there must be a positive necessity for such interference, and that it must also appear that the remedies provided in the articles had first been exhausted. In Foss v. Harbottle,[1] two members of an incorporated company, called The Victoria Park Company, filed a bill against the directors and others, charging them with numerous fraudulent and illegal acts, misapplying the property, alienating and wasting it, and praying that the defendants be compelled to make good the losses sustained by their acts, and for the appointment of a receiver to apply the property to the payment of its debts, and to secure the surplus, if any. The general result of the act incorporating the company was (in the opinion of the court) to make the directors the governing body, subject to the superior control of the proprietors, who, when assembled in general meeting, had power to originate proceedings for any purpose within the scope of the company's powers, as well as to control the directors in any acts which they might have originated. The court was of opinion that the acts of the defendant complained of were of such a nature as to be capable of confirmation by a majority of the members of the company; that it did not appear that any attempt had been made to bring those acts before a general meeting of the shareholders, and that under those circumstances the court could not interfere at the suit of a minority, whatever it might have been induced to do if proper means had been resorted to and found ineffectual to set the general body of shareholders in motion.

In Mozley v. Alston,[2] a bill was filed by two shareholders of a railway company against the company and its directors, alleging that the latter had been illegally appointed; that they had possession of the seal of the corporation, and that they were about to use it for various improper purposes. The bill prayed that the directors, who were defendants, might be restrained from acting as directors, and be ordered to place the seal, and the books and documents of the company under the control of its lawful directors. It appeared from the statements of the bill that a majority of the shareholders agreed with the plaintiffs in their view of the illegality of the defendant's appointment, and the court held that, if that were so, there was nothing to prevent the company from filing a bill in its corporate character to remedy the alleged evils; and that as the plaintiffs showed no reason

[1] 2 Ha. 461. [2] 1 Ph. 790.

to justify them alone in applying to the court for redress, they were not entitled to its assistance.

These cases have been followed by a variety of others.[1] One of the most characteristic of the class is perhaps Bailey v. The Birkenhead, Lancashire and Cheshire Junction Railway Company,[2] where a bill was filed by one of a set of shareholders in an amalgamated company, alleging that an unfair and unnecessary call had been made upon that set, and seeking to restrain proceedings to enforce payment of the call. Lord Langdale thought that the case could only be considered as an attempt to induce the court to interfere in the internal management of the affairs of a company, and to take upon itself to determine a question which might well and ought to be determined by the shareholders themselves at general meetings. In other cases the court has declined on similar grounds to restrain payment of a dividend by a company before its works were completed,[3] or before its unsecured debts were paid.[4]

In such cases as these, the minority who complain of the managing body should, before appealing to the court of chancery, endeavor to bring the matter of their grievances before their fellow shareholders, and ascertain what the views of the majority are; and until this is done the court will not restrain, unless the act against which an injunction is sought is illegal or so oppressive as to call for equitable interference.[5]

Injunction and dissolution — instances in which injunction will be granted.

SEC. 359. Where a bill alleged substantially that the complainant had bought the interest of H in the newspaper publishing firm of B and H, and that B had collected the debts of the firm and was wasting the proceeds, and that owing to personal and political differences, etc., irreparable mischief would be done if B retained the management, etc., it was held that it set forth grounds for an injunction and the appointment of a receiver.[6]

It was formerly a matter of controversy whether an injunction restraining a partner would be granted unless there was a prayer for

[1] See, in addition to those mentioned in the text, Edwards v. The Shrewsbury and Birmingham Rail. Co., 2 De G. & Sm. 537; Yetts v. The Norfolk Rail. Co., 3 id. 293; Kent v. Jackson, 14 Beav. 367, and 2 De G., Mac. & G. 49; Inderwick v. Snell, 2 Mac. & G. 216.

[2] 12 Beav. 433. Compare Preston v. Grand Collier Dock Co., 11 Sim. 327.

[3] Browne v. The Monmouthshire Railway and Canal Co., 13 Beav. 32.

[4] Stevens v. The South Devon Rail. Co., 9 Ha. 313.

[5] The Exeter and Crediton Rail Co. v. Buller, 5 Rail. Ca. 211; Lindley on Part. p. 752, *et seq.*

[6] Ballard v. Collison, 4 W. Va. 326.

a dissolution.[1] But, as has been previously stated, an injunction will not be now denied, either in England or in this country, on that ground.[2] Equity will restrain a person from holding out another as a partner against that person's assent;[3] so it will restrain persons from interfering with the partnership, as an executor of a deceased partner, who seeks to interfere in the management of the business, or to control the deceased partner's interest therein,[4] or a person claiming one partner's share under a judicial sale or otherwise.[5]

As between the partners, equity will in proper cases interfere by injunction: as, to prevent one partner from doing acts inconsistent with the express or implied conditions of the partnership agreement; as, from setting up a similar business in the same locality, or indeed from engaging in any other business that essentially interferes with the business of the firm. In England v. Curling,[6] one of the partners, before the time had expired, attempted to dissolve the partnership and retired from the business, and entered into partnership with other parties. Upon application of his old partners he was restrained from carrying on business with his new partners, or any other persons than his old partners, and his new partners were also restrained from carrying on business with him, until the expiration of the term for which the old partnership was formed. But if the partnership term is indefinite, one partner may retire at will and engage in the same business in opposition to his former partners, unless he has contracted not to do so,[7] even though he has sold his interest to his copartner,[8] provided he does not attempt to carry on business in such a way as lead people to believe that he is the successor of the old firm.[9] He may indicate that he was *formerly* connected with the old firm, but must not hold himself out as its successor.[10] So, one partner will be restrained from using the partnership name improperly, as by signing

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[1] Marshal v. Colman, 2 Jac. & W. 266.

[2] Carlton v. Poulter, 19 Ves. 148; Mills v. Thomas, 9 Sim. 609; Chavany v. Van Sommer, 1 Swanst. 512; Plunkett v. Dillon, 4 Houst. (Del.) 338; Gregg v. Brower, 67 Ill. 525. But see contrary doctrine in a recent case in Georgia. Davis v. Weaver, 46 Ga. 626.

[3] Troughton v. Hunter, 18 Beav. 470; Routh v. Webster, 11 id. 561; Bullock v. Chapman, 2 De G. & S. 211.

[4] Hawkins v. Hawkins, 4 Jur. (N. S.) 1045; Gold v. Canham, 2 Sw. 326 n.; Hartz v. Schrader, 8 Ves. 317.

[5] Bevan v. Lewis, 1 Sim. 376; Phillips v. Atkinson, 2 Bro. C. C. 272; Newell v. Townsend, 6 Sim. 419.

[6] 8 Beav. 129.

[7] Parsons v. Hayward, 31 L. J. Ch. 666; Shackle v. Baker, 14 Ves. 468; Chunton v. Douglass, Johns. 174; Cantwell v. Lye, 17 Ves. 335; Davies v. Hodgson, 25 Beav. 177; Kennedy v. Lee, 3 Mer. 455; Harrison v. Gardner, 2 Mad. 198; Lindley on Partnership, 842.

[8] Parsons v. Hayward, *ante*.

[9] Hunt v. Hancock, 15 L. T. 499.

[10] Clark v. Leach, 32 Beav. 14; Bradbury v. Dickens, 27 id. 53; Marshall v. Watson, 25 id. 501.

it to notes for his own private purposes,[1] or from negotiating or accepting bills for other than partnership purposes;[2] or from concealing or keeping the partnership books so that they cannot be inspected by his copartners;[3] or from collecting the debts of the firm under certain circumstances;[4] or generally, from doing any act inconsistent with his contract, or with his relations as a partner, or that injuriously affect the interests of the firm. Thus, in Morris v. Colman,[5] one of the proprietors of the Haymarket Theater was restrained from acting contrary to the articles of partnership, by writing plays for other theaters; and in Glassington v. Thwaites,[6] an injunction was obtained by one of the partners in the publication of a daily journal, against his copartners, restraining them from publishing in another paper, with which they were connected, any matter or information that was obtained for and should first have been published in the former paper. In a suit instituted for the purpose of having a partnership dissolved, or of having an account taken after a partnership has been dissolved, it has never been doubted that an injunction will be granted to restrain one of the partners from doing any act that will impede the winding up of the concern; as, from carrying on the business for any other purpose than closing it up,[7] or from excluding another partner or the executor of a deceased partner from the examination of the books or property of the firm.[8] So the executor, as well as other persons in whom the legal estate of any part of the property of the firm may be in, will be restrained from making an improper use of it.[9] So, if the surviving partner has been guilty of any breach of trust, so as to make it apparently

[1] Hood v. Ashton, 1 Russ. 412; Jervis v. White, 7 Ves. 413.

[2] Jervis v. White, *ante*.

[3] Greatrex v. Greatrex, 1 De G. & S. 692; Charlton v. Poulter, 19 Ves. 147, n; Taylor v. Davis, 7 L. J. (N. S.) 179.

[4] Read v. Bowers, 4 Bro. C. C. 440.

[5] 18 Ves. 437.

[6] 1 Sim & Stu.

[7] De Tastet v. Bordenave, Jac. 516.

[8] Elliott v. Brown, 3 Swanst. 489, n; Hawkins v. Hawkins, 4 Jur. (N. S.) 1045.

[9] Alden v. Fouracre, 3 Swanst. 490, n. In McMahon v. O'Donnell, 20 N. J. Eq. 306, the court granted an injunction on the allegations in a bill that the complainant and two of the defendants were partners, and purchased lands for partnership purposes, and that the defendants fraudulently, and without the knowledge and consent of the complainant, took the conveyances in their own name, and on the dissolution of the partnership sold and mortgaged the lands to the other defendants. But the injunction was dissolved upon the coming in of the answer alleging that the defendants were employed at wages to be measured by a proportion of the profits, and *denying* that the title to the lands was taken in their names without the knowledge of the complainant. Where one partner who is insolvent or in failing circumstances, without the consent and against the will of his copartner, is disposing of the partnership effects and making use of the proceeds for his own purposes, his copartner is entitled to an injunction restraining him from so doing, and to have a receiver appointed. Phillips v. Frezenart, 67 N. C. 370.

unsafe to confide the winding up of the concern to him, he will be enjoined from disposing of the partnership assets, or collecting debts due it,[1] as the interests of the concern ought not to be jeopardized by intrusting them to a person who, in any respect, has shown himself unworthy of the trust. But, unless there is a very good reason shown therefor, a surviving partner will not be restrained from carrying on the business under the old firm name,[2] but the executor of a deceased partner will be restrained, at the suit of the survivor, from carrying on business in the name of the old firm at least, until the right to do so is determined at law.[3]

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[1] In Ballard v. Callison, 4 W. Va. 326, it was held that a bill that set forth substantially that the complainant had bought the interest of H, in the newspaper publishing firm of B & H; that B had collected debts due the firm, *and was wasting the proceeds;* that owing to personal and political differences, etc., irreparable mischief would be done if B retained the management of the business, the court held that this presented a good ground for an injunction and receiver. Harze v. Schroder, 8 Ves. 317. But, unless some fraud or improper conduct on the part of the partners, in the management of the business is shown, an assignee of one of the partners will not be entitled to an injunction or the appointment of a receiver, and the fact that they refuse to permit him to interfere personally in the business of the firm is no ground for granting either. McGlensey v. Cox, 5 Penn. (L. J. Rep.) 203. When the facts are doubtful an injunction will not be granted. Baxter v. Buchanan, 3 Brewst. (Penn.) 435.

[2] Webster v. Webster, 3 Swanst. 490, n; Lewis v. Langdon, 7 Sim. 421.

[3] In Lewis v. Langdon, 7 Sim. 421, it appeared that in and before 1788 Stephen Brookman and Joshua Langdon carried on the business of making and selling lead pencils, at No. 28 Great Russell street, Bloomsbury, under the firm of Brookman and Langdon. In 1788 Stephen Brookman died. In 1798 Joshua Langdon died, having, by his will, appointed William Langdon his executor and made him his residuary legatee. In May, 1828, William Langdon died intestate, and administration of his effects was granted to Fruzan Langdon, his widow. After the deaths of Stephen Brookman, Joshua Langdon and William Langdon, the business was carried on under the same firm and at the same place, by Joshua Langdon, William Langdon and Fruzan Langdon in succession. In June, 1828, Fruzan Langdon took into partnership with her the plaintiff, James Lewis (who was the half brother of the intestate, and was then considered to be his sole next of kin), and they carried on the business under the same firm and at the same place. During the partnership, William Tobias Langdon claimed to be the son and sole next of kin of the intestate, and divers legal proceedings were had, with respect to such claim, between William Tobias Langdon and Fruzan Langdon and James Lewis. In July, 1832, they came to an agreement in writing for the settlement of their disputes, whereby it was agreed that the business of William Langdon and the profits arisen from the same since his decease should belong to Fruzan Langdon and James Lewis. In November, 1834, Fruzan Langdon died, having, by her will, appointed the defendant, Augustus Langdon, and two other persons, her executors. After the death of Fruzan Langdon, James Lewis took the plaintiff, G. E. Warren, into partnership with him, and they carried on the business at No. 58 Great Russell street, under the firm of James Lewis & Co., successors to Brookman & Langdon. In January, 1835, the defendant, Augustus Langdon, commenced carrying on the business of making and selling lead pencils under the firm of Brookman & Langdon, at No. 27 Great Russell street. In May, 1835, the bill was filed, praying that the defendant might be restrained from marking any pencils with the name or firm of Brookman & Langdon, and from using the same name or firm in carrying on his business, and that he might account for and pay, to the plaintiffs, the profits made by him by using that name or firm. The plaintiffs moved for the injunction.

The Vice-Chancellor said: "The

So, where a suit for dissolution is pending, one partner will be restrained from improperly interfering with or obstructing the partnership business,[1] or from drawing, accepting, or indorsing bills of exchange or notes for other than partnership purposes,[2] and in case there is bad faith on the part of the indorsees or payees of such obligations, they will also be restrained from negotiating them.[3] So, during the pendency of proceedings for a dissolution, a partner will be restrained from getting in firm debts,[4] from withholding the firm books,[5] or from

question in this case depends on the right, in the surviving partner, to carry on the business under the name of the partnership. Lord Eldon certainly has expressed a doubt in the case of Crawshay v. Collins, 15 Ves. 227, upon what has been understood to be the proposition laid down, by Lord Rosslyn, in the case of Hammond v. Douglas, 5 Ves. 539. It is true that the question might have been, to a certain degree, whether, having regard to what had taken place, the money should be considered to belong to one party rather than to another; and it is, also, observable that Lord Eldon might have been throwing out his observations with reference to a supposed connection between the place where the business was carried on, and the good-will. But it occurs to me that, if the good-will is to be considered as a salable article which belongs to the partnership, then this consequence must follow, namely, that the surviving partner must be under an obligation to carry on the trade for some time after his partner's death in order that the thing which is said to be salable, may be preserved until it can be sold. If a partnership were carried on between A and B under the name of Smith & Co., and the surviving partner chose to discontinue the business and to write to the customers and say that his partner was dead, and that the business was at an end, the effect would be that that which is said to be salable would cease to exist. Now what power is there in a court of equity to compel a partner to carry on a trade after the death of his copartner, merely that, at a future time, the good-will, as it is called, may be sold? It is plain that, unless there is such a power in this court, it must be in the discretion of the surviving partner to determine what shall be done with the good-will; and, if that is the case, it must be his property. I cannot but think, when two partners carry on a business in partnership together under a given name, that, during the partnership, it is the joint right of them both to carry on the business under that name, and that, upon the death of one of them, the right which they before had jointly, becomes the separate right of the survivor. My opinion, therefore, is that Mr. Lewis, by becoming the surviving partner of Mrs. Langdon, had, in himself, the right to use, either simply or in a modified way, the firm of Brookman & Langdon under which the partnership business was agreed to be carried on by virtue of a clause which I find in the agreement, and he cannot be said to have abandoned that right; for he has made use of the firm as subsidiary to the new partnership which he is now carrying on under the name of James Lewis & Co., successors to Brookman & Langdon, and thereby he connects himself with the former partnership of Brookman & Langdon. As, therefore, Mr. Lewis has never abandoned the right which accrued to him on the death of Mrs. Langdon, the consequence is that Mr. A. Langdon, who is the executor only of Mrs. Langdon, has no right to use the partnership firm for his own benefit, and, therefore, I shall immediately grant an injunction to restrain him from using that firm in carrying on his business. But if the parties wish to have the question decided in a court of law, I will direct an action to be brought by Mr. Lewis against Mr. A. Langdon for that purpose."

[1] Smith v. Juges, 4 Beav. 503; Charlton v. Poulter, 19 Ves. 148 n.

[2] Hood v. Aston, 1 Russ. 412; Williams v. Bingley, 2 Vern. 278 n.; Jarvis v. White, 7 Ves. 412.

[3] Hood v. Aston, *ante;* Jarvis v. White, *ante.*

[4] Reed v. Bowers, 4 Bro. C. C. 441;

[5] Greatrex v. Greatrex, 1 De G. & Sm. 692; Taylor v. Davis, 3 Beav. 388 n.; Charlton v. Poulter, 19 Ves. 148 n.

doing any act that will operate injuriously to the firm.[1] An injunction will also be granted to restrain a stranger who has bought or otherwise came into possession of one partner's share in the business, from interfering therewith,[2] as an assignee in bankruptcy,[3] a sheriff[4] or an executor or other person, by whatever means he may have become vested with the interest of one partner.[5] So an injunction will be issued to restrain a partner from violating a special agreement with the firm, as not to set up a similar business in the vicinity;[6] from

[1] Marshall v. Watson, 25 Beav. 501. In Davidson v. Napier, 1 Sim. 297, one of a firm of solicitors became bankrupt, and the assignees excluded him from interfering with the affairs of the firm. The court refused to order them to deliver to him the papers belonging to the clients of the firm, unless the clients assented thereto.

[2] Allen v. Kilbre, 4 Madd. 464.

[3] Fraser v. Kershaw, 2 K. & J. 496.

[4] Bevan v. Lewis, 1 Sim. 376; Newell v. Townsend, 6 id. 419.

[5] Phillips v. Atkinson, 2 Bro. C. C. 272; Freeland v. Stansfield, 2 Sm. & G. 479.

[6] In Whittaker v. Howe, 3 Beav. 383, the plaintiff moved for an injunction to restrain the defendant from detaining and keeping possession of or destroying certain documents; and also to restrain him from carrying on the business of an attorney and solicitor. It appeared that in the year 1831 the plaintiff purchased the defendant's business, or interest in his business as an attorney and solicitor, then being carried on by the defendant and one Heptinstall as partners. On August 4th, 1831, the plaintiff and the defendant, and his partner Heptinstall, executed an agreement whereby it was agreed that the plaintiff, upon his admission in Michelmas Term then next, should become a partner with Howe & Heptinstall for two years, and should give 5,000*l.* for the partnership, and as the consideration for the absolute purchase of all their interest in the business, during and after the expiration of two years. Howe & Heptinstall agreed to put plaintiff into the possession of all the profits of the business from the time that the 5,000*l.* should be secured as therein mentioned, but they were nevertheless to continue in business as the copartners of Whittaker for two years from such time, and were during such two years to attend at the chambers wherein the business should be carried on, and it was agreed that Howe and Heptinstall should carry on, and in all things aid and assist Whittaker in carrying on the same, as they had been accustomed to do (Whittaker, or Whittaker and Tatham, finding the necessary capital). And that Howe and Heptinstall should also respectively use their utmost endeavors to retain their then present clients, and secure the possession of the said business, as the same had been and was carried on by them, to Whittaker, during the term of two years and after the expiration thereof; and further, that neither of them, Howe and Heptinstall, should afterward practice as solicitors or attorneys in any part of Great Britain for the space of twenty years without the consent of Whittaker." And it was also agreed, that the plaintiff, Tatham, should from the admission of Whittaker as attorney become a copartner with Whittaker for nine years, and receive a fixed portion of the profits, and "that all books and accounts which had been theretofore kept in respect of the said business, should be kept at the chambers where the business should be carried on, with liberty for any of the parties to the agreement, or their representatives, to have access thereto." Mr. Whittaker secured the payment of the 5,000*l.* as required on the 7th of November, 1831, and he became admitted as an attorney and solicitor. The agreement was acted upon, and the business carried on under the firm of Howe, Heptinstall & Whittaker. The money was actually paid in the month of June, 1832, and Mr. Howe received 3,000*l.* as his share of it. During the progress of the two years, at the end of which Messrs. Howe and Heptinstall were to retire, Mr. Whittaker began to apprehend that even after the expiration of two years it might be very important to him to have the advantage of being assisted by the greater experience and established character of Mr. Howe, and in May, 1833, he wrote a letter to Mr. Howe, thereby, very earnestly, requesting him to continue his assistance in the business after the end

retaining a partnership book which he has come into possession of contrary to the terms of the partnership agreement;[1] from divulging a secret of the trade,[2] or from carrying on the same business in such a way as to induce people to believe that he is the successor of the firm.[3]

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of the two years. After some treaty, Mr. Howe agreed to do so, in consideration of his receiving 500*l.* a year as a remuneration, which was some time afterward increased to 700*l.* a year. Mr. Heptinstall retired from the business altogether at the end of two years. Mr. Howe continued to act under the new arrangement, under which a question arose, whether he was a partner with Whittaker and Tatham. This question did not appear to have arisen out of any dispute as to the emoluments of the business, but seemed rather to be one of liability and feeling, and particularly whether the defendant stood in relation to Messrs. Whittaker and Tatham in the capacity of clerk or in some superior station. On the 12th of August, 1840, the defendant sent to the plaintiff, Whittaker, a letter, stating amongst other things, "that all intercourse in the nature of partnership and otherwise must cease at the expiration of the nine years from whence he entered partnership," which occurred on the 7th November, 1840. In August, 1840, the dispute as to the partnership still continued. Mr. Howe insisted upon its being dissolved. Mr. Whittaker thought there was no partnership to dissolve; but at last they agreed to sign and publish a notice of dissolution of the partnership, and at the same time Mr. Howe signed an acknowledgment that Mr. Whittaker's signature of the notice of dissolution should not prejudice any question between them as to a partnership having actually subsisted. About the same time, the name of the firm painted on the door of the chambers was altered, and the name of Howe, being separated from its former connection with the others, was painted on the door separately from them. On the 25th of December, 1840, in the absence, and without the knowledge of Whittaker and Tatham, Mr. Howe removed a great many books, deeds, documents and papers from the chambers in Lincoln's Inn, where the business was carried on, to his own chambers, amongst which were some of those included in the articles of August, 1831, and others belonging to the clients of the partnership. Mr. Howe took chambers in the neighborhood, for the purpose and with the intention of carrying on business as an attorney and solicitor, and, as was stated by the plaintiff's affidavit, he threatened and intended to solicit the clients of plaintiffs' partnership, and to induce, or endeavor to induce, such clients to take away their business from the plaintiffs' firm, and to employ him, the defendant, in respect of their business; and he intended to make use of the documents and papers, which were so as aforesaid surreptitiously obtained by him from the chambers of said partnership, for the purpose of furthering his said designs, and of preventing the plaintiffs from transacting the business of their said clients, and of otherwise embarrassing the plaintiffs in the conduct of such business. It was also alleged by the plaintiffs, that the defendant intended to practice in the name of a third person in such manner as to evade his agreement. The plaintiffs thereupon filed their bill, and now moved for an injunction "to restrain the defendant, Howe, from detaining and keeping possession of the books, etc., from the chambers occupied by the plaintiffs," and from permitting the same to remain away from the office of the plaintiffs, etc., and, "from practicing or in any manner carrying on business as a solicitor or attorney in any part of Great Britain," etc., and to restrain him from soliciting the clients of the late firm of Howe and Heptinstall to transfer their business from the plaintiffs to any other solicitor or attorney, or to cease to employ them, and from acting as the solicitor or attorney of any such clients.

An injunction was granted restraining the defendant from practicing as an attorney or solicitor in any part of Great Britain, or from endeavoring to induce any persons who were the clients of Howe and Heptinstall, or of Howe, Whittaker and Tatham, from employing Whittaker and Tatham as their attorneys or solicitors, Lord Langdale, M. R., saying: "I cannot come to the conclusion that this agreement is void,

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[1] Taylor v. Davis, cited in n. (e) 3 Beav. 388.

[2] Morrison v. Moat, 9 Harr. 241.

[3] Charlton v. Douglass, 1 Johns. 174.

Again, if one partner sues another at law, a court of equity will interfere by injunction, if, having regard to the partnership accounts, or the state of the partnership business, it can be shown that the action ought not to have been brought.[1] But a court of equity will not interfere to prevent a shareholder of a company who is a creditor of that company from executing a judgment obtained against it by him as creditor.[2]

Before leaving this subject, it is necessary to make a few observations on the kind of misconduct which will induce the court to grant an injunction against one partner at the suit of another. Mere squabbles and improprieties, arising from infirmities of temper, are not considered sufficient ground for an injunction;[3] but if one partner excludes his copartner from his rightful interference in the management of the partnership affairs, or if he persists in acting in violation of the partnership articles on any point of importance, or so grossly misconducts himself as to render it impossible for the business to be carried on in a proper manner, the court will interfere for the protection of the other partners.[4] Where, however, the partner complained of has by agreement been constituted the active managing partner, the court will not interfere with him unless a strong case be made out against him;[5] nor will the court restrain a partner from acting as such, merely because if he is known so to do, the confidence placed in the firm by the public will be shaken.[6]

Partner seeking to restrain must show willingness himself to conform to the provisions of the contract.

SEC. 360. It need scarcely be observed that a partner who seeks an injunction against his copartner must himself be able and willing to perform his own part of any agreement which he seeks to restrain his copartner from breaking,[7] and the plaintiff's own misconduct may be a complete bar to his application, however wrong the defendant's conduct

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and I do not think that this court can refuse an injunction to restrain the violation of a contract or covenant, because there may be some parts of the agreement which the court could not compel the defendant specifically to perform."

[1] See Gold v. Canham, 1 Ch. Ca. 311, and 2 Swanst. 325, note; and as to restraining actions of ejectment, Elliot v. Brown, 3 Swanst. 489, note, and Hawkins v. Hawkins, 4 Jur. (N. S.) 1045.

[2] Rheam v. Smith, 2 Ph. 726; Hardinge v. Webster, 6 Jur. (N. S.) 88; also reported in 6 Jur. (N. S.) 88; and see Hammond v. Ward, 3 Drew. 103.

[3] See Marshall v. Colman, 2 J. & W. 266; Smith v. Jeyes, 4 Beav. 503; Lawson v. Morgan, 1 Price, 307; Cofton v. Hornor, 5 Price, 537; Warder v. Stilwell, 3 Jur. (N. S.) 9.

[4] In Anderson v. Wallace, 2 Moll. 540, one of several partners who horsed a mail coach was restrained from horsing it on the ground that he did it so badly as to imperil the business of the concern.

[5] See Lawson v. Morgan, 1 Price, 303; Waters v. Taylor, 15 Ves. 10.

[6] Anon., 2 K. & J. 441.

[7] Smith v. Fromont, 3 Swanst. 330.

may have been.[1] As stated by Lord Eldon, in Const v. Harris, a partner who complains that his copartners do not do their duty to him, must be ready at all times, and offer to do his duty to them.[2]

Equity will restrain one from holding out another as his partner against his will.

SEC. 361. In consequence of the liability which attaches to a person who holds himself out as a partner with others, and of the danger run by a person who is held out as a partner with others, even although it may not be with his consent, a court of equity will, it seems, interfere and restrain a person from holding out another as partner with him, without the authority of that other.[3]

Injunction without dissolution.

SEC. 362. It is not necessary, as between partners, that an application for a dissolution of a partnership should accompany an application for an injunction. It is often the case that a dissolution would involve the partners in serious loss, and that equity requires that a partner should be compelled to go on with the business, but to go on with it in conformity with the contract and the true interests of the firm, and in such cases an injunction is often a very proper remedy.[4] As to restrain a partner from applying the partnership property to other than partnership purposes,[5] or from preventing a partner from transacting his business in the firm,[6] or from excluding a partner from the business.[7] A surviving partner, in a proper case, will be restrained from improperly ejecting the representatives of a deceased partner.[8] The appointment of a receiver of a firm operates as an injunction *ipso facto* and ousts the partnership of all control over the business. It is more effectual in its restraint than an injunction, because an injunction only operates to restrain those against whom it issues, while by the appointment of a receiver the court takes the entire control of the

[1] Littlewood v. Caldwell, 11 Price, 97, where an injunction was refused because the plaintiff had taken away the partnership books.

[2] Const v. Harris, T. & R. 524.

[3] Routh v. Webster, 10 Beav. 161; Bullock v. Chapman, 2 De G. & S. 211; Troughton v. Hunter, 18 Beav. 470; and if a person is without his authority advertised by the promoters of a company as a trustee, an injunction will be granted restraining such use of his name. Routh v. Webster, 10 Beav. 161.

[4] Fairthorne v. Weston, 3 Hare, 387; Miles v. Thomas, 9 Sim. 696; Richardson v. Hastings, 7 Beav. 301.

[5] Gardner v. McCutcheon, 4 Beav. 534; Hall v. Hall, 12 id. 414; Taylor v. Davis, 4 L. J. Ch. (N. S.) 18; Goodman v. Whitcombe, 1 J. & W. 589, Hawkins v. Blackford, 1 L. J. Ch. 142.

[6] Anonymous, 2 K. & J. 441.

[7] Wander v. Stitwell, 26 L. J. Ch; 378; Hall v. Hall, 12 Beav. 414; Shrewsbury, etc., R. R. Co. v. Shrewsbury, etc., Co., 1 Sim. (N. S.) 423.

[8] Hawkins v. Hawkins, 4 Jur. (N. S.) 1045.

property through him, and excludes everybody but the receiver.[1] When a surviving partner is dilatory in closing up the business of the firm, a court of equity will interpose and enjoin from acting further in the closing up of the business, and will direct an account to be taken.[2] So, too, upon principle held to apply to cases of dissolution by agreement, it would restrain him from disposing of the property, otherwise than for partnership purposes.[3]

Real or threatened breach of contract must be alleged.

SEC. 363. As has previously been stated, a court of equity interferes in cases of partnership as to matters arising between the partners, with great care, and only in cases where the grounds alleged in the bill are such as to render its interposition necessary for the proper protection of the rights of the parties, and in cases of doubt, the doubt is always resolved against the complainant. The ground upon which this interference is predicated is an actual or threatened breach by the party sought to be restrained, of some of the provisions of the contract of partnership, either express or implied. So long as they all keep within the scope of the contract, and violate none of its provisions or obligations, express or implied, or threaten or contemplate a violation thereof, an injunction cannot issue, although the consequences likely to be visited upon the firm are very serious, and, while there may be instances in which the court will interfere when the act complained of or sought to be restrained, is not sufficient to warrant a dissolution, yet, those instances are the exception rather than the rule,[4] and generally the breach must be such as to warrant a dissolution.[5] It is proper to say, however, that an injunction cannot issue in all cases where a dissolution will be ordered, nor, upon the other hand, can a dissolution be ordered in all cases where an injunction will issue. An injunction will lie to restrain the doing an act that a person threatens to do, and which, if done, would operate as a violation of the complainant's rights,[6] while a dissolution can only be granted because of some breach of some one of the express or implied provisions of the contract of partnership. Thus in one case[7] the parties were copartners in a general coach company. The company fur-

[1] Evans v. Coventry, 5 D. M. & G. 911.

[2] Davis v. Fulton, 1 Overt. (Tenn.) 121; Murray v. Mumford, 6 Cow. (N. Y.) 441.

[3] Devan v. Fowler, 2 Paige's Ch. (N. Y.) 400.

[4] Glassington v. Thwaites, 1 S. & S. 61.

[5] Goodman v. Whitcomb, 1 J. & W. 592; Marshall v. Colman, 2 J. & W. 268; Harrison v. Armitage, 4 Madd. 143.

[6] Anderson v. Wallace, 2 Moll. 540.

[7] Anderson v. Wallace, 2 Moll. 540.

nished the coaches, and each partner supplied horses for a distinct part of the line. The plaintiff brought a bill to restrain the defendant from interfering with a mail coach on his part of the line, upon the ground that his horses were so bad as seriously to imperil the business. An injunction was granted. In another English case[1] the court granted an injunction in a case where no grounds for a dissolution of the contract were set forth in the bill. In that case the plaintiff, as one of the partners in a company formed for the publication of a newspaper called "The Morning Newspaper," brought a bill in equity to restrain the defendants (his copartners) from using the partnership effects in the publication of another newspaper called "The English Chronicle," of which they were the proprietors, and in which the plaintiff had no interest. He also prayed for an accounting of the partnership dealings. It appeared that "The Morning Herald" was divided into ten shares and one-half. The plaintiff was entitled to one of these shares. The defendant, Thwaite, had six shares and a half, and the other defendants were proprietors of the remaining three shares. The articles of partnership, under which these shares were held, were dated in July, 1816. By one of the clauses in this deed it was provided that a general meeting of the proprietors should be held every week, at such time and place as should be fixed by the major part of the proprietors, whose votes should, on all occasions, be, and be considered, not by number, but in proportion to the value of their respective shares; and that, at every such meeting, all matters relating to the management of the newspaper should be settled; and that all rules, regulations and orders, touching the management of the newspaper, made by the votes of the majority in value of the proprietors and parties interested therein and then present, should be binding and conclusive on all the parties to the deed. This deed was executed by the plaintiff, as well as by the other proprietors.

For some time previously to the year 1816, an evening newspaper called the English Chronicle, had been carried on, and the proprietor of that paper had been also one of the proprietors of the Morning Herald, and both these papers had for many years been carried on and published at the same place. In the year 1804 an agreement was made between the proprietor of the English Chronicle and the proprietors of the Morning Herald, by which the former paper was allowed to have the use of the types and other effects belonging to

[1] Glassington v. Thwaites, 1 S. & S. 61.

the partnership of the Morning Herald, in consideration of the sum of 200*l.* a year. This agreement subsisted in 1816, and the proprietors of the Morning Herald, under the deed of July, 1816, continued to act on the same agreement, and to allow to the English Chronicle the use of the types and partnership effects, and to receive the annual sum of 200*l.* as the price of this convenience.

In the year 1821, the proprietor of the English Chronicle offered to sell that paper to the proprietors of the Morning Herald, who, with the exception of the plaintiff alone, accepted the offer, and purchased that paper. Thus the two newspapers were united under the same proprietors, except that the plaintiff had a share in the Morning Herald only, and had no interest in the English Chronicle. After this purchase a new agreement was entered into, by which the English Chronicle was to pay an annual sum of 250*l.* instead of 200*l.* to the Morning Herald, for the use of the types, etc. Under this new agreement the plaintiff and the other proprietors of the Morning Herald continued to allow to the English Chronicle the use of their types and partnership effects, till August, 1822, when the plaintiff caused a notice to be served on the defendants that this agreement must be discontinued, and none of the effects of the Morning Herald used for the English Chronicle.

The plaintiff stated, by his bill, that he had for many months been excluded from his rights as a partner in the Morning Herald, and that the effects of the partnership in that paper had been misapplied to the use of the "English Chronicle;" that intelligence obtained at the expense of "The Morning Herald" had been first used for "The English Chronicle," by which means it was rendered of no value to "The Morning Herald;" and that the plaintiff's name, without his consent, was used as one of the publishers of that paper. The defendants, in their answer, insisted on the terms of the deed of July, 1816. They also stated that the plaintiff had greatly misconducted himself, and had not properly accounted for balances of partnership money in his hands, but was indebted to the company in that respect to the amount of 300*l.* and more; and that, in consequence of his misconduct, the defendants who were a majority in number, and in value of shares, had been compelled to exclude him from interfering in the management of the paper; that the agreement with "The English Chronicle" was beneficial to "The Morning Herald," not only on account of the annual sum of 250*l.* which was paid for the use of the types and other effects, but also because "The Morning Herald" had the

use of the type composed for new matter in "The English Chronicle," but also the use of the type of that paper. They also alleged many years' acquiescence on the part of the plaintiff in this course, and that no new circumstances had arisen to render it less beneficial than before, and denied that any intelligence obtained by "The Morning News," except on one occasion, many months prior to the bringing of the plaintiff's bill, had been first used in "The English Chronicle."

The Vice-Chancellor said: "The practice complained of by this application is defended as being the act of a majority of the partners, who, by the express terms of the partnership articles, are entitled to bind the minority, and the plaintiff is the only partner who objects to it. And it is further stated that the plaintiff himself concurred in the propriety of this practice, until his copartner purchased this evening paper, and that it is the same thing, in effect, as to the interest of the plaintiff, whether the evening paper belongs to his copartners or belongs to strangers. The right of the majority to decide is necessarily confined to matters which occur in the conduct of the partnership concern.

"All newspapers are to some extent rivals. The competition is more immediate between two morning papers and two evening papers; but there is necessarily some degree of rivalry between a morning and an evening paper, especially in the country. It might, therefore, have been made a question, whether it would be a due act of management in the partnership concern of a morning paper, to assist with its property and its labor the publication of any other newspaper, so as to enable the majority of the partners in that respect to bind the minority. But that question does not arise, because the plaintiff himself is to be considered as a party to the practice before his copartners became the proprietors of the evening paper, and because there is evidence that the proprietors of other morning papers have adopted the same practice with respect to other evening papers, so as to form a sort of usage in the trade to this effect. And it is to be considered that the annual sum paid by the evening paper, for the accommodation afforded to it, outweighs the danger of increased competition.

"The true question here is, whether it makes any difference that the other proprietors of the Herald have now become the proprietors of the evening paper, and I think it does not make a material difference. It is true that a considerable part of the expense of a newspaper is occasioned by procuring information, and if some of the pro-

prietors of a morning paper are also the proprietors of an evening paper, they may have a stronger interest to promote the success of the evening paper than of the morning paper, and a strong temptation to use the information obtained at the expense of the morning paper for the benefit of the evening paper. This temptation forms a powerful objection in all cases to the partner in the concern of one newspaper being permitted to be a partner in the concern of any other newspaper. But it is an objection founded on the principle of policy and discretion, against which parties may protect themselves by their contracts, and, accordingly, it is a common covenant in such partnership articles that no partner shall be the proprietor of any other newspaper. In the present case, there is actually a covenant that the proprietors will not be concerned in any other morning paper, which, by implication, affords the conclusion that it was the intention of the parties that they might engage in the concern of any evening paper.

"Where there is no such covenant of restraint, it is clear that at law a partner in one newspaper may be a proprietor in any other newspaper; and in this case equity must follow law, and it cannot be intended that the parties meant to impose a restraint which they might have expressed, and have not expressed, and where it is plain their attention was directed to the subject.

"The principles of courts of equity would not permit that parties bound to each other by express or implied contract to promote an undertaking for the common benefit, should any of them engage in another concern, which necessarily gave them a direct interest adverse to that undertaking. But the argument here is, not that the defendants, by becoming the proprietors of the evening paper, place themselves in a situation in which they are necessarily required to betray their duty to the morning paper, but that, if their interest be greater in the evening paper than in the morning paper, they are exposed to a temptation to be dishonest and to betray their duty to the morning paper. If they act honestly, it is immaterial to the morning paper whether the defendants are or not the proprietors of the evening paper and for this reason it is that it makes no difference in the present case that the defendants have become the proprietors of the evening paper."

The court refused the injunction generally, but allowed the plaintiff to take an injunction to restrain the defendants from publishing in the "English Chronicle" any information obtained at the expense

of the "Morning Herald," until it should have been first published in the "Morning Herald."

Instances in which equity will restrain.

SEC. 364. Indeed, a court of equity will in a proper case restrain the dissolution of a firm.[1] "The more usual cases of fraud and misconduct," says Mr. Bissett in his work upon Partnership, p. 138, "in which the court of chancery will interfere by injunction to restrain a partner from intermeddling with the partnership effects, are to restrain him from drawing, accepting, or indorsing bills in the name of the partnership;[2] to restrain the application of partnership property to a use not warranted by the articles,[3] or the oppressive conduct of one partner,[4] or an execution against the partnership property for the separate debt of one partner,[5] or setting up a trade in same neighborhood contrary to agreement,[6] and, generally, any misapplication of the partnership fund, or proceeding contrary to good faith, by any partner."[7] "A court of equity," says Mr. Eden in his work upon Injunctions, p. 359, "will frequently interpose by injunction to restrain a partner from intermeddling with the partnership effects, accepting or negotiating bills in the name of the partnership, etc., and if necessary, appoint a receiver."[8] "But," he adds, "there are cases where an injunction will be granted, although a receiver is refused.[9] This will not be done merely on the ground of there being a dissolution of the partnership. It will be granted whenever there is a violation of duty in the partner, or a breach of contract."[10]

Mr. Gow in his work upon Partnership, p. 112, after laying down the general rule that a court of equity will not enjoin unless there be a prayer for a dissolution, proceeds to say: "But though the general principle of the court is not to interfere in the partnership concern, unless the bill prays a dissolution, yet, there are cases of partnership for a term of years in which it has been said the court will interpose, although notwithstanding a dissolution be not prayed. Thus, where

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[1] Chavany v. Van Somer, 1 Swanst. 512, n.

[2] Williams v. Bingley, 2 Vern. 278, n.; Master v. Kirton, 3 Ves. 74; Hood v. Aston, 1 Russ. 412; Seton's Decrees, 308.

[3] Glassington v. Thwaites, 1 S. & S. 61.

[4] Charlton v. Poulter, 19 Ves. 148, n.

[5] Anonymous, 2 Ch. Ca. 38.

[6] Harrison v. Gardner, 2 Madd. 197; Williams v. Williams, 2 Swanst. 253.

[7] Devan v. Fowler, 2 Paige's Ch. (N. Y.) 400.

[8] Williams v. Bingley, 2 Vern. 278, n.; Phillips v. Atkinson, 2 Bro. C. C. 272; Read v. Bowers, 4 id. 440; Peacock v. Peacock, 16 Ves. 49; Boyd v. Wickham, 3 Johns. Ch. (N. Y.) 48; Green v. Winter, 1 id. 60; Verplank v. Caines, id. 57.

[9] Hartz v. Schrader, 8 Ves. 317.

[10] Harding v. Glover, 18 Ves. 281; Charlton v. Poulter, 19 id. 148, n.

some of the members of a partnership or company seek te embark one of their body in a business which was not originally part of the partnership concern, and they are unable to show that such partner either expressly or tacitly acquiesced in the proposed extension of the concern, a court of equity would, it is apprehended, restrain them from proceeding in the execution of their intention, without dissolving the partnership or company. So, where a member neglected to enter the receipt of partnership money in the books, and did not leave the books open for the inspection of other partners, equity interfered without dissolving the partnership.[1] So, where there has been a studied intentional, prolonged and continued inattention to the application of one partner calling upon the other to observe the contract of partnership, the court would grant an injunction to restrain the breach of it,[2] and, in general, circumstances of the latter description must be disclosed to induce a judicial interference on a breach of the articles of partnership, unless a dissolution be prayed." "If," said Wigram, V. C., "it were the rule of the court that a bill would in no case lie to compel a man to observe the covenants in a partnership deed, unless the bill seeks a dissolution of the partnership, it is evident that a person, fraudulently inclined, might of his own mere will and pleasure compel his copartners to submit to the alternative of dissolving the partnership, or ruin them by a continued violation of the partnership contract."[3] In Richardson v. Hastings, Lord Langdale, M. R., said: "At one time the court would not entertain a suit between parties in relation to partnership transactions, except upon a bill to wind up the partnership. That is not now the rule of the court, for I think, and the cases which have been referred to corroborate that view, that the court will, as between partners, entertain a bill to settle questions arising between them, without proceeding to wind up the concerns and affairs of the partnership."

"Whatever doubt there may formerly have been upon the subject," says Mr. Lindley, vol. 2, p. 840, "it is clear that an injunction will not be refused simply because no dissolution of partnership is sought. In a recent case, a partner who had been suffering from temporary insanity had recovered, but was excluded by his copartners from the management of the affairs of the partnership. On a bill filed by him against them, praying for an injunction to restrain them from pre-

[1] Goodman v. Whitcomb, 1 J. & W. 592.
[2] Marshall v. Colman, 2 J. & W. 268.
[3] Fairthorne v. Weston, 3 Hare, 387; see, also, to the same effect, Richardson v. Hastings, 7 Beav. 301; Miles v. Thomas, 9 Sim. 606.

venting him from transacting the business of the partnership, as a partner, the court granted the injunction, and thereby restored the plaintiff to his position in the firm.[1]

Again, in England v. Curling,[2] a partnership had been entered into, for a term of years which had not expired. One of the partners insisted on a dissolution and retired from the partnership, and entered into another partnership, which assumed the name of the old firm, opened the letters addressed to it, and circulated notices of its dissolution. But on a bill filed by the continuing partners of the old firm against their copartner and the other members of the new firm, the court granted an injunction restraining the retired copartner from carrying on business with his new partners or any other persons except his old copartners, until the expiration of the term, and restraining his new partners from carrying on business with him, or otherwise, in the name of the old firm, and from receiving or opening letters addressed to it, and from interfering with its property, and restraining the retired partner from publishing or circulating any notice of the dissolution of the old firm, before the expiration of the term for which it had been entered into. So, in the subsequent case of Hall v. Hall,[3] a partnership for twenty-one years, determinable on twelve months' notice by either party,[4] was entered into by the plaintiff and the defendant, disputes arose, and the defendant wholly excluded the plaintiff from the partnership business. The plaintiff filed a bill praying that the articles might be performed, and, amongst other things, for an injunction, but not for a dissolution. An injunction was granted restraining the defendant from applying any of the moneys and effects of the copartnership, otherwise than in the ordinary course of business, and from obstructing or interfering with the plaintiff in the exercise or enjoyment of his rights under the partnership articles.

These authorities show that where a partnership is not determinable at will, those partners who are desirous of carrying on the business in the proper way will be protected by a court of equity from the unwarranted acts of a copartner, whose only object may be, by grossly misconducting himself, to force the others to agree to a dissolution.[5]

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[1] Anon., Z. v. X., 2 K. & J. 441.

[2] 8 Beav. 129; see, too, Warder v. Stilwell, 3 Jur. (N. S.) 9.

[3] 12 Beav. 414; 20 id. 139; and 3 Mac. & G. 79.

[4] See 20 Beav. 139.

[5] See, too, Fairthorne v. Weston, 3 Hare, 387.

Where the partnership is determinable at will, there is, it is said, more difficulty in interfering, if a dissolution is not prayed, for, supposing the court to interfere, the defendant might immediately dissolve the partnership.[1] But supposing him to do so, an injunction will not necessarily be futile, inasmuch as so long as it continues in force the defendant is rendered powerless for evil, and a notice by him to dissolve the partnership cannot *per se* operate as a dissolution of the injunction. In Glassington v. Thwaites,[2] the plaintiff, who was one of the proprietors of the "Morning Herald," obtained an injunction, restraining his copartners, who were also proprietors of the "English Chronicle" (in which, however, the plaintiff had no interest) from publishing in the latter paper, any information obtained at the expense of the former until it should have been first published in the "Morning Herald." So in Morris v. Colman,[3] one of the proprietors of the Haymarket Theatre was restrained from acting contrary to the articles of partnership, by writing plays for other theatres. It does not appear from the reports of these cases whether the partnerships were partnerships at will or not, but supposing them to have been merely partnerships at will, it is clear that the injunctions were far from valueless."

Mr. Kerr, in his excellent work upon Injunctions, pp. 165–170, after proceeding to state that an injunction may issue where a dissolution is not prayed, proceeds to state the instances in which this remedy has been permitted, as follows: "Where a member of a partnership firm who had been suffering from temporary insanity had recovered, but was excluded by his copartners from the management of the affairs of the partnership, they were restrained from preventing him from transacting the business of the partnership as a partner.[4] So, also, disputes having arisen among the partners in a partnership firm, formed for twenty-one years and determinable on twelve months' notice by either party, one of the partners was restrained from excluding his copartner from the partnership business, and from obstructing or interfering with the plaintiff in the exercise or enjoyment of his right under the partnership articles,[5] and from applying any of

[1] See Peacock v. Peacock, 16 Ves. 49; Miles v. Thomas, 9 Sim. 606.
[2] 1 Sim. & Stu. 124.
[3] 18 Ves. 437.
[4] Anon., 2 K. & J. 441.
[5] Hall v. Hall, 12 Beav. 414; 3 Mac. & G. 79; Shrewsbury and Chester Railway Co. v. Shrewsbury and Birmingham Railway Co., 1 Sim. (N. S.) 423, per Lord Cranworth; Warder v. Stillwell, 26 L. J. Ch. 373.

the funds or effects of the partnership, otherwise than in the ordinary course of business, though no dissolution was sought.[1]

It is doubtful whether the court would interfere in the case of partnerships determinable at will, if a dissolution is not prayed for, for, supposing the court to interfere, the defendant might immediately dissolve the partnership.[2] It is, however, probable that the court would not decline to interfere where the act complained of might tend to the destruction of the partnership, or where its interference might be of service in preventing the doing of an illegal act.[3] In Glassington v. Thwaites,[4] the plaintiff, who was one of the proprietors of a morning newspaper, obtained an injunction against his copartners, who were also proprietors of another newspaper in which he had no interest, from publishing in the latter paper any information obtained at the expense of the former until it should have been published in the former. So, in Morris v. Colman,[5] one of the proprietors of a theatre was restrained from acting contrary to the articles of partnership by writing plays for other theatres. Had these cases been partnerships at will, an injunction would not have been without value.[6]

After the dissolution of a partnership any one of the partners may, in the absence of express agreement, recommence business in the old line in the old neighborhood.[7] Though a retiring partner may have assigned his interest and good-will in the business to his copartner, an agreement not to recommence business will not be implied,[8] but a retiring partner may not recommence or carry on business in such a way as to lead people to suppose that he is the successor of the old firm.[9] He has, however, a right to say, in the absence of express agreement, that he lately belonged to a certain firm, and may advertise the fact,[10] or to advertise that he is no longer connected with the concern.[11] An agreement by one partner not to carry on business in opposition to his late copartners may be sometimes implied.[12] A retir-

[1] Hall v. Hall, 12 Beav. 414; 3 Mac. & G. 79. See Goodman v. Whitecombe, 1 J. & W. 589; Hawkins v. Blackford, 1 L. J. Ch. 142; Taylor v. Davis, 4 L. J. Ch. (N. S.) 18; Gardner v. M'Cutcheon, 4 Beav. 534.

[2] Peacock v. Peacock, 16 Ves. 49.

[3] Miles v. Thomas, 9 Sim. 608. See Blissett v. Daniel, 10 Ha. 493; Lindley on Part. 179.

[4] 1 Sim. & Stu. 124

[5] 18 Ves. 437.

[6] See Lindley on Part. 842.

[7] Shackle v. Baker, 14 Ves. 468; Cruttwell v. Lye, 17 id. 335; Harrison v. Gardner, 2 Madd. 198; Kennedy v. Lee, 3 Mer. 455; see Davies v. Hodgson, 25 Beav. 177; Churton v. Douglas, Johns. 174; Parsons v. Hayward, 31 L. J. Ch. 666.

[8] Id.

[9] Churton v. Douglas, Johns. 174; Hunt v. Hancock, 15 L. T. 499.

[10] Clark v. Leach, 32 Beav. 14.

[11] Bradbury v. Dickens, 27 Beav. 53; see Marshall v. Watson, 25 id. 501.

[12] Harrison v. Gardner, 2 Madd. 198; see Cooper v. Watson, 3 Doug. 414; Goslin v. Ryan, 10 L. T. 36; Lindley on Part. 707.

ing partner who has entered into an express agreement not to carry on business will be restrained according to the terms of the covenant, provided the covenant be reasonable in its terms. Injunctions accordingly have been granted to enforce covenants not to carry on a business,[1] not to get in the debts of the firm,[2] and not to divulge a trade secret.[3] A name or partnership style is an asset of the partnership. If on a dissolution the partners choose to divide the assets, each of them may, in the absence of express agreement, carry on the business in the name of the old firm. But if one of the partners by arrangement takes the whole concern at a valuation, the name is an item in the valuation, and the retiring partner may not continue the use of it.[4] In Bradbury v. Dickens,[5] an author who had been in partnership with a publisher, was restrained, after dissolution, from advertising that a certain publication would be discontinued, the right to use the name of the publication being partnership assets.[6]

The right to use the style of the partnership firm until dissolution belongs, *prima facie*, in the absence of agreement, to the surviving partner. A surviving partner will not be restrained from continuing to carry on the business in the name of himself and his deceased partner, unless to do so is contrary to agreement.[7] On the other hand, the representatives of a deceased partner will, in the absence of agreement, be restrained, till the right be established at law, from using the name of the partnership firm.[8] In Evans v. Hughes, a surviving partner was restrained from carrying on business for three months after the decease of the other partner, under any style except that of the old firm, there being a stipulation in the articles of partnership that the representatives of a deceased partner might elect to take his share.

If the whole of a partnership concern and the good-will of a business have been sold, the right to the name or partnership style, as a general rule, passes with it.[10]

The court will not interfere in all cases of misconduct to grant an injunction against one partner at the suit of another. Mere disagreements, or quarrels arising from bad temper and improprieties of con-

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[1] Whittaker v. Rowe, 3 Beav. 383; Turner v. Evans, 2 D. M. & G. 740; Turner v. Major, 3 Giff. 443.

[2] Davis v. Amer, 3 Drew. 64.

[3] Morison v. Mont, 9 Ha. 241.

[4] Banks v. Gibson, 34 Beav. 566.

[5] 27 Beav. 53.

[6] See Marshall v. Watson, 25 Beav. 501.

[7] Webster v. Webster, 3 Sw. 490, n.; Lewis v. Langdon, 7 Sim. 425.

[8] Lewis v. Langdon, 7 Sim. 425; see Robertson v. Quiddington. 28 Beav. 536.

[9] 18 Jur. 691.

[10] Banks v. Gibson, 34 Beav. 566. See, as to the meaning of "good-will," Austen v. Boys, 2 D. & J. 626.

duct, are not a sufficient ground for the interference of the court. Unless a partner is conducting himself so grossly as to render it impossible for the business to be carried on in a proper manner, the court will not interfere.[1] When partners have agreed that the management of their affairs shall be intrusted to one or more of them exclusively, the court will not interpose, unless he or they is or are acting illegally, or in breach of the trust reposed in them, or have become insolvent.[2] The court will not interfere to restrain a partner from acting as such, merely because if he were known to be acting as partner the confidence of the public in the concern might be shaken.[3] When the articles of partnership provide that it should be lawful for the other partners, in certain events, to expel any one of their number, the power may be exercised without any reason being assigned for such expulsion, but it must be exercised in good faith, and not against the truth and honor of the contract.[4]

The court will interfere by injunction to protect partners from the interference of persons claiming the share of a late copartner by reason of his bankruptcy,[5] or under an execution,[6] or by reason of his death.[7] If one partner sues another at law, the court will interfere by injunction, if having regard to the partnership accounts, or the state of the partnership business, it can be shown that the action ought not to have been brought.[8] An injunction will be granted to restrain a person from holding out another as a partner, against the wish and without the authority of that other.[9] So, also, a company was restrained from advertising a certain person as their trustee without his authority.[10] Upon the same principle a company will be restrained from wrongfully retaining on the list of shareholders a person who has ceased to be one.[11] A partner in a patent will not be

[1] Marshall v. Coleman, 2 J. & W. 268; Hawkins v. Blachford, 1 L. J. Ch. 142; Smith v. Jeyes, 4 Beav. 503; Warder v. Stillwell, 26 L. J. Ch. 373; Anderson v. Anderson, 25 Beav. 190; Baxter v. West, 1 Dr. & Sm. 173.

[2] Marshall v. Colman, 2 J. & W. 268; Goodman v. Whitcombe, 1 id. 589; Lawson v. Morgan, 1 Price, 303; Cofton v. Horner, 5 id. 537; Waters v. Taylor, 15 Ves. 10; Glassington v. Thwaites, 1 Sim. & Stu. 125; Smith v. Jeyes 4 Beav. 304; Roberts v. Eberhardt, Kay, 160.

[3] Anon., 2 K. & J. 441.

[4] Blisset v. Daniel, 10 Ha. 493.

[5] Frazer v. Kershaw, 2 K. & J. 500; Allen v. Kilbre, 4 Madd. 464; Davidson v. Napier, 1 Sim. 297; Freeland v. Stansfield, 2 Sm. & G. 479; Francis v. Spittle, 9 L. J. Ch. (N. S.) 230.

[6] Bevan v. Lewis, 1 Sim. 376; Newell v. Townshend, 6 id. 419.

[7] Phillips v. Atkinson, 2 Bro. C. C. 272.

[8] See Gold v. Canham, 1 Ch. Ca. 311; 2 Sw. 326, n. See, as to restraining ejectment by one partner against another, Elliott v. Brown, 3 Sw. 389, n.; Hawkins v. Hawkins, 4 Jur. (N. S.) 1045.

[9] Routh v. Webster, 10 Beav. 561; Bullock v. Chapman, 2 DeG. & S. 211; Troughton v. Hunter, 18 Beav. 470.

[10] Routh v. Webster, 10 Beav. 561.

[11] Bullock v. Chapman, 2 DeG. & S. 215.

restrained from publishing a book containing an account of the invention.[1] A partner who seeks to restrain his copartner from violating the terms of a partnership agreement, or his duties as a partner, must be able to show that he is able and willing to perform his own part of the agreement, and has fulfilled the duties incumbent on himself.[2] However improper the conduct of his copartner may have been, a partner may, by his own acts, debar and preclude himself from relief in equity.[3] Acquiescence in the act complained of may disentitle a partner to relief against his copartners.[4]

One partner will be restrained from misapplying the funds or effects of the partnership. Thus, a surviving partner has been restrained at the suit of the representatives of a deceased partner, from using the partnership effects to sustain himself and family,[5] and so, generally, there can be no question but that equity would interfere to restrain any act on the part of one partner that is inconsistent with the provisions of the contract, or with the implied obligations of partners to each other, or the ordinary rules of good faith and fair dealing that are peculiarly applicable to the relation. Thus, a partner will be enjoined from carrying on the same business, in the same place, as a separate business of his own,[6] or from applying funds that have come into his hands as a partner, to his own use.[7]

So, where a partner has become insolvent, a court of equity will, upon the application of a copartner, restrain him from disposing of the partnership property, or getting in its debts.[8] So it will restrain one partner from excluding his copartner from the business, or from collecting firm debts.[9] Thus, in a Kentucky case,[10] Pirtle & Penn, as partners, agreed to publish Pirtle's Digest. Penn to do the printing and binding, and each to be entitled to half the proceeds. There was a dispute as to whether Pirtle was entitled to half the gross proceeds, or only to half the net proceeds. Penn, after a portion of the books had been sold, refused to permit Pirtle to have any control over or to

[1] Hawkins v. Blachford, 1 L. J. Ch. 142.

[2] Smith v. Fromont, 3 Sw. 330; Const v. Harris, T. & R. 524.

[3] Littlewood v. Caldwell, 11 Price, 97.

[4] Glassington v. Thwaites, 1 Sim. & Stu. 125.

[5] Hartz v. Schroder, 8 Ves. 317.

[6] Marshall v. Johnson, 33 Ga. 500.

[7] Merritt v. Thompson, 3 E. D. S. (N. Y.) 284. In Jennings v. Chamberlain, 10 Wis. 21, a surviving partner mixed the goods of the firm with his own, sold them together, and kept no separate account of the sales, and used the same for the support of himself and family, such conduct is an abuse of his trust, and the court will enjoin him and appoint a receiver, and direct an account. If the survivor desires to retain possession, he may do so upon giving security to account for the assets, pay debts, etc.

[8] Randall v. Morrell, 13 N. J. Eq. 347.

[9] Wolbert v. Harris, 7 N. J. Eq. 622.

[10] Pirtle v. Penn, 3 Dana (Ky.), 249.

participate in the sale of the residue. The court found Pirtle was entitled to half the proceeds of sale. It was held that Pirtle was entitled to an injunction and to an account, although there was no prayer for a dissolution; that a bill for an account may be sustained without a prayer for a dissolution, if there be any good reason for compelling an account and settlement.

A mere apprehension by one partner, that his copartner intends to misapply the joint funds, does not afford a proper ground for an injunction. In order to warrant the granting of this preventive remedy, he must actually have misapplied the funds, or must have threatened to do so under such circumstances as render it probable that he will do so unless restrained.[1] Generally, it may be said, an injunction will not be granted, unless the cause shown therefor is such as to demand it,[2] and while it is competent for the court to issue a prelimi-

[1] Woodward v. Schatzell, 3 Johns. Ch. (N. Y.) 415.

[2] Shad v. Fuller, R. M. Charlt. (Ga.) 501.

Injunction.—Where a partnership had been entered into for a term of years which has not expired, and one of the partners insisted on a dissolution, and retired from the firm, and entered into another partnership which assumed the name of the old one, and opened letters addressed to it, and gave notice of its dissolution, the court granted an injunction restraining the retired copartner from carrying on business with his new partners or others except his old partners until the expiration of the term, and restraining his new partners from carrying on business with him or otherwise in the name of the old firm, and from receiving or opening letters belonging to it, and the retired partner from circulating any notice of the dissolution of the old firm until the expiration of the time fixed therefor. England v. Curling, 8 Beav. 129; Warder v. Stilwell, 3 Jur. (N. S.) 9. And where an agreement was entered into between two parties for a partnership to continue twenty-one years, but determinable on twelve months' notice by either party, and disputes arose and the defendant excluded the plaintiff from any participation in the partnership business, and the plaintiff filed a bill asking that the agreement might be performed and for an injunction, but not a dissolution, an injunction was granted as prayed. Hall v. Hall, 12 Beav. 414; 3 Mac. & G. 79; 20 Beav. 139; Fairthorn v. Weston, 3 Hare, 387. But when the partnership is determinable at will, under such circumstances, it is generally necessary that a dissolution should also be prayed, Peacock v. Peacock, 16 Ves. 49; Miles v. Thomas, 9 Sim. 606, although even under such circumstances an injunction has sometimes been granted by the English courts without a prayer for dissolution. Glassington v. Thwaites, 1 Sim. & Stu. 124; Morris v. Coleman, 18 Ves. 437. So, a partner has been restrained from carrying on the partnership for any other purpose except to wind it up, De Tastet v. Bordenave, Jac. 516, from improperly rejecting the representatives of his deceased partner, Elliot v. Brown, 3 Swanst. 489; Hawkins v. Hawkins, 4 Jur. (N. S.) 1045; for making an improper use of the real estate of the partnership which may be held by a party for the use of the firm, Alder v. Fouracre, 3 Swanst. 490, n.; to restrain a partner from getting in partnership assets, if he has been guilty of breaches of trust with reference to them, Hartz v. Schrader, 8 Ves. 317; from improperly interfering with or obstructing the partnership business, Smith v. Jeyes, 4 Beav. 503; Charlton v. Poulter, 19 Ves. 148, n.; from withholding the partnership books, Taylor v. Davis, 3 Beav. 388; Greatrix v. Greatrix, 1 De G. & Sm. 692; Charlton v. Poulter, 19 Ves. 148, n.; and on dissolution to restrain one partner from injuring the property of the firm, Marshall v. Watson, 25 Beav. 501. So will the court grant an injunction to protect partners from interference on the part of persons claiming the share of a deceased partner, by reason of his death.

nary injunction upon filing of the bill, yet, unless the cause alleged is such as to render delay extremely hazardous to the interests of the complainant, it will not be issued until the coming in of the answer, and the court can act fully upon the real equities of the case.[1]

Rule in Goodman v. Whitcomb.

SEC. 365. The opinion that a partner's misconduct may be restrained by injunction, without the necessity of a dissolution, is sanctioned by Lord Eldon in the case of Goodman v. Whitcomb.[2] The parties in that case being partners in the business of carpet manufacturers, the bill was filed for a dissolution of the partnership and the usual accounts. One of the grievances stated in the bill was, that the defendant had sold goods at an under price, and exchanged others for household furniture, which he had appropriated to his own use. Lord Eldon said that trifling circumstances of conduct were not sufficient to authorize the court to award a dissolution. It was stated that the defendant had exchanged carpets for household furniture; that, perhaps, might be an improper act, but still there might be a thousand reasons why the court should not do more than restrain him in future from so doing, more particularly, as it was stated by the answer that he did it because he thought it the best thing that could be done.

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or bankruptcy, or upon an execution. Freeland v. Stansfield, 2 Sm. & G. 479; Phillips v. Atkins, 2 Bro. C. C. 272; Allen v. Kilbre, 4 Madd. 464; Fraser v. Krenshaw, 2 K. & J. 496; Davidson v. Napier, 1 Sim. 297; Bevan v. Lewis, id. 376; Newel v. Townsend, 6 id. 419. And in case of dissolution the court will restrain by injunction breaches of special agreements made by the partners, as not to carry on business, Whittaker v. Howe, 3 Beav. 383; or to get in debts of the firm, Davis v. Amer, 3 Drew. 64; or to divulge a trade secret, Morrison v. Moat, 9 Ha. 241; or to violate his agreement in reference to goodwill, assigned to plaintiff Churton v. Douglass, 1 Johns. 174; or to restrain a suit at law, where it ought not to be maintained by one partner against another. Gould v. Cauhaur, 1 Ch. Ca. 311; 2 Swanst. 325; Elliot v. Brown, 3 Swanst. 489; Hawkins v. Hawkins, 4 Jur. (N. S.) 1045. But a court of equity will not interfere to prevent a shareholder of a company, who is its creditor, from executing a judgment obtained against it by him, Rheam v. Smith, 2 Ph. 726; Hardinge v. Webster, 6 Jur. (N. S.) 88; Hammond v. Ward, 3 Drew. 103; or to interfere in the case of mere squabbles between partners, arising from the infirmities of temper, Marshall v. Coleman, 2 J. & W. 266; Smith v. Jeyes, 4 Beav. 503; Lawson v. Morgan, 1 Price, 307; Cofton v. Hornor, 5 Price, 537; Warder v. Stilwell, 3 Jur. (N. S.) 9; nor to restrain a partner to act as such merely because if he is known so to do, the confidence of the public in the firm will be shaken. 2 K. & J. 441; Lind. on Part. 844. The general maxim of equity jurisprudence is here applicable, that he who seeks equity must do equity. And where one partner seeks an injunction against another, on account of a violation of the articles of partnership, he must be able and willing to perform his own part of the agreement, Smith v. Fromont, 3 Swanst. 330, and the misconduct of the plaintiff may be a bar to his right to an injunction, as a partner who claims equity must be ready also to do his duty. Littlewood v. Caldwell, 11 Price, 97; Const v. Harris, T. & R. 524.

[1] Petit v. Chevellier, 13 N. J. Eq. 181; Van Kuren v. Trenton Locomotive Works, id. 307.

[2] 1 Jac. & Walk. 592.

Injunction when there are no grounds of dissolution.

SEC. 366. A court of equity, however, will be reluctant to award an injunction against a partner, unless there be grounds for a dissolution; and in many cases such a course would be attended with obvious inconvenience to the parties.[1] And cases may arise, where an injunction cannot with propriety be granted, whether the parties do or do not contemplate a dissolution of the partnership, and even though the party against whom the injunction is sought may have acted contrary to the spirit of the partnership arrangements. Thus, two persons agreed to work a coach from Bristol to London, one providing horses for a part of the road and the other for the remainder. In consequence of the horses of one having been taken in execution, the other provided horses for that part which had been undertaken by the first. He afterward persisted in providing horses for the whole journey, and claimed the whole profits. Upon a motion for an injunction to restrain him from so working the coaches, Lord Eldon refused the injunction. "It is difficult," said his Lordship, "to understand how such a case can be the proper subject of the jurisdiction of this court by injunction. If I enjoin the defendant from bringing horses to convey the coaches between the limits in question, I must enjoin the plaintiff from not bringing horses there. I cannot restrain the defendant, unless I have the means of assuring him that he shall find the plaintiff's horses ready. I should otherwise enjoin him from doing that which, if he omits to do, he will be liable to actions by every person whom he has undertaken to convey from Bristol to London."[2]

Rule in Williams v. Williams.

SEC. 367. In ordinary cases, however, the court will grant an injunction to restrain the working of stage-coaches in a manner inconsistent with the terms of an agreement. Thus, in Williams v. Williams,[3] the plaintiff and defendant had been partners in stage-coaches; and by an agreement on the dissolution of their partnership, it was stipulated that the business, so far as it was carried on between Newbury and London, should belong to the plaintiff, and that the defendant should not carry on the business of coach proprietor between Newbury and London. The defendant afterward set up a stage-coach, which began its journey at a place a few miles distant from Newbury,

[1] Marshall v. Colman, 2 Jac. & Walk. 266.

[2] Smith v. Fromont, 2 Swanst. 330. In this case Lord Eldon said that a question might arise, whether the plaintiff, showing that his horses were always ready, would not be entitled to the same profit as if they were used.

[3] 1 J. Wils. 473, n.

but traveled through Newbury to London. And on a bill filed, and an affidavit, Lord Eldon granted an injunction to restrain the defendant from carrying on the business between Newbury and London. So, where a company in which A and B were partners, contracted with the Postmaster-General for the service of the mail, each partner supplying horses for a distinct part of the road, but in consequence of the bad manner in which A horsed the coach, the Postmaster had been frequently obliged to suspend the contract, it was held that B might maintain an injunction against A to restrain him from interfering with B's portion of the road, on the ground of the irreparable injury to the partnership, which would ensue from such interference.[1]

Mode of obtaining an injunction.

SEC. 368. Where the plaintiff's case is not of such an urgent nature as to require the most summary interference, or if it be of that description, and he should not seek immediate protection, it is usual for him to defer making his application until after the defendant has filed his answer.[2] But where the object of the plaintiff is to prevent irreparable mischief, as, for instance, if the defendant is *insolvent* and is wasting the effects of the partnership, a special injunction may be granted on motion before answer supported by affidavit, as in other cases of waste.[3] It is, however, to be observed, that many acts may be committed productive of great inconvenience and even of loss, but which are not, therefore, in the nature of waste. In the case of Cofton v. Horner,[4] the plaintiff and defendant agreed to dissolve partnership, and that the defendant on payment of half the value of the effects should take the whole. The defendant accordingly took possession of the partnership property, but failed to make payment, and had begun to pull

[1] Anderson v. Wallace, 2 Molloy, 540.

[2] Jeremy's Eq. Jur. 337; Anon., 1 Vez. 477; Lawson v. Morgan, 1 Price, 303.

[3] Lawson v. Morgan, *supra*; Reade v. Bowers, 4 Bro. 440. In the latter case, the bill charged the insolvency of the defendant, and the probable loss of the partnership effects through his acts, and on motion "it was prayed that an injunction may be awarded against the defendant to restrain him from collecting or receiving any more of the debts now due and owing to the said copartnership, or any of them, or any sum of money on account thereof; which, on hearing the said plaintiff's said affidavit and the six clerks' certificate read, is ordered accordingly, until the defendant shall fully answer the plaintiff's bill, and this court make other order to the contrary." R. L. 1793, B. 10. In the case of waste and other cases of an analogous nature, the court will grant the injunction without notice, and before appearance, and before subpœna served, provided the plaintiff makes an early application to the court. 1 Newl. Pr. 219. But in general, if the motion is made after appearance, notice is necessary. Id.; and see Jeremy's Eq. Jur. 337. As to waste between tenants in common of real estate, see 7 Ves. 589; 16 id. 128.

[4] 5 Price, 537.

down part of the buildings The plaintiff filed his bill for an account, and for an injunction from collecting the debts, etc., and from committing waste on the partnership premises. He then moved for an injunction before answer, on the usual affidavit, but the court of exchequer held that the conduct of the defendant did not amount to waste, and dismissed the application. In a suit for an account of partnership transactions, and upon a motion for an injunction before answer, to restrain the defendant from acting as a partner, it is a complete bar to the motion if the defendant aver by affidavit that the plaintiff has possessed himself of the partnership books, and that for such reason the defendant is unable to account properly, or to put in a full answer, accordingly, in such case, notwithstanding palpable misconduct on the part of the defendant, the injunction will be refused.[1] When a special injunction has been obtained, as the injunction by the terms of the order is to continue until answer or further order, the defendant may apply to dissolve it, either upon putting in his answer, or upon affidavit before answer.[2]

The general rule is that for the purpose of obtaining or continuing an injunction, affidavits cannot be received in contradiction to assertions positively made by the answer.[3] To a certain extent, however, there is an exception to this rule in cases of waste,[4] and of misconduct in partners analogous to waste.[5] In these cases affidavits *filed prior to the answer* may be read against the answer.

Affidavits filed subsequently to the answer may be read in support of an allegation in the bill, not contradicted by the answer.[6]

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[1] Littlewood v. Caldwell, 11 Price, 97.

[2] 1 Newl. Ch. Pr. 226.

[3] Id. 227; Morgan v. Goode, 3 Mer. 10.

[4] Smythe v. Smythe, 1 Swanst. 252. But not where the title to the property is in dispute. Norway v. Rowe, 19 Ves. 144.

[5] Charlton v. Poulter, 19 Ves. 148; Peacock v. Peacock, 16 id. 49; Lawson v. Morgan, 1 Price, 303.

[6] 1 Swanst. 254, note (b); Farrer v. Hutchinson, 2 You. & C. 706. In this country the practice in case of this remedy is usually pointed out by statutes in the various states.

CHAPTER XIV.

RECEIVER, WHEN APPOINTED.

SEC. 369. Of the right to a receiver.
SEC. 370. When dissolution is intended, or has occurred.
SEC. 371. Cases illustrating.
SEC. 372. When granted on application of representative of deceased partner.
SEC. 373. When all the partners are dead.
SEC. 374. When receiver will be permitted to sue.
SEC. 375. Receiver, when appointed—instances and illustrations.
SEC. 376. Distinction between applications for, and for injunctions.
SEC. 377. Upon what the right to have a receiver depends.
SEC. 378. Must appear that firm, or some of them, have forfeited right to manage the business, or that loss would result therefrom, or that parties have agreed thereto.
SEC. 379. Misconduct that is deemed sufficient.
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SEC. 381. Receivers in mining partnerships.
SEC. 382. Partnership must be established.
SEC. 383. Of the sale of partnership property.
SEC. 384. Method of securing appointment of receiver — Generally not appointed until answer is in — When the rights of the receiver attach — Appointment does not defeat liens previously acquired by legal process or otherwise.
SEC. 385. Rights, powers and duties of receiver.

Of the right to a receiver.

SEC. 369. It seems clear that the party who seeks the benefit of a receiver, whether he desires to continue or to dissolve the partnership, should be able to prove such a case to the court as would authorize a decree for a dissolution. It has been decided that the court will not upon motion appoint a receiver of the partnership, unless it appear that the plaintiff will be entitled to a dissolution at the hearing.[1] It has been laid down by Lord Eldon, that in the ordinary course of trade, if any one of the partners seek to exclude another from taking that part in the concern which he is entitled to take, the

[1] Goodman v. Whitcomb, 1 Jac. & Walk. 689.

court will grant a receiver.[1] Where, therefore, such a course would be for the benefit of the excluded person, the court would appoint a receiver, even with a view to the continuation of the partnership. But, generally, in thus interposing between the parties, the court looks to a dissolution and general winding up of the affairs;[2] and in one case it is reported that upon a motion by a partner for a receiver during the partnership, by reason of his copartner having *embezzled* the partnership funds, the court thought that the receiver of the stock of a subsisting partnership, where the trade is going on, could not be appointed unless upon the very grossest abuse, for it must destroy the trade.[3]

When dissolution is intended, or has occurred.

SEC. 370. Where a dissolution is intended, or has already taken place, a court of equity will appoint a receiver, provided there be some breach of the *duty* of a partner, or of the *contract* of partnership.[4] Thus, if in breach of a moral obligation, one partner unjustly takes possession and refuses to give security to his copartner for his share of the stock, moneys and securities;[5] or if he in any respect behaves *unrighteously* against the interest of the other partner, a receiver will be appointed.[6] So, also, if in breach of the contract of

[1] Wilson v. Greenwood, 1 Swanst. 481. See, also, Hale v. Hale, 3 Mac. & G. 79; 8 Eng. L. & E. 191; 12 Beav. 414; Peacock v. Peacock, 16 Ves. 49; Boyce v. Burchard, 21 Ga. 74.

[2] Waters v. Taylor, 15 Ves. 10; Harrison v. Armitage, 4 Madd. 143. See Skip v. Harwood, 1 Dick. 114.

[3] Oliver v. Hamilton, 2 Anst. 453. One would have thought that embezzlement was sufficiently gross.

[4] Harding v. Glover, 18 Ves. 281; Estwick v. Conningsby, 1 Vern. 118. In Skip v. Harwood, a receiver was appointed of the brewery. "It was ordered that it should be referred to the Master to appoint a proper person to be a receiver of the stock, goods, etc., of the brewing trade, and the debts due to the partnership. That the defendant be restrained from receiving any debts due or to become due in the said trade. That the Master do allow the receiver a reasonable salary for his care, he giving security, etc. That such receiver do act as broad clerk in the said brewing trade, and collect and get in the debts according to the custom and usage of the trade, and out of the money to be received on account of the said debts, etc., that the said receiver do pay the excise and the charges, etc., in the said brewing trade. That the said receiver be at liberty to bring actions for such debts as are now or shall become due, as occasion shall require; and the persons in whose names such actions shall be brought are to be indemnified against any costs and damages on account thereof, out of the stock, goods and effects in the said trade. The stock, goods, and money, in the hands of the receiver, to be applied as the court shall direct. The books relating to the trade to be in his custody. In the meantime the defendants to be restrained from alienating, disposing, or removing any of the utensils or dead stock belonging to the said trade." R. L. 1748, B. 517.

[5] Peacock v. Peacock, 16 Ves. 49; Milbank v. Revett, 2 Mer. 405. See, also, Blakeney v. Dufaur, 15 Beav. 40; 15 Eng. L. & Eq. 76; Sloan v. Moore, 37 Penn. 217; Rutter v. Tallis, 5 Sandf. 610; Wetter v. Schlieper, 4 E. D. Smith, 707.

[6] "If partners quarrel, and one of them behaves unrighteously against the interest of the other, a receiver will be appointed. But if partners quarrel, a receiver will not merely on that account be appointed." D. Lord Eldon, Texiere v. Da Costa, in chancery, Nov. 1815, Cooke's MSS.

partnership he carries on the trade with the partnership effects on his separate account after the dissolution,[1] and thus, or in any other manner, excludes his copartner from that share to which he is entitled in winding up the concern, a receiver will be appointed.[2]

Cases illustrating.

SEC. 371. On these latter considerations a receiver was appointed in the case of Wilson v. Greenwood.[3] There, certain partners had entered into an agréement, by which, upon the bankruptcy of one of them, his share was to be valued and assigned to the remaining partners, for a consideration payable by installments, and upon the footing of this arrangement the remaining partner continued to trade with the partnership effects; upon a bill filed by the assignee of the bankrupt partner against the solvent partner, praying for a sale of the partnership effects, a division of the proceeds, and a receiver, Lord Eldon granted a receiver upon motion made before answer, observing that the court would here apply the principle on which it proceeds in all cases where some members of a partnership seek to exclude others from that share to which they are entitled, either in carrying on the concern, or winding it up when it becomes necessary to sell the property.[4] In this case, there being no imputation of misconduct, or suspicion of insolvency against the partners defendants, one of them, with the consent of the plaintiffs, was made receiver, but without salary, and upon giving security for the management, etc.

When granted on application of representative of deceased partner.

SEC. 372. The same rules which prevail respecting the appointment of a receiver in a suit between partners are applicable in a suit between the representative of a deceased partner and the surviving partner. However, in the case of Hartz v. Schrader,[5] where the bill was filed by the administrator of a deceased partner against the surviving partner, and a motion was made before answer to restrain the defendant from disposing of the joint stock, and receiving the outstanding debts, and for a receiver, and the affidavit stated, according

[1] Harding v. Glover, *supra*.

[2] The dissolution which takes place on the refusal of an appointee under a will to become partner is clearly not a dissolution arising from the exclusion of the appointee by the surviving partners, and will therefore be no foundation for a receiver. Kershaw v. Matthews, 3 Russ. 62; Butchart v. Dresser, 4 De G. M. & G. 542; 31 Eng. L. & Eq. 121. For instances in which the court will take the property out of the hands of the parties, and place it in those of a receiver, see Gowen v. Jeffries, 2 Ashm. 296.

[3] 1 Swanst. 483.

[4] Wilson v. Greenwood, 1 Swanst. 471. But it is not necessary to the appointment of a receiver that a dissolution be asked or contemplated. Fairthorne v. Weston, 3 Hare, 387.

[5] 8 Ves. 317; 2 Hov. Supp. 106.

to the *information and belief* of the deponent, "that the defendant is in embarrassed circumstances and at present imprisoned in Newgate for a separate debt, and now expends the joint stock or the moneys received by him for the outstanding debts in the maintenance of himself and his family, and not in discharge of the debts due from the partnership;" Lord Eldon made the order for an injunction, but refused it as to a receiver.

Where all the partners are dead.

SEC. 373. Where all the partners are dead, and a suit is instituted between their representatives, a receiver will be appointed as a matter of course. For, as Lord Kenyon observed, "where there is a copartnership there is a confidence between the parties, and if one dies, the confidence in the other partner remains, and he shall receive, but where both are dead, there is no confidence between the representatives, and, therefore, the court will appoint a receiver."[1]

When receiver will be permitted to sue.

SEC. 374. It should seem that courts of equity will sometimes empower the receiver to sue for debts due to the partnership, upon motion founded on affidavits that the suit will probably be attended with success.[2] But in a case in which one partner, in a suit against his copartner, moved that the receiver might file a bill against the agent of the partners, Lord Eldon refused the motion to the extent prayed for, but directed a reference to the Master, to inquire whether the proposed suit was beneficial to the parties.[3] In all urgent cases a receiver and manager may be moved for on affidavit before answer.[4]

Receiver, when appointed. Instances and illustrations.

SEC. 375. Perhaps it would be safe to say, that whenever partners are unable to agree as to the management of the property and business of the firm, and especially if loss is likely to result therefrom, and especially in the absence of agreements or stipulations in the articles of copartnership in reference to the matters in controversy, a receiver will be

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[1] Phillips v. Atkinson, 2 Bro. 272.

[2] Estwick v. Conningsby, 1 Vern. 118; Dacie v. John, M'Clel. 575.

[3] Musgrave v. Medex, 3 Ves. & B. 167. As a general rule each partner is entitled to the same rights, in the control and management of the property, that others enjoy, and he will not be deprived of this right by the appointment of a receiver without good cause. Gowan v. Jeffries, 2 Ashm. 296; Buchart v. Dresser, 4 De G., M. & G. 542; 31 Eng. L. & Eq. 121; Roberts v. Everhardt, 1 Kay, 148; 23 Eng. L. & Eq. 245.

[4] Wilson v. Greenwood, 1 Swanst. 475.

appointed on the application of any partner.[1] And so a receiver will be appointed on the proper application of a partner, where another has the charge of affairs of the partnership, in case of abuse of his powers or such neglect of duties as is likely to result in injury to the interests of the copartner.[2] When a partnership is dissolved by a decree of court, or by consent, and there is disagreement between the parties in interest, a court will usually appoint a receiver.[3] And also, where all the partners are dead.[4] A receiver will be appointed to take charge of the partnership property, where the firm has become insolvent, and the partner is wasting the property or threatens to make an improper use of it.[5] So pending proceedings for a dissolution of a firm, in order to preserve the "good-will" of the firm, or the partnership property to its purchaser, where the character or nature of the property is such that it would be seriously deteriorated in value by lying idle, or even where the firm itself would sustain serious loss from such cause, the court will appoint a receiver to manage the property and prosecute the business *pendente lite* in the case of a hotel, stage company, steamboat company, newspaper company, etc.[6] But the court will not continue the business of a partnership, through a receiver, longer than is necessary for the preservation of the interests of the partners and its creditors, nor generally, longer than is necessary to effect a favorable sale of the property and business.[7]

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[1] Terrell v. Goddard, 18 Ga. 664; Walker v. House, 4 Md. Ch. 39; Speights v. Peters, 9 Gill (Md.), 472; Law v. Ford, 2 Paige (N. Y.), 310; Martin v. Van Shaick, 4 id. 479; McCracken v. Ware, 3 Sandf. Ch. (N. Y.) 688; Goulding v. Bain, 4 id. 716; Williams v. Wilson, id. 379; Durham v. Jarvis, 8 Barb. (N. Y.) 88.

[2] Hart v. Clark, 19 Beav. 349; 27 Eng. L. & Eq. 561; Shepherd v. Oxenford, Kay & J. Ch. 491; Jeffries v. Smith, 1 Jac. & W. 298; Bently v. Bates, 4 You. & C. 182; Gratz v. Bayard, 11 S. & R. (Penn.) 41; Jacquin v. Buisson, 11 How. Pr. (N. Y.) 385; Collins v. Young, 28 Eng. L. & Eq 14; Evans v. Evans, 9 Paige's Ch. (N. Y.) 178; Hubbard v. Guild, 1 Duer (N. Y.), 662; Dayton v. Wilkes, 17 How. (N. Y.) Pr. 510. And an injunction will also be issued in such cases, Phillips v. Tresevant, 67 N. C. 370.

[3] Richards v. Baurman, 65 N. C. 162; Story v. Moon, 3 Dana (Ky.), 331; Randall v. Morell, 17 N. J. Eq. 343; Marten v. Van Shaick, 4 Paige, 310.

[4] As to rules for estimating compensation of a receiver, see Grant v. Bryant, 101 Mass. 567; Walker v. House, 4 Md. Ch. 39. For instances in which a receiver will not be appointed, see Buchanan v. Comstock, 57 Barb.; Baxter v. Buchanan, 3 Brewst. (Penn.) 435; Garretson v. Weaver, 3 Edw. (N. Y.) 385; Goulding v. Bain, 4 Sandf. (N. Y.) 716; Dayton v. Wilkes, 17 How. (N. Y.) Pr. 510.

[5] Williamson v. Wilson, 1 Bland. (Md.) 418. See, also, Benton v. Chaplain, 9 N. J. Eq. 62; Birdsall v. Colie, 11 id. 63; Wilson v. Fitcher, 12 id. 71; Cox v. Pet. U.S., 13 id. 39; Deveau v. Fowler, 2 Paige's Ch. (N.Y.) 400; Evans v. Evans, 9 id. 178; Jacquin v. Buisson, 11 How. (N. Y.) Pr. 385; Stout v. Fortner, 7 Iowa, 183.

[6] Allen v. Hawley, 6 Fla. 164; Jackson v. De Forest, 14 How. Pr. (N. Y.) 81; Martin v. Van Schaick, 4 Paige's Ch. (N. Y.) 479.

[7] Jackson v. De Forest, *ante;* Allen v. Hawley, *ante*.

While courts of equity are averse to exercise their powers, to appoint receivers to operate the business of a firm, or even to the appointment of a receiver at all, where all the partners do not consent thereto and the cessation of the business is likely to result in great loss,[1] yet, in a proper case it is regarded not only as a legitimate, but an essential power.[2] Thus, when one partner has been wrongfully excluded from all participation in the management of the business,[3] and this is the rule even where the assignee of a partner is wrongfully excluded;[4] so, where one partner denies another partner access to the firm books, and has been guilty of fraudulent or improvident conduct;[5] so, where the managing partner is grossly mismanaging the business;[6] so, when by reason of dissensions or disagreements between the partners, it is evident that the business cannot be advantageously continued, particularly if there is a lack of good faith on the part of either of the partners, or if the partnership articles have been violated, or if the confidence of the partners in each other is destroyed, the firm will be dissolved and a receiver appointed.[7] But, in order to warrant the exercise of this power, it should be made to appear that the parties will suffer loss by a continuance of the possession of the property by the partners.[8]

The mere fact that the partners disagree as to the management of the business, or that the business has proved unprofitable, will not justify the appointment of a receiver. In order to warrant the exercise of this power, the facts stated in the bill must be such as warrant a dissolution of the firm, and a winding up of the business. The bill must be a foundation for the appointment by setting forth facts that warrant it.[9]

Upon the death of a partner the survivor is entitled to the custody of the partnership property, and the courts will not, except under extraordinary circumstances, interfere therewith; but if he is con-

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[1] Page v. Vankirk, 1 Brewster (Penn.), 290.

[2] Sayler v. Mockbie, 9 Iowa, 209.

[3] Wolbert v. Harris, 8 N. J. Eq. 605; Katsch v. Schenck, 18 L. J. (N. S.) 386; Kirby v. Ingersoll, 1 Doug. (Mich.) 477; Seibert v. Seibert, 1 Brewst. (Penn.) 531· Speights v. Peters, 9 Gill (Md.), 472.

[4] Seibert v. Seibert, *ante*.

[5] Haight v. Burr, 19 Md. 130.

[6] Sutro v. Wagner, 23 N. J. Eq. 388.

[7] Whitman v. Robinson, 21 Md. 30; Boyce v. Blanchard, 21 Ga. 74; Williamson v. Wilson, 1 Bland (Md.) 418.

[8] White v. Colfax, 33 N. Y. Sup. Ct. 297; Boyce v. Burchard, 21 Ga. 74; Sutro v. Wagner, *ante;* Loomis v. McKenzie, 31 Iowa, 425; Jackson v. DeForest, *ante*. And an unexecuted agreement for a partnership will not entitle one of the partners to a receiver to wind up the affairs of the firm. Hobart v. Ballard, 31 Iowa 521.

[9] Tomlinson v. Ward, 2 Conn. 396; Roberts v. Ebenhardt, Kay, 148; Garretson v. Weaver, 3 Edw. Ch. (N. Y.) 385.

ducting the business improvidently or fraudulently, it affords ample ground for placing the property in the hands of a receiver, upon application of the representatives of the deceased partner.[1]

If, after a dissolution, either partner makes an improper use of the firm property, or a use that is inconsistent with the winding up of its affairs, the court will put the business in the hands of a receiver.[2] So, when the firm becomes insolvent, and, while in the case of general partnership, an application for a receiver cannot be made by a creditor until he has acquired a lien upon the property under a judgment; yet, in the case of a *limited* partnership an application therefor may be made by a general creditor, and an allegation of insolvency on the part of the company is sufficient.[3]

When a firm becomes insolvent, or there is danger that it will become so, in consequence of the mismanagement of the partners, or where they are guilty of unfairness or fraud toward their creditors, the court will, upon application of the creditors, appoint a receiver; but in order to warrant it, a strong case must be made out by the creditors, and if the partners in their answer deny the allegations of the bill, the relief will be denied.[4]

When application for a receiver has been made by one partner, and a decree appointing one has been made, the parties cannot, by agreement, dismiss the bill, *without the consent of all the creditors.* The matter, after decree, has passed beyond the control of the parties, and the court, having acquired control of the property, will retain it for the benefit of all interested parties.[5] But it seems that in a case where the order or decree was improvidently made, or its continuance will result in a serious loss to the partners, the court will, before a final decree, set it aside upon proper conditions. Thus, in a New York case,[6] the plaintiff upon affidavits setting forth that he was a partner with the defendants in a firm, and that the defendants, without his consent, had altered the style of the firm, so as to exclude the plaintiff, applied for an order dissolving the partnership and appointing a receiver, which was granted. But subsequently, it being made to appear that the capital invested in the firm was between $60,000 and $70,000, and that the plaintiff had put in only $1,800 of this sum, and

[1] Holden's Administrators v. McMakin, Par. Eq. Cas. 270; Miller v. Jones, 39 Ill. 54; Tillinghast v. Champlin, 4 R. I. 173.

[2] Goertner v. Trustees of Canajoharie, 2 Barb. (N. Y.) 625.

[3] Whitewright v. Stimpson, 2 Barb. (N. Y.) 279.

[4] Whitewright v. Stimpson, 2 Barb. (N. Y.) 279.

[5] Updike v. Doyle, 7 R. I. 446.

[6] Popper v. Scheider, 38 How. Pr. (N. Y.) 34.

also that the continuance of the order would result in destroying a valuable and profitable business, and the defendants offered to secure the plaintiff his interests, or the money due him on account, and moved to rescind the order, the court set aside the order upon the defendants giving ample security to indemnify the plaintiff.

It may be said that, unless the partners agree thereto, a receiver will never be appointed unless some breach of duty on the part of some of the partners is fully established. It does not by any means follow that, because a dissolution would be decreed, or an injunction granted, that a receiver will be appointed. In order to warrant the court in taking the management of the business out of the hands of the partners, it must appear either that they have agreed to have the business go into the hands of a receiver, or that there is imminent danger of loss if the management is continued in their hands, or that some of the partners have been guilty of a breach of duty.[1] In Birdsall v. Cole,[2] the court held that the mere fact that one partner asks for a dissolution and the appointment of a receiver in the case of a partnership *at will*, the court will not, as a matter of course, appoint a receiver. In such cases some breach of duty that would, at least, warrant the dissolution of a partnership for a definite period, must be shown.[3] But when the right to a dissolution is established, and the agreement of the parties makes no provision for winding up the business, a receiver will be appointed as a matter of course.[4] When the firm has become insolvent, upon the application of a copartner, a receiver will be appointed to protect alike the interests of the partners and the firm creditors.[5]

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[1] Cox v. Peters, 18 N. J. Eq. 47; Fitcher v. Fitcher, 11 id. 721

[2] 10 N. J. Eq. 66.

[3] Henn v. Walsh, 2 Edw. Ch. (N. Y.) 129; Law v. Ford, 2 Paige's Ch. (N. Y.) 310.

[4] Martin v. Van Schaick, 4 Paige's Ch. (N. Y.) 479; Law v. Ford, 2 id. 310.

[5] Thus in Williamson v. Wilson, Bland's Ch. (Md.) 418, one partner filed a bill against his two copartners, suggesting that the firm had become insolvent and stopped payment, and that the defendants had since held and retained, in their possession, exclusively, all the goods, effects, books, papers and vouchers of the firm, and were collecting the debts due, and wasting and misapplying the property of the partnership to the ruin of the plaintiff and to the prejudice of the creditors of the firm. The answer denied these charges of the bill, but admitted the insolvency of the firm, and then charged the plaintiff with a design so to apply the joint funds as to give an undue and improper preference to one or more of their creditors. "These parties," said Chancellor Bland, "have, in many respects, given an opposite and very different account of the state of affairs between them. They both, however, admit the present insolvency of the firm, and agree that, according to the stipulations of their contract of copartnership, the term of its duration has not yet expired." "In point of principle and so far as relates to the matter now under consideration, there can be no difference between a bankruptcy, according to the English law, and an actual insolvency in fact according to our law. So long as a man carries on his

Where a partner neglects the business and fails to keep proper accounts of the money received,[1] or brings a stranger into the firm,[2] or where all the partners are dead,[3] a receiver will be appointed. In the last-named case the defendant was willing to account, but insisted that no receiver should be appointed, as such a proceeding would operate as an imputation on his character. But Lord Kenyon said "where there is a copartnership there is a confidence between the parties, and, if one dies, the confidence in the other partner remains, and he shall receive; *but when both are dead there is no confidence between the representatives*, and, therefore, the court will appoint a

business and has a prospect of gain, he is not considered as insolvent, but if, in addition to such deficiency of property, his business so far declines as to leave him in no prospect of paying his debts, he is then, according to the universal sense of mankind, insolvent. Whether he is declared to be in this condition according to the technical process of the English bankrupt law, or is admitted to be so in fact, the effect upon the contract of copartnership must be the same. The insolvency is the total destruction of the pecuniary capacity of the partner to fulfill his contract of copartnership. But his pecuniary capacity was the basis on which it rested. The contract itself, therefore, must be considered as effectually annulled, as if the party were dead. If both of them be insolvent, or dead, there is no efficient or living capacity left to execute the contract, if one only be dead or insolvent, the terms of it cannot be complied with, and where personal confidence was the principal inducement for making the agreement, as in contracts of this nature, it would be unreasonable, and therefore the other party shall not have the executor, administrator, trustee or assignee of the deceased, or of the insolvent, intruded upon him. Consequently, the partnership between these parties must be considered as having been virtually and effectually terminated by their insolvency. It can be extended over no new transactions, nor be allowed to expand itself any more. It must be wound up and brought to a close, and, except for such purposes, must be deemed to have totally ceased to exist." "These parties admit themselves to be insolvent debtors. The plaintiff charges his copartners, the defendants, with a design to waste the joint property and to apply it to their own use. The defendants deny these allegations, and charge the plaintiff with a design to misapply the funds and to give to some of the creditors an undue preference. Taking the charges of the plaintiff and of the defendants or of either party to be true, or allow that each or either party was about to waste the property, or has his favorite creditors to whom it is his design to give an undue preference, and it is clear that one or the other or both of them have formed a fixed resolution to violate one of the great principles of equity, which it is the peculiar province of this court to prevent. None of the creditors of these insolvent debtors, so far as it appears, have, as yet, obtained any legal advantage. It is proper, therefore, that this court should now lay its hands upon the joint property of this partnership, and let all its creditors come in *pari passu*, and according to their respective priorities, if any should appear. Both parties profess to have had this equitable distribution in contemplation; both acknowledge themselves to be in that insolvent condition in which the making of such an equitable distribution has devolved upon them as a duty, and yet each charges the other with having made an effort, and formed a fixed design to disregard this duty. Neither of them seems to have the least confidence in the other. Under all these circumstances, I consider this as a case in which it is peculiarly fit and proper that a receiver should have been appointed before answer, and should now be continued, as a means of winding up the affairs of this partnership in safety and with justice and equality to all concerned." A receiver will be appointed where a partner has been carrying on trade on his own account, with the copartnership effects. Harding v. Glover, 18 Ves. 281.

[1] Read v. Bowers, 4 Br. C. C. 441.

[2] Peacock v. Peacock, 16 Ves. 49.

[3] Phillips v. Atkinson, 2 Br. C. C. 272.

receiver. When one partner excludes another from the business, whether the business is going on in the usual way, or is in the process of settlement, this constitutes a valid ground for the appointment of a receiver. When the partners disagree as to the management of the business, or disagree as to their rights, the court may not only appoint a receiver, but may also direct him to continue the business, where the interests of the parties require such an order. Thus, in a New York case [2] the parties were partners in running a steamboat, and the court appointed a receiver, who run the boat under an order of the court for two years. But the court is always reluctant to take the control of a business for any considerable time, and in another New York case [3] it was held that although the court will appoint a receiver of a newspaper establishment where the partners cannot agree, yet the court will not take upon itself the responsibility of continuing the publication of a political paper, by a receiver, any longer than is absolutely necessary to prevent a sacrifice of the property. In this case the counsel for the complainant moved for the appointment of a receiver to take charge of the partnership effects, consisting of a printing establishment and the subscription list and advertising custom of a public newspaper. The defendant's counsel opposed the application, on the ground that the principal value of the property consisted in the good-will of their business, which would be lost by the appointment of a receiver. The Chancellor said (besides what we have laid down): "Each partner has an equal right in this case to the possession and control of the partnership effects and business; and if they cannot agree among themselves, it is a matter of course to appoint a receiver, upon a bill filed to close the partnership concerns, on the application of either party. If a receiver is appointed, he must proceed and sell the establishment without delay, and, in the meantime, the business must be carried on by him, as usual, so that the good-will thereof may be secured to the purchaser and the full value of the establishment realized by the partners, on such sale." "Until a sale can be effected, the defendants may continue to superintend the editorial department of the paper, as they have heretofore done, but the paper must be published under the direction of the receiver, who will be personally responsible for any publication therein which is improper. There must be a reference to a Master to appoint a receiver without delay." A receiver will not be appointed merely

[1] Const v. Harris, 1 T. & R. 496.
[2] Crane v. Ford, Hopk. Ch. (N. Y.) 114.
[3] Martin v. Van Schaick, 4 Paige's Ch. (N. Y.) 479.

because there has been a dissolution of a partnership. There must be some breach of the duty of a partner or of the contract of partnership.[1]

Trifling circumstances of conduct are not sufficient to authorize the court to award a dissolution.[2] In the case last referred to, Lord Eldon said: "It may be a question whether the court will not restrain a partner, if he has acted improperly, from doing certain acts in future; but if what he has done does not give the other party a right to have a dissolution of the partnership, what right has the court to appoint a receiver and make itself the manager of every trade in the kingdom? Where partners differ, as they sometimes do when they enter into another kind of partnership, they should recollect, that they enter into it for better and worse, and this court has no jurisdiction to make a separation between them, because one is more sullen, or less good tempered, than the other. Another court, in the partnership to which I have alluded, cannot, nor can this court in this kind of partnership interfere, unless there is a cause of separation, which, in the one case, must amount to downright cruelty, and in the other must be conduct amounting to an entire exclusion of the partner from his interest in the partnership." And so, in Henn v. Walsh,[3] Vice-Chancellor M'Coun said: "If partners quarrel, a receiver will not be appointed merely on such an account, because it may not, of itself, be a sufficient ground for severing the connections between them."[4]

The court is not bound to interfere upon every breach of adherence to the rules of a partnership. The breach must be such as renders it impracticable to permit the business to be managed by the partners.[5]

There can be no ground for a receiver in a case of partnership, where the partner who applies to the court has the property in his possession and the other does not object to such possession. Thus, in Smith v. Lowe,[6] the complainant and defendant had been partners as watch-makers. The former became dissatisfied with the latter, and a bill was filed for a dissolution of the partnership and for an account. It appeared by the bill that the complainant had taken into his own possession the stock in trade. He now, by petition, asked for a receiver. The Vice-Chancellor said: "There can be no ground for a receiver in a case of partnership,

[1] Harding v. Glover, 18 Ves. 281.
[2] Goodman v. Whitcomb, 1 Jac. & W. 573.
[3] 2 Edw. Ch. (N. Y.) 129.
[4] Texiere v. Da Costa, note.
[5] Const v. Harris, 1 T. & R. 518.
[6] 1 Edw. Ch. (N. Y.) 33.

where the partner applying has the property in his own possession. He can, as a partner, sell it. The only liability that attaches to him is that of accounting to the other partner for his share of the property; *and if the other partner does not object, he who has the possession of the property ought not to complain.*"

Mr. Lindley, on the subject of Receivers of Partnerships, vol. 2, p. 850, observes:

"The object of having a receiver appointed by the court is to place the partnership assets under the protection of the court, and to prevent everybody, except the officer of the court, from in any way intermeddling with them.

Courts of equity are by no means anxious to take upon themselves the management of a partnership business, and they will, it is said, never do so, save with a view to a dissolution or final winding up of the affairs of the concern. In the well-known case of Const v. Harris,[1] Lord Eldon intimated that a receiver might be appointed in a suit where a decree could be made for the carrying on of the concern according to some specific agreement between the parties, as well as in a suit for a dissolution and winding up; and in that very case a receiver was appointed, although no dissolution was prayed by the bill. The receiver here appointed was, however, in no sense a manager, but merely a person nominated to receive money coming in from certain quarters, and to apply it in the manner agreed upon in the partnership articles. If the appointment of a receiver does not involve the appointment of a manager, Const v. Harris is a clear authority to show that a receiver may be obtained in a suit not seeking a dissolution of the partnership; and later cases are not opposed to this. But the writer is not aware of any instance in which a suit has been instituted for the purpose of continuing a partnership, and in which the court has appointed a receiver and manager; and in the late case of Hall v. Hall,[2] Lord Cottenham decided that in such a suit no such appointment could be made. Roberts v. Eberhardt[3] is a still more recent case to the same effect. There the plaintiff and the defendants were partners in a colliery, the plaintiff being the managing partner. Disputes arose between the plaintiff and the defendant, and the former filed a bill for an account and a receiver, but did not ask for a dissolution. The Vice-Chancellor, on a motion by the plaintiff for a receiver, refused the motion, on the ground that the object of the suit was to insure a continuance of the partnership, and not to

[1] 1 Turn. & R. 517. [2] 8 Mac. & G. 79. [3] Kay, 148.

bring it to a close. As was said by Lord Eldon, the court will not by appointing receivers take upon itself the management of every trade in the kingdom; nor will it take upon itself the management of any partnership business, save with a view to its final winding up.[1] It is not, however, necessary, in order to induce the court to interfere, that the plaintiff should by his bill expressly pray for a dissolution; for the court will entertain an application for a receiver if the object of the suit is to wind up the partnership affairs, and the appointment of a receiver and manager is sought with that view. Thus, in the recent case of Sheppard v. Oxenford,[2] a bill was filed by the plaintiff on behalf of himself and other shareholders in the National Brazilian Mining Company against the defendant, its sole director and manager, praying for an account of moneys received and paid by the directors on behalf of the association, and of its debts, and for payment thereof out of the assets of the company, and for a division of the profits amongst the shareholders. The bill also prayed for an injunction to restrain the defendant from selling the property, and for a receiver to get in the debts owing to the company, and all remittances made to it from abroad, and *generally to conduct the business and affairs of the association* until the accounts should be taken. No dissolution was expressly asked for, but the whole object of the suit evidently was to wind up the company and have its assets applied in liquidation of its liabilities; and on a motion by the plaintiff for an injunction and a receiver, an injunction was granted, and a receiver and manager was appointed, as prayed by the bill.[3]

Again, in Evans v. Coventry,[4] a bill was filed by the members of two societies, or rather it would seem of one society having two branches of business, viz., a loan branch and an insurance branch, for the purpose of having the funds of the societies made good by the defaulting directors, and of having the accounts investigated, the affairs of the societies wound up if necessary, and their assets in the

[1] See Goodman v. Whitcombe, 1 Jac. & W. 589; Harrison v. Armitage, 4 Madd. 143; Hall v. Hall, 3 Mac. & G. 79; Smith v. Jeyes, 4 Beav. 503; Waters v. Taylor, 15 Ves. 10; Oliver v. Hamilton, 2 Anstr. 453. In Morris v. Coleman, 18 Ves. 438, there was a reference for the appointment of a manager.

[2] 1 K. & J. 491.

[3] A receiver and manager was appointed in this country, and the defendant, who had gone to the Brazils after the bill had been filed, was appointed receiver and manager out there.

[4] 5 De G. Mac. & G. 911, reversing S. C., 3 Drew. 75. It does not appear very distinctly what the manager, as distinguished from the receiver, was expected to do. The Vice-Chancellor refused the motion mainly upon the ground that he could not take upon himself the management of such societies, even until the hearing of the cause. The Court of Appeals did not allude to this.

meantime protected by the appointment of a manager and receiver. It was proved that some of the funds had already been made away with by the secretary, and a manager and receiver was appointed to protect what remained until the hearing of the cause, upon the ground that the plaintiffs had an interest in the funds in question, and that those funds were in danger of being lost.

Distinction between applications for injunctions and for receivers.

SEC. 376. It has been already remarked that in granting or refusing an order for a receiver the court does not act on the same principles as when it grants or refuses an order for an injunction; it being one thing to manage the affairs of a partnership oneself, and another to prevent a person who has already misconducted himself from interfering further with the partnership concerns.[1] Another reason for drawing a distinction between an injunction and a receiver is, that whilst the former excludes only the person against whom it is granted, the latter excludes *all* the partners from taking part in the management of the concern. It, therefore, does not follow that because the court will grant an injunction, it will also appoint a receiver, or that because it refuses to appoint a receiver it will also decline to interfere by injunction.[2]

Upon what the right to have a receiver depends.

SEC. 377. The right to the appointment of a receiver in suits for a dissolution or winding up of a partnership depends in the first place on whether the person sought to be excluded from interference is a partner or not. For, whilst the court is reluctant to exclude a partner from the management of the partnership affairs, it will readily interfere to prevent other persons from intermeddling therewith. The reason given for this is, that each partner is at the outset trusted by his copartners, and has confidence reposed by them in him; and until it can be shown that he ought not to be allowed to take part any longer in the management of the partnership affairs, the court will not interfere with him. But this reasoning has no application to persons who acquire an interest in the partnership assets by events over which the partners have no control, *e. g.*, the death or bankruptcy of one of the members of the firm. Whilst, therefore, even in a suit for a dissolution, or winding up, a receiver will not be granted against a

[1] See Hall v. Hall, 3 Mac. & G. 85.

[2] Although an injunction was granted, a receiver was refused, in Read v. Bowers, 4 Bro. C. C. 441; Hartz v. Schrader, 8 Ves. 317; Hall v. Hall, 12 Beav. 414, and 3 Mac. & G. 79.

member of the firm, unless some special ground for the interference of the court can be established,[1] it is a matter of course to appoint a receiver where all the partners are dead, and a suit is pending between their representatives,[2] or where such appointment is sought by a partner against the representatives of his late copartner.[3] The late case of Fraser v. Kershaw,[4] is a good illustration of this doctrine. There one partner had become bankrupt; the share of the other partner had been taken in execution under a *fi. fa.* for a separate debt, and had been assigned to his creditor by the sheriff. The creditor, as the assignee from the sheriff of all the share and interest of the non-bankrupt partner, claimed the right of winding up the affairs of the partnership, and to exclude the assignees of the bankrupt partner from interfering. But on a bill filed by them against the judgment creditor, the court granted an injunction, and appointed a receiver, holding that the right of the non-bankrupt partner to wind up the affairs of the partnership was personal to himself, and was incapable of transfer, and did not, therefore, pass with his share and interest in the partnership assets.[5]

Must appear that firm has forfeited its right to manage the business, or that loss would result therefrom, or that the partners have agreed thereto.

SEC. 378. Inasmuch as the court will not appoint a receiver against a partner unless some special ground for so doing can be shown, it follows that in a firm of several members there is more difficulty in obtaining a receiver than in a firm of two. For the appointment of a receiver, operating in fact as an injunction against *all* the members, there must be some ground for excluding all who oppose the application. If the object is to exclude some or one only from intermeddling, the appropriate remedy is rather by an injunction than by a receiver.[6]

The grounds on which the court is usually asked to appoint a receiver are either because, by agreement, the partners have divested themselves more or less of their right to wind up the affairs of the concern; or because, by misconduct, the right of personal intervention has been forfeited, and the partnership funds are in danger of being lost.

As an illustration of an appointment of a receiver, grounded on an

[1] Harding v. Glover, 18 Ves. 281; Collins v. Young, 1 Macqueen, 385, and see Kershaw v. Matthews, 2 Russ. 62; Kennedy v. Lee, 3 Mer. 448; Lawson v. Morgan, 1 Price, 303.

[2] Phillips v. Atkinson, 2 Bro. C. C. 272.

[3] Freeland v. Stansfield, 2 Sm. & G. 479.

[4] 2 K. & J. 496.

[5] See, too, Candler v. Candler, Jac. 225, where a receiver was granted against the assignee of partnership debts.

[6] See Hall v. Hall, 3 Mac. & G. 79.

express agreement, reference may be made to Davis v. Amer.[1] There the plaintiff and the defendant, on dissolving partnership, appointed a stranger to get in the assets of the firm, and agreed not to interfere with him. After this agreement had been partially acted on, one of the partners died, and disputes arising between the executors of the deceased partner and the surviving partner, the latter proceeded to get in the debts of the firm, in violation of the agreement. On a bill filed by the executors of the deceased partner for an account, and for an injunction and a receiver, the court, on motion, appointed a receiver, but declined to grant an express injunction, on the ground that there was no sufficient impropriety of conduct on the part of the defendant to render such an order necessary.

Misconduct that is deemed sufficient to put business in hands of receiver.

SEC. 379. With respect to misconduct, the observations which have been already made on this head, when speaking of injunctions, might be here repeated. There must be something more than a partnership squabble; the due winding up of the affairs of the concern must be endangered to induce the court to appoint a receiver of its assets; and non-co-operation of one partner, whereby the whole responsibility of management is thrown on his copartner, is not sufficient.[2]

Where, however, a partner has so misconducted himself as to show that he is no longer to be trusted, as, for example, if one partner colludes with the debtors of the firm, and allows them to delay paying their debts,[3] or carries on a separate trade with the partnership property,[4] or, the partnership property being abroad, runs off in order to do what he likes with it there,[5] or, if a surviving partner insists on carrying on the business, and employing therein the assets of his deceased partner,[6] or if there is such mutual mismanagement as endangers the whole concern,[7] or if the persons having the control of the partnership assets have already made away with some of them,[8] in all these cases the court will interfere by appointing a receiver.[9]

Again, the reluctance of the court in appointing a receiver against a partner, being based on the confidence originally reposed in him, that reluctance disappears if it can be shown that such confidence

[1] 3 Drew. 64.
[2] See Roberts v. Eberhardt, Kay, 148, and Rowe v. Wood, 2 J. & W. 556, where one partner declined to advance more money to work a mine.
[3] Eastwick v. Coningsby, 1 Vern. 118.
[4] Harding v. Glover, 18 Ves. 281.
[5] Sheppard v. Oxenford, 1 K. & J. 491.
[6] Madgwick v. Wimble, 6 Beav. 495.
[7] See De Tastet v. Bordieu, cited in a note in 2 Bro. C. C. 272; but see Const v. Harris, T. & R. 524.
[8] See Smith v. Jeyes, 4 Beav. 503.
[9] Evans v. Coventry, 5 De G. Mac. & G. 911.

was originally misplaced. Therefore, where a defendant, by false and fraudulent representations, induced the plaintiff to enter into partnership with him, and the plaintiff soon afterward filed a bill, praying that the partnership might be declared void, and for a receiver, the court on motion ordered that a receiver should be appointed.[1]

Moreover, even although there be no misconduct jeopardizing the partnership assets, the court will appoint a receiver if the defendant wrongfully excludes his copartner from the management of the partnership affairs.[2] This doctrine is acted on where the defendant contends that the plaintiff is not a partner,[3] or that he has no interest in the partnership assets.[4]

Illegality as a defense to application for receiver.

SEC. 380. Some difficulty occurs where the defendant relies on illegality as a defense to the suit against him. If the illegality is established, the court cannot, it is conceived, interfere. But if a receiver is moved for before the hearing of the cause, and the court is not perfectly satisfied that no relief can ultimately be given, it will appoint a receiver to protect the property *pendente lite*, and the disgraceful character of the defense will go far to remove any scruples the court might otherwise have in interfering. Thus, in Hale v. Hale,[5] the plaintiff and the defendant had carried on the business of brewers for many years in partnership together. The plaintiff filed a bill for a dissolution, and the defendant then denied the plaintiff's right to any account or relief whatever, on the ground that the partnership was illegal. Having thus set the plaintiff at defiance, and claimed the whole property himself, Lord Langdale, on that ground alone, appointed a receiver and manager, although the plaintiff was only a dormant partner, and the defendant's management of the business was in no way complained of.

Receivers in mining partnerships.

SEC. 381. In mining partnerships a receiver will be appointed or refused upon the same principles as in other partnerships. Accordingly, if no dissolution or winding up is sought, a receiver and man-

[1] See Ex parte Broome, 1 Rose, 69.

[2] See Wilson v. Greenwood, 1 Swanst. 481; and Goodman v. Whitcomb, 1 J. & W. 589.

[3] Peacock v. Peacock, 16 Ves. 49; Blakeney v. Dufaur, 15 Beav. 40.

[4] Wilson v. Greenwood, 1 Swanst. 471, where the plaintiffs were the assignees of a bankrupt partner. See, too, Clegg v. Fishwick, 1 Mac. & G. 294, where the plaintiff was the administratrix of a deceased partner.

[5] 4 Beav. 369. See, too, Sheppard v. Oxenford, 1 K. & J. 491, where a receiver was appointed although the legality of the partnership was denied.

ager will not be appointed;[1] but with a view to a dissolution or winding up, a receiver and manager will be appointed, if there are any such grounds for the appointment as are sufficient in other cases,[2] or if the partners cannot agree as to the proper mode of working the mines until they are sold.[3] In Rowe v. Wood,[4] indeed, a receiver was refused, although one of the partners excluded the other from interfering with the mine; but this was a peculiar case, for the partner complained of was not only a partner, but also a mortgagee in possession, and his mortgage debt was still unsatisfied. Again in Norway v. Rowe,[5] although the plaintiff was excluded, a receiver was refused on the ground of his laches, he having been excluded for some time, and having taken no steps to assert his rights until the mine proved profitable.

Partnership must be established.

SEC. 382. Where a partnership is alleged on the one side and denied on the other, and a motion is made for a receiver, the court, if it directs an issue as to partnership or no partnership, usually declines to appoint a receiver until that question is determined.[6] If the court, on being applied to for the appointment of a receiver, thinks that a proper case for such an appointment is made, and the party actually carrying on the business has not been guilty of such misconduct as to have rendered it unsafe to trust him, the court generally appoints him the receiver and manager without salary.[7] It is usual, however, to require him to give security duly to manage the partnership affairs, and to account for money received by him. In other cases the appointment of a receiver is referred by the judge to his chief clerk, and leave is frequently given for each partner to propose himself. A partner who is appointed receiver becomes the officer of the court, and must act and be respected accordingly.

The order appointing a receiver usually directs the partners to deliver up to him all the effects of the partnership, and all securities in their hands, for the outstanding personal estate, together with all books and papers relating thereto. The receiver is directed to get in the debts of the firm, and he is, if necessary, empowered to bring

[1] Roberts v. Eberhardt, Kay, 148.

[2] Sheppard v. Oxenford, 1 K. & J. 491, where there was no prayer for a dissolution.

[3] Jefferys v. Smith, 1 J. & W. 298; Lees v. Jones, 3 Jur. (N. S.) 954, V. C. W.

[4] 2 J. & W. 553.

[5] 19 Ves. 159.

[6] Peacock v. Peacock, 16 Ves. 49; Chapman v. Beach, 1 J. & W. 594; Fairburn v. Pearson, 2 Mac. & G. 144.

[7] This was done in Wilson v. Greenwood, 1 Swanst. 471; Blakeney v. Dufaur, 15 Beav. 40.

actions with the approbation of the judge; he is directed to pay the partnership debts and to pass his accounts, and to pay balances in his hands into court.[1]

With respect to the partnership books and papers, an order for their delivery will not be made if there is no necessity for it, and if it would occasion inconvenience. For example, in Dacie v. John,[2] the court declined to order a solicitor, who was the managing partner of a firm, to deliver up its books and documents to the receiver; for the receiver had free access to them all, and nothing more was considered necessary.

Of the sale of partnership property under the decree of the court.

SEC. 383. It has been already seen that in the absence of a special agreement to the contrary, the right of each partner, on a dissolution, is to have the partnership property converted into money by a sale.[3] This mode of ascertaining the value of the partnership effects is adopted by courts of equity, unless some other course can be followed consistently with the agreement between the partners. And even where the partners have provided that their shares shall be ascertained in some other way, still, if owing to any circumstance their agreement in this respect cannot be carried out, or if their agreement does not extend to the event which has in fact arisen, realization of the property by a sale is the only alternative which a court of equity can adopt.

Thus in Cook v. Collingridge,[4] where the partners had agreed that on the expiration of the partnership the stock in trade should be divided between the partners, it was held that as this could not be literally carried into effect, there must be a sale and a division of the proceeds. So, if on the death of a partner an option is given to a third party, *e. g.*, his son or executor, to take his share at a valuation, and this is not done, a sale will be decreed.[5]

Again, in a case where the articles had provided that on a dissolution by the death of a partner his share should be taken by the survivors at a valuation, and they had afterward agreed that in the event of a dissolution by bankruptcy, the same course should be followed as

[1] See forms of order in Seton on Decrees, 555; Wilson v. Greenwood, 1 Swanst. 484; Whitley v. Lowe, 4 Jur. (N. S.) 815. The receiver here was appointed without opposition, see 4 Jur. (N. S.) 197, S. C.

[2] McClel. 206.

[3] Crawshay v. Collins, 15 Ves. 227; Crawshay v. Maule, 1 Swanst. 495; Featherstonhaugh v. Fenwick, 17 Ves. 298; Hale v. Hale, 4 Beav. 375. In Wild v. Milne, 26 id. 504, a partition of a partnership colliery was asked for in vain.

[4] Jac. 607, and see Rigden v. Pierce, 6 Madd. 353.

[5] See Downs v. Collins, 6 Ha. 418; Kershaw v. Matthews, 2 Russ. 62; and Madgwick v. Wimble, 6 Beav. 495.

in the event of a dissolution by death, it was held that this last agreement not being, under the circumstances, binding on the assignee, the partnership property and effects ought to be sold.[1]

On the other hand, if the articles of partnership can be carried out in their spirit, and if a sale is inconsistent with them, then the rule in question will not apply, as for example in those cases already noticed,[2] in which it has been agreed that a deceased partner's share shall be ascertained from the last signed account, and the partnership accounts have not been taken and signed as it was agreed they should.

The rule as to selling partnership property is merely adopted in order that justice may be done to all parties when no other course has been or can be agreed upon. It is not an arbitrary rule, inflexibly applied in all cases whether it is necessary or not; and although, if one partner or his representatives insist on a sale, the court may not be able to refuse to enforce that right, still the court is always inclined to accede to any other mode of settlement which may be fair and just between the partners. In a late case, where one partner had become lunatic, and a decree for a dissolution had been obtained on that ground, and an offer was made by the other partners to pay a sum of money as the lunatic's share, the court referred it to the Master to inquire whether it would be for the benefit of the lunatic that such offer should be accepted, and on the Master reporting in the affirmative, the court ordered that the offer should be accepted, thereby dispensing with a sale and winding up in the ordinary way.[3]

Upon the same principle, and with a view to do as little injustice as possible, when the court decrees a sale it will direct an inquiry as to the proper mode of selling,[4] and if it appears that it will be for the benefit of all parties that the whole property shall be sold to one or more of the partners who are desirous of buying it, the court will sanction a sale accordingly.[5] The court will also, if necessary, direct an inquiry whether it be for the benefit of all parties that there should be an immediate sale, or that the concern should be carried on for the purpose only of winding up its affairs, and if the latter is the case, the court will give any of the parties liberty to propose himself as manager until a sale.[6]

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[1] Wilson v. Greenwood, 1 Swanst. 471.

[2] See Pettyt v. Janeson, 6 Madd. 146; Simmons v. Leonard, 3 Ha. 581.

[3] Leaf v. Coles, 1 De G. Mac. & G. 170. See, too, Prentice v. Prentice, 10, Ha. app. 22.

[4] As in Wilson v. Greenwood, 1 Swanst. 484; Cook v. Collingridge, Jac. 624.

[5] Crawshay v. Maule, 1 Swanst. 530, where infants were concerned.

[6] Crawshay v. Maule, 1 Swanst. 529; Waters v. Taylor, 2 V. & B. 306. See, too, Wild v. Milne, 26 Beav. 504.

If one of the partners holds an appointment which is not saleable, but the profits of which are by agreement to be accounted for by him to the partnership, the partner holding the appointment will be debited with its value, for that is the only mode in which, upon a dissolution, such a course of gain can be dealt with.[1]

Although it is not usual for the court to direct a sale before the hearing of the cause, still, if circumstances require it, an order for a sale will be made on motion, even although the partnership has not been previously dissolved."[2]

Method of securing appointment of receiver — Generally not appointed until answer is in — When the rights of the receiver attach — Appointment does not defeat liens previously acquired by legal process or otherwise.

SEC. 384. A court of equity only can entertain an application for or appoint a receiver, consequently a bill or complaint in equity should be filed for that purpose, setting forth the special grounds rendering such an appointment desirable, and praying for a dissolution — if a dissolution is sought — and a receiver; or if a dissolution of the firm is not sought, then simply for a receiver. The application is addressed to the discretion of the court, and unless the cause alleged is such as shows pretty clearly that the partners complained of have been guilty of some breach of duty that is of sufficient importance to warrant a decree for a dissolution, it will not be granted. Generally, the court will not appoint a receiver until the defendant has served his answer,[3] but if the bill discloses such a state of facts as renders an immediate appointment necessary, it will be made at once, leaving the defendant to move for his removal, or to set aside the order of appointment after his answer is served.[4] And even though a proper ground for the appointment is disclosed both by the bill and answer, yet if it also appears from the answer that serious injury is likely to result to the other partners from the appointment, the court will, upon the execution by them of proper bonds securing the complainant the payment of such sums as may be found due to him upon a final accounting, and against the indebtedness of the firm, set aside the order, and leave the other partners to manage the business themselves.[5] But, as has previously been stated, when the appointment

[1] See Smith v. Mules, 9 Ha. 572.

[2] Baily v. Ford, 13 Sim. 495; Crawshay v. Maule, 1 Swanst. 523.

[3] Holden v. McMakin, 1 Pars. Sel. Cas. 284; People v. Norton, 1 Paige's Ch. (N. Y.) 17.

[4] Popper v. Scheider, 38 How. Pr. (N. Y.) 34; Gowan v. Jeffries, 2 Ashm. (Penn.) 296.

[5] Popper v. Scheider, *ante*; see, also, Higginson v. Air, 1 Desau. (S. C.) 427; Estwick v. Coningsby, 1 Vern. 118. But, *contra*, see Law v. Ford, 2 Paige's Ch. (N. Y.) 310.

has been made under a final decree, the court will not set it aside though both the plaintiff and defendants apply for its rescission. If the parties desire to make an amicable adjustment of their differences, they must do it before the rights of their creditors have intervened.

The receiver's rights only attach from the date of his appointment,[1] and an order of appointment cannot be ante-dated, nor can it be made retroactive,[2] nor does it, nor can it be made to defeat a valid attachment or levy upon the property made *previous* to the appointment[3] and until the appointment is actually made, creditors may pursue their legal remedies against the firm.[4] Thus in Artisans' Bank v. Treadwell,[5] it was held that where creditors of a special partnership obtain a judgment against a firm, issue an execution and make a levy on the personal property before a receiver is appointed in behalf of all the creditors, such creditors obtain a preferable lien to any of the other creditors, and preferable to the claim of the receiver, and the claim of the judgment creditor must be first paid. The claim of the receiver does not relate back from the date of his appointment to the time of the insolvency of the firm. As to partnership creditors who seek to subject partnership assets to the payment of their debts, as provided by the statute, they are to be paid *pro rata;* and a receiver will be appointed to wind up the concern, under such a proceeding, but prior judgment liens will not be affected by such proceedings.[6]. In another New York case [7] all the members of the firm, as well as the firm itself, became insolvent on or about May 25, 1860. On that day a judgment was obtained against the general partners; execution was issued on the same day and delivered to the plaintiff, a sheriff, who, on the same day, levied upon all the personal property of the copartnership. On the same day a suit in equity was commenced by one of the parties, to dissolve and close up the partnership and distribute the assets among the creditors. In this suit an injunction was obtained, and Cook was appointed a receiver. The levy was made at five o'clock, P. M., on May 15. The receiver took possession the next day at two P. M. The property was sold by the receiver, and the funds in his hands were deposited, etc. It was held, 1. That judgment creditors might levy on the partnership property and thus acquire a lien. 2. That if such levy was made

[1] Van Alstyne v. Cook, 25 N. Y. 489.

[2] Artisans' Bank v. Treadwell, 34 Barb. (N. Y.) 559.

[3] Becker v. Torrence, 31 N. Y. 87; Van Alstyne v. Cook, 25 id. 489; Green v. Breck, 32 Barb. (N. Y.) 74.

[4] Adams v. Wood, 8 Cal. 155; Nagler v. Minturn, id. 540.

[5] 34 Barb. (N. Y.) 562.

[6] Greene v. Breck, 32 Barb. (N. Y.) 74.

[7] Van Alstyne v. Cook, 25 N. Y. 489.

before the appointment of a receiver in the suit brought to close up the affairs of the partnership, although the suit was pending, the appointment of a receiver would not defeat or overreach the levy, nor operate as a lien as against the execution creditor. 3. That the sheriff, when suing by leave of the court, was entitled to recover of the receiver.

Rights, duties and powers of a receiver.

SEC. 385. The receiver does not represent the firm, but is an officer of the court appointing him, and represents the court in the winding up of the business, and is subject to its orders and directions, and, without the consent of the court, cannot be made a defendant in another suit.[1] As the agent of the court he is entitled to all the

[1] Van Rensselaer v. Emery, 9 How. Pr. (N. Y.) 139. "A receiver," says Mr. Edwards," is an indifferent person between the parties appointed by the court to receive the rents, issues or profits of land or other thing in question in the court pending the suit, when it does not seem reasonable to the court that either should do it. Wyatt's Prac. Reg. 355. He is an officer of the court. Matter of Burke, 1 B. & B. 74, and, therefore, he is not to be disturbed by anybody, not even by a party, without leave of the court. Tanfield v. Weston, 2 Sim. & S. 98; Bryan v. Cormick, 1 Cox, 422; Wardle v. Lloyd, 2 Molloy, 388; Hutchinson v. Lord Bassarene, 2 B. & B. 55; MSS. Case of Broad v. Wickham, in 1 Smith's Ch. Pract. 500. And when a tenant has attorned to a receiver, the court becomes the landlord. Angel v. Smith, 9 Ves. 335. He has (as we shall hereafter show) some privileges and is under some restraints. 1 Grant's Ch. Pr. 298, 2d edition. His appointment is provisional only. Skip v. Harwood, 3 Atk. 564; Cooke v. Gwyn, 3 id. 690. A receiver appointed by the court is appointed on behalf of all parties, and not of the complainant or of one defendant only. Davis v. The Duke of Marlborough, 2 Swanst. 125. He is appointed for the benefit of all parties who may establish rights in the cause; and the money in his hands is in *custodia legis* for whoever can make out a title to it. Delany v. Mansfield, 1 Hogan, 234. And so long as a cause is undecided, no order for a receiver will affect the rights of parties or property. Skip v. Harwood, 3 Atk. 564. A receiver is, as between the parties to the suit, to be considered as appointed from the date of the order of reference to the master. Tanfield v. Weston, *supra*. It is the court itself which has the care of the property in dispute; the receiver is but the creature of such court. Generally speaking, a receiver should be a person wholly disinterested in the subject-matter of the suit. Bennet's Master, 93; and he ought not to interfere in any litigation between the parties. Comyn v. Smith, 1 Hogan, 81. If a receiver in the discharge of his duty be threatened with violence, or actual violence be committed upon him, the court will attach the wrong-doer. Fitzpatrick v. Eyre, 1 Molloy, 171.

His general powers, and what property he can control.—He has no powers except such as are conferred upon him by the order for his appointment and the course and practice of the court, Verplanck v. Mercantile Ins. Co., 2 Paige's Ch. (N.Y.) 452; unless where he is appointed under the statute directing proceedings against corporations (2 R. S. 438); and then he is a statutory assignee, vested with nearly all the powers and authority of the assignee of an insolvent debtor. Id.; Attorney-General v. Life & Fire Ins. Co., 4 Paige's Ch. (N. Y.) 224. The rules of the English court of chancery were formerly strict in not allowing a receiver to do many things, such, for instance, as making leases or even repairs, without a previous approval of a Master. "But," says Mr. Hoffman, "our court would, undoubtedly, sanction, when performed, what it would have directed to be done; and it is the constant course for officers of this description, to perform their duties without the previous approval of the court." Hoffman's Master, 156. If this be so, he must get his power through the prac-

assets of the firm[1] which it is his duty to retain, and dispose of under its orders (and not without) and to proceed without delay to collect the partnership debts.[2] The funds and property in his hands are not subject to attachments at the suit of the creditors of the firm, as they are only in his custody as an officer of, and for the court, and are sub-

tice of the court, and we are inclined to doubt whether a receiver should step far out of his order without its authority. The point is not, whether the court may possibly protect him when he has volunteered an act, but whether he ought to have done it without direction. Chancellor Walworth calls the ordinary receiver of the court a common-law receiver, and says he is appointed to protect the fund during the litigation, and has no powers except such as are conferred upon him by the order for his appointment and the course and practice of this court. Verplanck v. Mercantile Ins. Co. of N. Y., *supra*. Every kind of property of such a nature that, if legal, it might be taken in execution, may, if equitable, be put into the possession of a receiver, and hence the appointment of such a person has been said to be an equitable execution. Jeremy's Eq. Jur. 249. And chancery, which has, as it has been somewhere said, "a long arm," can reach property out of the jurisdiction. "The original and primary jurisdiction of this court," says Chancellor Walworth, "was in *personam* merely. The writ of assistance to deliver possession and even the sequestration to compel the performance of a decree, are comparatively of recent origin. The jurisdiction of the court was exercised for several centuries by the simple proceeding of attachment against the bodies of the parties to compel obedience to its orders and decrees. Although the property of a defendant is beyond the reach of the court, so that it can neither be sequestered nor taken in execution, the court does not lose its jurisdiction in relation to that property, provided the person of the defendant is within the jurisdiction. By the ordinary course of proceeding, the defendant may be compelled either to bring the property in dispute, or to which the complainant claims an equitable title within the jurisdiction of the court, or to execute such a conveyance or transfer thereof as will be sufficient to vest the legal title, as well as the possession of the property, according to the *lex loci rei sitæ*." Mitchell v. Bunch, 2 Paige's Ch. (N. Y.) 615, and see cases there and also the arguments of counsel. Still, the difficulty remains as to a recognition of the powers or officers of the court by persons holding or being upon the property (especially realty) out of the jurisdiction. Thus, in Malcolm v. Montgomery, 1 Hogan, 93, the Master of the Rolls observed, that a receiver could not be effectually appointed over estates in Ireland by the English court of chancery in any direct proceeding for the purpose, and that attempts had often been made to do so by service of orders made by the English court of chancery, but that they had failed, because the English court of chancery has no direct means of enforcing payment of rent to its receiver, by tenants who reside in Ireland. The attorney-general and other counsel also said that to their knowledge such attempts had frequently been made, but were uniformly given up as impracticable. A conflict, also, might arise between the receiver, out of the jurisdiction, and creditors and others also out of the jurisdiction. The comity of nations and different tribunals would hardly help a receiver. See Abraham v. Plestoro, 3 Wend. (N. Y.) 538. It is sometimes necessary to put a receiver upon property where the interest of the parties to the suit are so connected with those of third persons that the necessary possession of the officer of the court conflicts with the legal rights of such third persons. But the court never divests a previous possession of such third persons unnecessarily. Even where the receiver is in possession, although the court will not permit him to be interfered with, without its consent, such third persons are permitted to come in and be heard in relation to their interests. And the court will then make such order for the protection of the rights of such third persons, either through the agency of the receiver or otherwise, as may be just and equitable. Chancellor Walworth, in Vincent v. Parker, MS., 22 January, 1838. Where the property in litigation con-

[1] Jackson v. De Freest, 14 How. Pr. (N. Y.) 81.

[2] Jackson v. De Freest, *ante*.

ject to distribution only, under its orders.[1] But the fact that he is receiver of the individual effects of a member of the firm does not authorize or empower him to meddle with the partnership effects, and the court would direct a restoration by him to the firm of any such effects that he may have taken into his custody.[2]

sists of a gross sum, there will be no occasion for a receiver; because it can at once, by an order, be paid into court, but where it consists of income, as the rents and profits of land or the profits and produce of any other species of property, a receiver is appointed. Lubé, 96. A receiver is only to be controlled through the order appointing him, and the rules and practice of the court. Broad v. Wickham, *supra*. He can be put into possession in a summary way; note (c) to Sharp v. Carter, 3 P. Wms. 379. A receiver will not be appointed over the possession of another receiver; but the proper motion is that the receiver already appointed shall be extended to the cause in which it is sought to appoint one. Valle v. O'Reilly, 1 Hogan, 199; Irving v. Waller, id. 258; Osborn v. Heyer, 2 Paige's Ch. (N. Y.) 342; and see, in this last case, the course a receiver is to pursue where there is a second suit; also, Rules 193, 194.

In what stages of a cause a receiver may be appointed; the nature and form of pleading necessary to sustain an application, and orders of court affecting him.—A receiver is appointed in various stages of a suit; and sometimes, but not usually, before as well as after an answer, unless fraud is clearly proved by affidavit, or where it is shown that imminent danger would ensue if the property were not taken under the care of the court; and then it can be clearly done before answer. Vann v. Barnett, 2 Brown's Ch. C. 157. It must, however, be a strong, special ground to induce the court to interfere before an answer. Middleton v. Dodswell, 13 Ves. 266; see, also, Lloyd v. Passingham, 16 id. 59; Scott v. Beecher, 4 Price, 346; and see Bloodgood v. Clark, 4 Paige's Ch. 574. The old rule, of not granting a receiver before answer, is said, in Duckworth v. Trafford, 18 Ves. 283, to have been first broken through by Lord Kenyon, but Mr. Brown, in a note to Vann v. Barnett, 2 Bro. C. C. 157, says that a motion for a receiver before answer had been granted by Lord Bathurst, in 1773. With respect to appointing a receiver before answer, the cases where the court has refused it turned upon this that the party applying for the appointment could not state he had, strictly, an equitable title. Metcalfe v. Pulvertoft, 1 Ves. & B. 183. The earlier instances of the appointment of a receiver before answer seem to have proceeded on the ground of fraud and danger to the property. Note (b) 2 Swanst. 146. It is not proper to move for a receiver upon the effect of the evidence in the cause before hearing. It would be a source of general mischief. Lloyd v. Passingham, 3 Meriv. 697. Even after hearing and rehearing, and where a receiver has been refused, a party may be entitled, on the cause coming on for further directions, and showing a new state of facts, to renew an application for a receiver. Attorney-General v. Mayor, etc., of Galway, 1 Molloy, 95; see, also, Earl of Fingal v. Blake, id. 113. By an Irish case, it appears there may exist a state of facts where a receiver will be continued, even though a bill has been dismissed. Thus, where prior creditors have rights upon an estate and are parties to a suit, and the court by appointing a receiver interferes with their rights, although the complainant dismisses his bill, yet the court will protect the rights of such creditors, parties in the cause, by continuing the receiver, but putting the person so protected under terms to file a bill forthwith. Murrough v. French, 2 Molloy, 497; Davis v. Duke of Marlborough, 2 Swanst. 108; and in Quin v. Holland, Ridgw. Ca. temp. Hardw. 295, a receiver was continued until deeds of sale under the decree were executed, for the purpose of collecting arrears of rent. A decree supersedes a receiver unless expressly continued by it, Seton on Decrees, 44; and see a form of direction in a decree for continuing a receiver, id. 330; see, also, Ponsonby v. Same, 1 Hogan, 321. Abatement, by the death of a co-complainant, does not cause the

[1] Adams v. Hackett, 7 Cal. 187; Nagler v. Minturn, 8 id. 540.

[2] Hamill v. Hamill, 27 Md. 679.

He has only a right to the exclusive possession of such property as, the person or persons, as the receiver of whose property he acts, are entitled to the custody and control of, and if he transcends his powers in this respect the court will correct the matter upon proper application. He is vested with the legal and equitable title to the

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removal of a receiver. A motion should be made that the complainant revive (supposing it a case of revivor) within a limited time, Woods v. Creaghe, 1 Hogan, 174. In this case, however, the receiver had been appointed on process. The defendant was in contempt for not having answered. "The plaintiff has acquired a right," said the Master of the Rolls, "to a receiver and obtained an effectual order in the cause, for his appointment; that order still remains, and the plaintiff should have an opportunity of showing why he should not be deprived of the benefit of it. The order was made to enforce an answer from the defendant, which he has not yet filed. Had the receiver been appointed on the possession of a defendant who had died, the case would have been different." His Honor directed that the receiver should be discharged, unless the cause was revived in ten days after service of the order on the surviving plaintiff. However, in the subsequent case of Newman v. Mills, 2 Hogan, 291, the M. R. said, "an abatement of the cause does not determine the jurisdiction of a receiver, and his authority continues until an order is made for his removal." The general power of the court in England to appoint a receiver appears to require a suit to be pending, Anon., 1 Atk. 578 (save in peculiar cases, such as lunacy, Ex parte Whitfield, 2 Atk. 315; Shelford, 147). An *obiter dictum* of Lord Thurlow, if correctly reported, shows that his Lordship was of opinion that, in extreme cases, a receiver of an infant's estate might be appointed—and that he would have appointed a receiver—if there had been no bill filed. Pitcher v. Hilliard, 2 Dick. 580. This practice as to appointing a receiver only on a bill filed is not completely so in the court of chancery of Ireland. The statutes relating to its practice direct that receivers in certain cases may be appointed on petition and without bill, as, for instance, in relation to an infant's real and personal estate, 4 & 5 Wm. IV, c. 78, § 7, or on behalf of creditors by judgment and recognizance, 5 & 6 Wm. IV, c. 55, § 31. The statute last referred to is very explanatory of the duties and liabilities of receivers in Ireland, as are the rules of the Irish court of chancery. Rules 185, 189, 190, 191. In England, Acts of Parliament hardly touch upon the duties of receivers, nor are there many orders which apply to them, save in matters of accounting. Beames' Orders, 454, 462; Lord Lyndhurst's Orders, 63, 64. "When justice requires it," affidavits can be read before answer in support of a motion for a receiver. Duckworth v. Trafford, 18 Ves. 238. It has been decided in the Irish court of chancery, that a prayer for a receiver is not necessary to get a receiver appointed, provided the facts stated authorize the appointment of one. Malcolm v. Montgomery, 2 Molloy, 500. This, it would seem, is not so in the English court, for a party, in order to be entitled to move for a receiver before a decree, must have a prayer to that effect in his bill. At least, it is thus strongly put by Mr. Lubé (p. 96); although the case to which he refers, Cooke v. Gwyn, 3 Atk. 690, does not entirely bear him out. It was a case of foreclosure; and there was a decree that the defendant Gwynn should redeem or stand foreclosed — but reserving other matters. The plaintiff, instead of setting down the cause upon the equity reserved, applied by motion for possession of the moiety in mortgage to him. Lord Chancellor Hardwicke said: "The court, where they have at the hearing of a cause reserved any of the matters in question between the parties till after the Master has made his report, will not determine those matters in a summary way upon motion; but the plaintiff should have set it down in the ordinary course upon the equity reserved. If the plaintiff had indeed moved for a receiver *and had laid a proper case before the court for that purpose*, I would have granted the motion notwithstanding the decree, etc., etc." These words, "had laid a proper case before the court for that purpose," do not, it is believed, carry with them the absolute necessity for a prayer for a receiver. The propriety or positive want of such an officer may arise from a state

property of the firm, of whose property he is receiver, and may proceed at once to get in its property and debts,[1] and to this end it has been held that he may bring actions without special leave of the

of facts which come up between the time of filing the bill and a decree, and which did not occur at the commencement of the suit. If this should be so, and the bill is otherwise so far rightly framed as to have *laid a proper case before the court*, or, to use the language of Chancellor Hart, in Malcolm v. Montgomery, *supra*, "if the facts stated authorize the appointment of one," a receiver would surely be appointed. His Honor Chancellor Walworth, upon reading this paragraph, made the following note: "I think it has been decided that where the party in possession of the fund or property had become insolvent pending litigation, a receiver might be appointed on petition showing such fact, without the necessity of a supplemental bill and where the original bill showed a proper case." In the case of Verplanck v. Caines, 1 Johns. Ch. 57, one of the defendant's grounds of demurrer applied to that part of the bill which prayed for the appointment of a receiver. Chancellor Kent said that this could not be a ground of demurrer. A receiver will be ordered of an infant's estate after the filing of a bill, although no receiver is prayed for by it. ——— v. Gutteridge, MS. 2 Mad. Ch. Prac. 284; and see Pitcher v. Hellier, Dick. 580. Still there is no reason why a pleader, who knows his duty, should not in *all* cases, where a receiver may by even a possibility become necessary or proper, add a prayer for a receiver. And the draughtsman should be careful of having all proper parties before the court, in order to obtain those aids to ultimate relief which protect the thing in dispute. Thus, although there are cases in which the court will appoint a receiver, even though all the proper parties to the suit are not before it, yet it is very difficult to do so at the inception of a cause, unless the transactions happen to be very simple. Gray v. Chaplin, 2 Russ. 145; see, also, Malcolm v. Montgomery, 1 Hogan, 93. A person, however, is not to be made a party who refuses possession to a receiver, when it does not appear in what right the possession is held. Reid v. Middleton, 1 Turn. & Russ. 455. It may be as well to add here, that notice or service of a subpœna should be made upon a defendant whom a motion for a receiver will affect, prior to the application for one, Stratton v. Davidson, 1 Russ. & Mylne, 484; unless, perhaps, where he is designedly beyond the jurisdiction or keeps out of the way to avoid the service of process. Quinn v. Gunn, 1 Hogan, 75; Malcolm v. Montgomery, id. 93; Maguire v. Allen, 1 B. & B. 75; Coward v. Chadwick, 2 Russ. 150, note; and S. C. p. 634. And even then it is said it cannot be done save in the case of a rent charge. Arthurs v. Arthur, 1 Hogan, 95. The ground for refusing the appointment of a receiver before a party has been served with process is that the court has not jurisdiction to deprive a man who is not present to defend himself of the possession of his estate. Tanfield v. Irvine, 2 Russ. Ch. 151. In cases of judgment creditors' bills on executions returned unsatisfied at law) the Vice-Chancellor of our first circuit has considered it proper that a copy of the bill should be served before a motion is made for a receiver. Hart v. Tims, 3 Edw. Ch. (N. Y.) 74.

Who can nominate a receiver. — The court, in appointing a receiver, pays a proper attention to parties and their property. A stranger is not allowed to nominate a person as receiver. It would be an invidious thing for the Master to appoint, even in extreme cases. It must be done upon a proposal by a party interested. Attorney-General v. Day, 2 Mad. 246. And any party interested in the cause may carry in the necessary proposal for one. Bennet's Master, 93. And while one party carries in his proposal, another party may present a counter-proposal. 1 Smith's Ch. Pr. 488.

From what time a receiver is to be considered as appointed. — The receiver is, as between the parties of the suit, to be considered as appointed from the date of the order of reference to the Master. After the date of that order, neither the owner nor any other party can exercise any right of ownership without the authority of the court. Tanfield v. Weston, 2 Sim. & Stu. 96

[1] Tillinghast v. Champlin, 4 R. I. 173; Wallace v. Yeager, 4 Phil. (Penn.) 251.

court.[1] But this is questionable, at least under ordinary orders of appointment. As a rule, and the rule is inflexible, except when the order provides otherwise, leave to sue must first be obtained from the court.[2] And, being an officer of the court, he cannot be sued in reference to any matter connected with his receivership, without its leave except when provision is made otherwise either by statute or the order of appointment.[3] It should be said, however, that the order may be so drawn as to authorize the receiver to sue for debts due the firm, or other matters for the protection of the interests of the parties, and it is generally expedient, if possible, to procure such an order.[4] As the court will not undertake to determine, and as, in fact, it has no power to determine what is, or what is not, property of the firm, the true method of determining the question is by an action in favor of or against the receiver, for that purpose, leave to do which will be granted by the court upon motion and a proper showing.[5] The receiver is entitled to have all the moneys belonging to the firm, or evidences of indebtedness, or other property of whatever description in the hands of *any* of the partners, and upon their refusal to turn over such property to him, the court will enforce obedience to its orders by attachment.[6] The receiver must pay out the funds that come into his hands according to the direction of the court, and he has no power to prefer one creditor to another, or to give one creditor an undue advantage over another, nor can he apply the funds in payment of a debt due from the firm to him.[7] It is his duty to get in the moneys due the firm, as speedily as possible, and, under the direction of the court, to sell the property and good-will of the business, if there be any, and, if the court thinks proper to do so, it may permit any of the parties to purchase the property, and having permitted such a purchase, it will protect the purchasers in their possession of the property.[8]

Where the interests of all parties require it, the court will direct the receiver to continue the business of the firm, and especially will it do this in those instances where the whole value of the property and business is dependent upon its continuance, as in the case of the pub-

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[1] Tillinghast v. Champlin, *ante*.

[2] Smith on Receivers, 165; Merritt v. Lyon, 16 Wend. (N. Y.) 410.

[3] Angel v. Smith, 9 Ves. 335; Brooks v. Greathed, 1 J. & W. 178.

[4] Iddings v. Bowen, 4 Sandf. Ch. (N.Y.) 417; Tillinghast v. Champlin, 4 R. I. 173.

[5] Higgins v. Bailey, 7 Robt. (N. Y. Sup. Ct.) 618.

[6] Miller v. Jones, 39 Ill. 54.

[7] Gridley v. Conner, 2 La. An. 87.

[8] Williams v. Wilson, 4 Sandf. Ch. (N. Y.) 379.

lication of a newspaper,[1] the running of a steamboat,[2] or other business, the stoppage of which would seriously impair the value of the property or lessen the receipts to the creditors and parties. The ground upon which this power is exercised is that it is the duty of the receiver, as the very object of his appointment contemplates, to preserve the property during the pendency of the action for the benefit of all parties. In one case, the receiver ran the business—the running of steamboats—two years.[3] But, as in the case last cited, the courts are exceedingly averse to running the business of a partnership, and will always wind up its affairs at the earliest practicable period.[3] If the receiver is guilty of laches, or unduly delays the winding up of the business, any of the parties can move for an order of sale, or he will be enjoined, or removed from the position as the facts and circumstances of the case may seem to require.[4] If, upon the coming in of the answer, all the equities of the plaintiff's bill are denied, and the plaintiff does not sustain the allegations in his bill by any additional evidence, the court will generally vacate the order appointing a receiver and thus the receiver is of course removed.[5] So, if it appears that the receiver is for any cause an improper person to hold the position, but this fact must clearly appear,[6] and the mere fact that the receiver is a relative of some of the partners, it not appearing that he has any interest that disqualifies him for the position,[7] is not sufficient; but if it is shown that he has, by reason of relationship and his former connection with matters involved, been in such a position as would be likely to affect the fairness and equality of his action as receiver, it has been held

[1] Mr. Edwards, in his work on Receivers, p. 128, says: "Where a receiver of the effects of a business is appointed, he should, ordinarily, proceed and sell the establishment without delay; but in the meantime, the business should be carried on by him as usual, so that the good-will thereof may be secured to the purchaser and the full value of the establishment realized by the partners on such sale. This was said by Chancellor Walworth, in Martin v. Von Schaick, 4 Paige's Ch. (N.Y.) 480. The suit related to a newspaper, its subscription list and advertising columns, and to a printing establishment; and there the court went on to say, 'but the court will not take upon itself the responsibility of continuing the publication of a political paper by a receiver any longer than is absolutely necessary to prevent a sacrifice of the property. Until a sale can be effected the defendants may continue to superintend the editorial department of the paper, as they have heretofore done; but the paper must be personally responsible for any publication therein which is improper. There must be a reference to a Master to appoint a receiver without delay.' And, in Const. v. Harris, 1 Turn. & Russ. 518, Lord Chancellor Eldon said, 'that it was not the business of the court to manage or carry on, from time to time, a partnership *of any kind*, and that it was impracticable for the court to do so.'"

[2] Crane v. Ford, Hopk. Ch. (N. Y.) 114.

[3] Allen v. Hawley, 6 Fla. 154; Walbert v. Harris, 7 N. J. Eq. 605; Jackson v. De Forest, 14 How. Pr. (N. Y.) 81.

[4] Ferry v. Bank of Central N. Y., 15 How. Pr. (N. Y.) 446; Copper Mining Co. v. Spencer, 25 Cal. 11.

[5] High on Receivers, 531, and cases cited in notes 4 and 5.

[6] Wetter v. Schlieper, 7 Abb. Pr. (N. Y.) 92.

[7] Wetter v. Schlieper, *ante*.

that he should not be retained.[1] But, in the case of partnerships, the court, having in view the interests of the parties, will, if the circumstances are such as to admit of it, that is, if he is not shown to be disqualified from any cause, often appoint one of the partners as receiver, and this generally is the wisest course.[2] But it is held that, in cases where one of the partners is appointed, he must serve without compensation.[3]

In a Tennessee case[4] it was held that even if the partner acting as receiver used the funds received by him as receiver, in his own business from which he realized a profit, his copartners could not compel him to account for the profits, but that he would be liable only to account for the interest upon the money at a legal rate. The appointment of a receiver, as we have previously stated, operates as an injunction, but if any of the partners or other persons interfere with the property, or threaten to do so, in a manner that is likely to be productive of injury thereto, or that will lessen the efficacy of the appointment, the court will specially restrain them from so doing.[5]

When a partnership is dissolved by decree the court will appoint a receiver as a matter of course upon the application of either of the partners in the course of winding up and settling the partnership business,[6] but in an action between partners to recover a balance due from the firm, the court will not appoint a receiver to sell joint property, until the exact interest of each partner in such property is judicially ascertained.[7] Neither will a receiver be appointed where the facts are doubtful,[8] nor where all the equities of the complaint are denied.[9] A decree in the settlement of a partnership should settle the whole matter so as to render further litigation unnecessary between the partners, consequently the report of a Master or referee, that omits a statement of the accounts between each of the partners, is defective,[10] and the court will not appoint a receiver to sell property belonging to the partners jointly until it is ascertained judicially what interest each partner has in it, unless insolvency is alleged, nor even then, if the defendants offer to indemnify the plaintiff against loss from delay.[11]

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[1] Williamson v. Wilson, Bland, 418.

[2] Hubbard v. Guild, 1 Duer (N.Y. Sup. Ct.), 662; Wilson v. Greenwood, 1 Swanst. 471; Blakeney v. Dufaur, 15 Beav. 40; Brenan v. Preston, 2 De G. M. & G. 818.

[3] See 3 Daniel's Ch. Pr. 1972.

[4] Whitesides v. Lafferty, 3 Humph. (Tenn.) 150.

[5] Skip v. Harwood, 3 Atk. 564. For form of bill, orders, etc., see appendix.

[6] Richards v. Baurman, 65 N. C. 162.

[7] Buchanan v. Comstock, 57 Barb. (N. Y.) 568.

[8] Baxter v. Buchanan, 3 Brewst. (Penn.) 465.

[9] Buchanan v. Comstock, *ante*.

[10] Eaton's appeal, 66 Penn. St. 483; Rhiner v. Sweet, 2 Lans. (N. Y.) 386.

[11] Buchanan v. Comstock, 57 Barb. (N. Y. 568.

CHAPTER XV.

OF THE PLEADINGS IN EQUITY BETWEEN PARTNERS.

SEC. 386. When bill in equity between partners will lie.
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When bill in equity between partners will lie.

SEC. 386. Having already considered the equitable rights between partners, we have necessarily noticed the various kinds of relief which may be prayed for by a bill filed between them in a court of equity. We have seen that a bill will lie for the specific performance of a partnership agreement, for the enforcement by injunction of the rights of a partner under a *series* of breaches of covenant committed by his copartner, for an account under a particular breach of covenant, for a dissolution and general account of the partnership, and, concurrently with the relief last mentioned, for a sale of the partnership effects, for an injunction from receiving the partnership moneys and negotiating the partnership securities, and for a manager or receiver. To these various heads of equity may be added those which arise in cases of fraud in mutual partnership transactions. Thus it has been held that a person who has been induced by fraudulent

representations to enter into partnership may file a bill for a return of the premium,[1] or for an account and receiver[2] and that the partnership may be declared void. So, it seems clear, that in many cases a bill may be filed by one partner for the delivery up of a false instrument executed by the other partner, on which the partnership might be sued, even though unsuccessfully, at law.[3] Lord Thurlow, however, refused to extend this doctrine to the case of a promissory note, alleged to have been made in the name of the firm after the dissolution of partnership. The bill prayed that the note might be delivered up to be canceled, or the plaintiff's name erased. Lord Thurlow said that, in decreeing such relief, he must determine that, wherever one party hath an instrument upon which he cannot maintain an action at law, he must be decreed to give it up; and that the bent of his inclination was against laying down the rule to this extent.[4]

Parties.

SEC. 387. To a bill for an account of partnership transactions, all the partners should be parties.[5] To a bill filed for payment of a share in a partnership adventure, all the parties having shares must be parties.[6] In a bill filed by a partner in respect of a fraud committed against him by his copartner and a third person, the latter should be joined as a defendant, if relief is sought against his acts, as where it is necessary that he should deliver up a fraudulent instrument,[7] or that he should be restrained from paying money to the fraudulent

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[1] Per Lord Eldon, Tattersall v. Groote, 2 Bos. & P. 131; Pillans v. Harkness, Colles' P. C. 442; Hamil v. Stokes, Daniel, 20; Evans v. Bicknell, 6 Ves. 174.

[2] Ex parte Broome, 1 Rose, 71. Lord Erskine, however, was of opinion that such a question would be more properly tried at law in an action for damages; and at all events, that if the fraud charged by the bill was not most fully made out by evidence, the bill should be dismissed with costs. His Lordship accordingly adopted that course in Clifford v. Brooke, 13 Ves. 132. Upon this case Mr. Hovenden observes that its circumstances are distinguishable from those alleged in Ex parte Broome, and that, though in the last-named case a bill was sustained on the ground of fraud, the relief there prayed was not merely satisfaction for money advanced, but the prayer was extended to other relief, of a nature which a court of equity alone could give. 2 Hov. Supp. 327. In Clifford v. Brooke, the prayer seems to have been for mere satisfaction of the sum advanced.

[3] See Jackman v. Mitchell, 13 Ves. 581; Mayor of Colchester v. Lowten, 1 Ves. & B. 244.

[4] Ryan v. Mackmath, 3 Bro. 15. And it should seem that upon the same principles a court of equity will refuse an injunction to restrain the use of the partnership name after the dissolution. In both cases a successful defense may be made at law. Opinions on this point appear to differ. See D. Sir Samuel Romilly, arg. 13 Ves. 585; D. Sir John Leach, 3 Russ. 432, line 3; and the case of Hodgson v. Murray, 2 Sim. 515; 3 id. 283; Hawkshaw v. Perkins, 2 Swanst. 543.

[5] Thomas v. Leigh, 2 Vez. 312; Longe v. Younge, 2 Sim. 369; Mitf. Pl. 164; Story's Eq. Pl., chap. 4, § 167; Calvert on Parties, chap. 3, § 19.

[6] Ireton v. Lewis, Rep. temp. Finch. 96.

[7] Ryan v. Mackmath, 3 Bro. 15.

partner,[1] or from indorsing or negotiating a partnership bill which he has fraudulently taken from such partner.[2] In a bill by partners against a copartner, to have the benefit of a fraudulent transaction clandestinely committed by the latter, not only they who were partners at the time of the fraud and have since retired, but they also who have become partners since the fraud, should be plaintiffs, if they share by agreement the stock, profits, and benefits of the old partnership.[3] And, generally, all persons who have such an interest in the matters in litigation, as that their rights may be affected by the *decree*, should strictly be parties to the suit.[4] Hence, when partnership stock is standing in the name of one of the defendant partners, the governor and company of the Bank of England must be made parties to the suit, in order that they may be restrained from transferring the stock.[5] So, also, where the bill prays for an injunction to restrain execution against the partnership effects, the sheriff should be made a party.[6]

Effect of bankruptcy of defendant.

SEC. 388. When a partner, plaintiff or defendant, becomes bankrupt pending a suit between them for an account, the suit becomes defective, and the assignees must be brought before the court by supplemental bill.[7]

Effect of death of defendant.

SEC. 389. When a partner, plaintiff or defendant, dies pending a suit between the partners for an account, the suit becomes to that extent defective, and can only be continued by a revivor as to the representatives of the deceased party.[8]

Assignee in bankruptcy may bring, when.

SEC. 390. After the bankruptcy of a partner, a bill for an account may be filed by the assignees against the solvent partners,[9] or

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[1] Master v. Kirton, 3 Ves. 74. See Alsager v. Rowley, 6 id. 748; Duff v. East India Comp., 15 id. 198.

[2] Hood v. Aston, 1 Russ. 412.

[3] Fawcett v. Whitehouse, Russ. & M. 143.

[4] Lubé Equity Pl. 282. The exceptions seem to be, where the interest of the party is very remote, or his rights depend upon the establishment of prior claims, or there is already before the court a person competent to protect them. Id.; and see Mitf. Pl. 165.

[5] Vulliamy v. Noble, 3 Mer. 593; Toulmin v. Copeland, 6 Price, 405; Scott v. Bank of England, 2 Younge & Jerv. 327.

[6] Bevan v. Lewis, 1 Sim. 376.

[7] If, upon the bankruptcy of one of several plaintiffs, the cause be not proceeded with, the defendant may obtain the usual order to dismiss for want of prosecution. Caddick v. Masson, 1 Sim. 501.

[8] Lubé Eq. Pl. 285; Boddy v. Kent, 1 Mer. 364; Falloweson v. Williams, 11 Ves. 306.

[9] 1 Swanst. 471.

their representatives [1] and the bankrupt partner.[2] Generally speaking, the bankrupt himself cannot file a bill relating to his estate after the bankruptcy.[3] But it is evident that there may be exceptions to this rule. Thus, upon the bankruptcy of a firm, it seems clear that any one of the bankrupts may file a bill against a creditor and the assignees for an account, provided there be specific charges of fraud on the part of the creditor, and of collusion on the part of the assignees, and likewise of a refusal by the latter to institute a suit against the creditor for the benefit of the plaintiff.[4] It has likewise been laid down, though the point was not expressly decided, that a bankrupt may file a bill for an account and an injunction to restrain proceedings at law, without making his assignees parties to the suit. In the case which gave rise to this opinion, an action had been brought against the bankrupts by certain persons claiming to be creditors, but who it seems had had partnership dealings with the bankrupts, and who, as alleged by the bankrupts, would have been found indebted to them on a balance of the accounts. To a bill filed by the bankrupts against the plaintiffs at law for a discovery, an account, and payment of the balance, an injunction and general relief, the latter pleaded the bankruptcy of the plaintiffs in equity as a bar to the suit, but Sir Thomas Plumer overruled the plea, observing that these demands arising out of partnership transactions could not be adjusted in the action at law as a set-off; that although the plaintiffs were not entitled to that part of the relief which sought the

[1] 2 Mer. 119. In West v. Skip, a cross-bill was filed by the assignees of Ralph Harwood against Skip and the execution creditors of the partnership. The bill prayed "That the said defendants may account with and deliver to the plaintiffs the possession of the said partnership brewhouse, utensils, stock, debts, and effects of or belonging to the bankrupt's estate, and may account for and pay to the plaintiffs all such money, notes, and effects, as they or the said receiver have or hath received by and out of the same, that so they may be sold, disposed of, or applied to or for the benefit of the plaintiffs, and of such other creditors of the said bankrupt, who have already proved their debts, or shall seek relief under the said commission; or in case any of the defendants have a right to a priority to the plaintiffs and the rest of the said bankrupt's joint creditors, and to have a satisfaction of any of the said defendants' demands, then, that an account may be taken of such demands, and that the residue of the said bankrupt's estate and effects, over and above what would satisfy such demands, may be applied to satisfy the plaintiffs and the other joint creditors under the said commission; and that in the meantime, and whilst such accounts shall be taken, the plaintiffs may be at liberty to sell and dispose of, receive, and get in all such the said bankrupt's estate and effects; and that the said receiver may deliver over to the plaintiffs all the said bankrupt's estate and effects which came to his hands, custody, or power, as receiver of the said partnership estate," and for general relief. R. L. 1748, B. 618.

[2] See next page.

[3] Co. B. L. 513, 7th ed.; Tarleton v. Hornby, 1 You. & Col. 172.

[4] Benfield v. Solomons, 9 Ves. 77. But see 3 Madd. 158.

payment to them of what might appear due on the taking of the accounts, for that belonged to the assignees, yet he thought they were entitled to so much of the relief prayed as related to taking the accounts. This was not an objection for want of parties, but he thought that such an objection would not have been available.[1]

Bill for account by, maintainable when.

SEC. 391. After the bankruptcy of a partner a bill for an account may be sustained by the solvent partners against the assignees of the bankrupt, and it is clear that in many cases the bankrupt may be joined as a defendant. Thus it has been laid down that although a bankrupt, who is made party to a bill against his assignees touching his estate, may demur to the relief, because all his interest is transferred to his assignees, yet it has been generally understood that if any discovery is sought of his acts before he became a bankrupt, he must answer to that part of the bill for the sake of discovery, and to assist the plaintiff in obtaining proof, although his answer cannot be read against his assignees.[2] And this will be still more essential where the bankrupt is charged with gross acts of fraud.[3] Lord Eldon, likewise, has expressed an opinion that it might be necessary to make a bankrupt a party, in order to enable the plaintiff to frame the interrogatories on which he was to be examined as a witness.[4] And in the case of Binford v. Dommett,[5] the bankrupt partner was made a co-defendant to a bill filed by the solvent partner against the assignees of the bankrupt for an account, the latter being likewise examined as a witness to prove the partnership.

Parties to the contract only necessary parties.

SEC. 392. But, although it may be laid down as a general rule that all persons materially interested in the subject ought to be parties to a suit, however numerous they may be,[6] yet in general, in a bill founded on a contract, it is only necessary to make those persons parties who are parties to the contract.[7] Where, therefore, an agreement for a

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[1] Lowndes v. Taylor, 1 Madd. 423; 2 Rose, 365.

[2] Mitf. 161; Robinson v. Field, 5 Sim. 14. But generally, either to a bill for relief, or to a bill for discovery in aid of an action, a mere witness cannot be made a party. See 7 Ves. 287.

[3] Hamil v. Stokes, 4 Price, 161; Daniel, 20. In this case the bankrupt had fraudulently induced the plaintiff to become a partner, and taken a bond from him for payment of money by installments, and then procured a joint commission to be sued out. The bankrupt, the assignees, and the assignee of the bond, were made defendants, and were refused their costs.

[4] Le Texier v. Margravine of Anspach, 1 Ves. & B. 546, cited.

[5] 4 Ves. 756; Glassford v. Jaffrey, 1 Ves. & B. 549, cited; but see Whitworth v. Davis, id.

[6] Mitf. Pl. 164.

[7] Humphries v. Hollis, Jac. 75.

lease had been made with one of two partners, and there was no evidence that the lessor knew that it was on the partnership account, upon the death of the intended lessee it was held that a bill could not be maintained by the surviving partner against the lessor to restrain the latter from granting a lease to the executors of the deceased, there having been no contract between the lessor and the surviving partner; but it was held that such surviving partner might file a bill to restrain the executors from disposing of the lease, if the lessor should grant one, except for partnership purposes.[1] Upon the same principles, except in cases of collusion, a debtor of the partnership ought not to be made a party.[2] And clearly, where there is a sub-partnership, the sub-partner ought not to be made a party to a suit for taking the accounts of the general partnership.[3] Upon principles analogous to the foregoing, if there are two partners, and one of them by will give a sum of money out of his share of the partnership effects, the executor of the partner who is dead and the surviving partner may settle the account of the effects without the legatee, for all the legatee is entitled to is to come out of the surplus, which is after the account is taken.[4] However, the legatee may in some instances file his bill against the surviving partners, as well as the executors of the deceased; but this will be more properly considered at a future page.[5]

Prayer of the bill.

SEC. 393. The prayer of a bill for an account of partnership transactions very frequently extends to an injunction, and sometimes to a writ of *ne exeat regno.*[6] Upon these two points it ought to be observed that generally the writ of injunction will not be granted unless prayed for by a bill which is already filed; and likewise that a writ of *ne exeat regno* ought regularly to be prayed for by the bill.[7]

Where a dissolution is intended it ought to be prayed for; and even where a dissolution has in fact taken place, the bill ought to pray that the partnership may be declared to be dissolved. In a case where the bill prayed the dissolution of a parol partnership, a demurrer to such bill, alleging that the prayer was nugatory in calling upon the court to do what the parties had a right to do themselves, was overruled.[8]

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[1] Alder v. Fouracre, 3 Swanst. 489.

[2] *Ante*, p. 246.

[3] Brown v. De Tastet, Jac. 284.

[4] Langley v. Earl of Oxford, 2 Ambl. 798, ed. Blunt. But see Newton v. Bennett, 1 Bro. 135.

[5] *Post*, Book 3, the concluding chapter. See Bowsher v. Watkins, Russ. & Myl. 277.

[6] Generally, the application for this writ must be supported by an affidavit, *positive* as to the amount of the debt. But information and belief will be sufficient in matters of pure account, as in the case of partners and executors. Per Lord Eldon, Petrie v. Jackson, 10 Ves. 165.

[7] Mitf. 46, Jeremy's notes.

[8] Master v. Kirton, 3 Ves. 74.

Demurrer for want of parties.

SEC. 394. The defendant may take advantage of the want of parties by demurrer, if the defect appear on the face of the bill, by plea in abatement if it do not so appear.[1] So, if parties having no interest in the suit be joined as plaintiffs, the defendant may demur or plead in like manner.[2]

Pleas.

SEC. 395. The defendant, instead of answering, will sometimes be advised to plead *in bar* of the suit. Whether the plea can be made to extend to the discovery, as well as the relief sought by the bill, must depend on the circumstances of each particular case. Where the discovery sought would, if given, in no way affect the validity of the plea, the plea is a sufficient bar both to the discovery and the relief. Where, on the other hand, the discovery sought has reference to matters which would put in issue the truth of the plea, the defendant must deny those matters by answer, and likewise by averments in the plea itself.[3]

If the plaintiff believes the plea to be defective in form or substance, he may take the judgment of the court upon its sufficiency,[4] in which case it must be set down for argument. But, whether it be allowed upon argument, or replied to by the plaintiff, and so admitted without argument,[5] still issue may be taken upon it in point of fact.[6] If the defendant succeed upon this issue, the suit so far as the plea extends is barred. If he fail, he will be examined on interrogatories to supply the defect of answer.[7] Where a bill calls for an account of partnership transactions, and in its whole frame is adapted and confined to that object, the defendant may plead in bar that he is *no partner*.[8] But on the principles already stated,[9] where there are facts charged in the bill as evidencing the partnership, the plea must be accompanied by an answer and discovery as to the circumstances so charged.[10]

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[1] Cockburne v. Thompson, 16 Ves. 325. On a plea in abatement for want of parties, it is discretionary in the court either to dismiss the bill without prejudice, or to give leave to amend on payment of the costs of the day. 2 Eq. Abr. 1.

[2] Cuff v. Platell, 4 Russ. 242; Makepeace v. Haythorne, 4 Russ. 244; see Rowlinson v. Halifax, 2 Sim. & Stu. 27.

[3] See Mitf. 271, 293; James v. Sadgrove, 1 Sim. & Stu. 4; Morony v. O'Dea, 1 Ball & Beat. 119.

[4] Mitf. 301. As to the costs of allowing or overruling pleas and demurrers, see Orders 31, 32, April, 1828.

[5] Gilb. For. Rom. 95.

[6] Mitf. 302.

[7] Id. And see Lubé Eq. Pl. 45.

[8] Drew v. Drew, 2 Ves. & B. 159.

[9] *Supra.*

[10] Sanders v. King, Madd. & Geld. 51, 2 Sim. & Stu. 277; Yorke v. Fry, id. See —— v. Harrison, 4 Madd. 252.

Plea of account stated.

SEC. 396. A plea of a *stated account* is a good bar to a bill for an account.[1] But a man who pleads a stated account must show it was in writing, and likewise the balance in writing, or at least set forth what the balance was,[2] although, to support such a plea, it is not absolutely necessary that the account should be signed by the parties, if there be other evidence of acquiescence.[3] The possession of the account for a long time by the party charged, as also the delivery of vouchers, has been held strong evidence of acquiescence.[4] In a modern case, however, the possession of the account three years without any objection made, was held not to be sufficient.[5] The defendant must by the plea aver that the account is just and true to the best of his knowledge and belief. Moreover, the delivering up of vouchers at the time the account was stated seems to be a proper averment in a plea of this nature, if the fact was such.[6] The same principles which have been stated in regard to pleas of no partner, where matters are charged by the bill as evidence of the partnership, will have place in regard to a stated account. For although, if a man prefer a bill generally for an account, an account stated is a good plea; yet, if in his bill he set forth that there was an account, and that there was a mistake, and set forth the particular mistake, there an account stated is no good plea,[7] unless there be an answer as to the mistake. And if error or fraud are charged, they must, it seems, be denied by the plea, as well as by way of answer.[8] Where A and B, partners in trade, stated their account, and A gave B a note for the balance, but B at the same time promised to rectify any error of mistake in the account, although B obtained judgment against A on the note at law, the Court of Chancery decreed a new account and payment, with interest.[9]

Court will not generally meddle after settlement.

SEC. 397. The court, however, is generally averse to the unraveling settled accounts. In Morris v. Harrison,[10] it was covenanted in the articles, that the surviving partners were to save harmless from the

[1] Mitf. 261; Taylor v. Shaw, 2 S. & S. 12.

Per Lord Hardwicke, 2 Atk. 399.

[2] Morris v. Harrison, Colles' P. C. 157.

[4] Willis v. Jernegan, 2 Atk. 251.

[5] Irvine v. Young, 1 Sim. & Stu. 333, overruling Tickel v. Short, 2 Ves. 239.

[6] Mitf. Pl. 260.

[7] Anon., 2 Freem. 62.

[8] Mitf. 259.

[9] Chandler v. Dorset, Rep. temp. Finch, 481. See Walker v. Consett, Forest, 167; Proud v. Coombes, 2 Freem. 183; Nels. 100.

[10] Colles' P. C. 157. See Sherman v. Sherman, 2 Vern. 276; Gray v. Minnethorpe, 3 Ves. 103.

partnership debts the executors and administrators of such partner as should die during the partnership, and were to take no advantage of survivorship, and were, within one month after such partner's decease, to render an account in writing of the trade and stock to his executors or administrators, as it stood at the partner's death. Harrison, one of the partners, died in September, and within a month after his death his administratrix desired an account, according to the articles. An account was made out, dated the 6th January following. At this period, one of the partners who survived Harrison was abroad, and in February he died, without ever having interfered in the transaction. His representative then filed a bill, impeaching the account so delivered, and praying for a general account of the partnership. But the Master of the Rolls held that the account delivered to the administratrix of Harrison should stand as a stated account, with liberty to the representatives of any of the partners to surcharge and falsify. Upon appeal to Lord Somers, and afterward to the House of Lords, this decision was affirmed.

Statute of limitations.

SEC. 398. The statute of limitations[1] bars only legal remedies, but courts of equity, by their own rules, independently of any statutes of limitation, give great effect to length of time, and they refer frequently to the statutes of limitation as furnishing a convenient measure for the length of time that ought to operate as a bar in equity of any particular demand.[2] They have therefore thought proper to adopt the limit of six years, in analogy to the statute.[3] And accordingly, the statute of limitations is a good plea in bar of a bill for an account. Where, therefore, a bill prayed an account against the representatives of a surviving partner, alleging the partnership to have commenced in 1788, and to have continued to 1798, without any account settled, and the partner died in 1806, and the bill was filed in 1808, the case was held to be within the statute.[4] On the same principle, the statute of limitations is a good plea in bar of a suit against the representatives of a deceased partner for an account, if there have

[1] 21 Jac. 1, c. 16, s. 3, by which it is enacted that "all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchants, their factors or servants, and all actions of debt grounded upon any lending or contract without specialty, shall be commenced and sued within six years next after the cause of such action or suit, and not after." The exception as to merchants applies only to running accounts, and not to any case where the account is closed and concluded between the parties. Welford v. Liddell, 2 Ves. 400.

[2] Per Lord Eldon, 17 Ves. 96.

[3] 1 Sim. 398.

[4] Barber v. Barber, 18 Ves. 286.

been no dealings within six years before the filing of the bill, and no admission on the part of the testator or the representatives, which can take the case out of the statute.[1]

But as pleas of the statute of limitations are admitted in courts of equity by analogy only, it follows that where the circumstances of a case are such as to make it against conscience to apply the rule founded upon this analogy, the court will not enforce it.[2] Therefore, if a partner devises his estate for payment of his debts, and dies, the court will not permit his representatives to set up the statute in bar of demands, which had legal existence at the time of his death, and on a bill filed for that purpose, the partnership accounts must be taken.[3] So, other cases might be stated in which the court would relax the general rule. On the other hand, if there have been that delay or forbearance on the part of the plaintiff, that makes it not illegal but inequitable to demand payment, the court will not sanction that indulgence of time which the statute gives him, but will leave him to his action at law.[4] In a court of equity, the exception in the statute relative to merchants' accounts extends to all accounts current,[5] and where accounts have remained unsettled through several succeeding partnerships, they will be considered with reference to the statute, as one unsettled account against any person who was a member of all the partnerships. In Robinson v. Field,[6] it appeared that three persons, A, B, and C, entered into partnership as attorneys. In 1808, A died, leaving B his executor and residuary legatee, and thereupon B and C continued the partnership upon the same terms as before, as nearly as circumstances would permit, until the 31st of December, 1825, when their partnership dissolved by consent. In 1827, B became bankrupt, and no settlement of accounts having taken place between any of the parties, B's assignees in July, 1831, filed their bill for an account of the dealings and transactions in both partnerships, from the commencement of the original partnership until the 31st of December, 1825, alleging that joint and separate advances had been made by A and B to C during A's life-time, and that advances had likewise been made by B to C since A's decease. C then pleaded the statute of limitation to so much of the bill as related to the advances, but Sir L. Shadwell overruled the plea on the ground that the partnership accounts could not be taken without having

[1] Ault v. Goodrich, 4 Russ. 434.
[2] Per Sir A. Hart, Sterndale v. Hankinson, 1 Sim. 398.
[3] Ault v. Goodrich, *supra*.
[4] Bridges v. Mitchell, Gilb. 257.
[5] Anon., 19 Ves. 185, cited.
[6] 5 Sim. 14.

regard to the joint advances made by A and B, and the advances made by B after A's death, and, therefore, that the plea covered too much, though possibly it might have been good as to the separate advances made by A and B in A's life-time.

Releases and awards.

SEC. 399. A *release* or an *award* may likewise be pleaded in bar to a bill for an account,[1] but if a release be pleaded to a bill for an account, it must be under seal, otherwise it must be pleaded as a stated account only.[2] But in all cases, if there be any equitable objection to the release, or to the award charged by the bill, the defendant must meet those charges in the same manner as has been alluded to in the case of other pleas, namely, by averments in contradiction of such charges, both by the plea itself, and by an answer in support of the plea.[3]

Bankruptcy.

SEC. 400. The *bankruptcy* of one of the plaintiffs is a good plea in bar to a bill for an account; for a bill cannot be sustained unless every plaintiff has some interest, legal or equitable, in the matters of the suit.[4] We have seen that a covenant to refer to arbitration is not a valid defense by way of plea.

When a demurrer is good.

SEC. 401. What is a good defense by plea is also good by demurrer, if the facts appear sufficiently by bill.[5] Thus, where the plaintiff sought an account of partnership transactions, but it appeared by the bill that all accounts between the parties had ceased for more than six years, and no demand had been made during that time, a general demurrer was allowed.[6] So, if a person be joined as co-plaintiff, who has no interest, the bill is demurrable, if that fact appear on the bill.[7] Where the bill is clearly demurrable, the defendant ought in prudence to demur, with a view to costs. For, in two cases where the defendants might have demurred, and the bill was dismissed, Sir John Leach refused the defendants their costs.[8]

Requirements of answer.

SEC. 402. If the defendant submit to answer, he must, according

[1] Beames' Pl. 218, 230.
[2] Id. 221.
[3] Id. 219, 231.
[4] Makepeace v. Haythorne, 4 Russ. 244.
[5] See Mitf. Pl. 216.
[6] Foster v. Hodgson, 19 Ves. 180.
[7] Harrison v. Hogg, 2 Ves. Jr. 323; Makepeace v. Haythorne, *supra;* see Sangar v. Gardiner, C. P. Coop. 119.
[8] Hill v. Reardon, 2 Sim. & Stu. 431; Jones v. Davids, 4 Russ. 277.

to modern decisions, answer fully. Therefore, if he mean to deny the partnership he must do so by plea, though formerly he might have used the same defense by answer, refusing at the same time to set forth any account.[1] However, the defendant may by his answer decline to admit the copartnership, if the admission would subject him to penalties.[2]

If the defendant by his answer suggests a settled account which he is not able to prove, the court will direct an account, with liberty to the plaintiff to surcharge and falsify if the Master should find any settled account.[3]

If one of the defendants reside abroad, and the plaintiff consent to take his answer without oath, it ought likewise to be taken without signature, though put in by his agent having a power of attorney to appear and defend suits for him.[4] If he be a foreigner, he ought to put in an answer in his own language,[5] together with a sworn translation.[6]

Every defendant is entitled to put in a separate answer, although all should have but one common defense.[7]

Where the bill calls for a discovery which the defendant cannot make completely without seeing the partnership books and accounts, which are not in his possession, but which he believes to be in the hands of the plaintiff, he must put in an answer stating to that effect, and then move that the court would stay proceedings against him for not putting in his full answer, until he has been assisted with that inspection. In such circumstances, a motion by the defendant for the production of the books and accounts, before answer, will be refused.[8]

When the partnership is disputed.

SEC. 403. It may be observed in conclusion of this section, that where a partnership is disputed, a court of equity will sometimes

[1] —— v. Harrison, 4 Madd. 252; Somerville v. Mackie, 16 Ves. 328; Ewing v. Osbaldiston, 6 Sim. 608. But see, as to the practice in the Exchequer, John v. Dacie, 13 Price, 632; Corbett v. Hawkins, 1 Young. & Jerv. 425; Desborough v. Curlewis, 3 You. & Coll. 175.

[2] Nelme v. Newton, 2 Younge & Jerv. 186.

[3] Kinsman v. Barker, 14 Ves. 579. But generally, if the bill seek to impeach an account which is proved or admitted, liberty will not be given to surcharge and falsify, unless specific errors be alleged. Id. And see 2 Bro. 62; 3 id. 266.

[4] Bayley v. De Walkiers, 10 Ves. 441; 2 Hov. Supp. 232.

[5] Hayes v. Leguin, Hogan, 274, to which, of course, and not to the translation, he ought to be sworn, if sworn.

[6] Simmonds v. Du Barre, 3 Bro. 263.

[7] Van Sandau v. Moore, 1 Russ. 441. But as to the costs of separate proceedings by defendants who appear by the same solicitor, see Orders, April, 1828, No. 27.

[8] Pickering v. Rigby, 18 Ves. 484.

direct an issue to ascertain the truth,[1] and will even direct the parties to be examined at the trial of such issue.[2] So, where it is uncertain whether a partnership was real or nominal, an issue may be directed to try the fact.[3] However, unless the point is very doubtful, an issue will be refused.[4]

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[1] Peacock v. Peacock, 16 Ves. 49; and see Ex parte Langdale, 18 id. 300; Binford v. Dommett, 4 id. 746.

[2] De Tastet v. Bordenave, Jac. 516.

[3] Jacobsen v. Hennekenius, 5 Bro. P. C. 482.

[4] Foster v. Hale, 5 Ves. 322; Metcalfe v. Royal Exch. Ass. Comp., Barnardist. 343.

CHAPTER XVI.

OF TORT BETWEEN PARTNERS.

SEC. 404. When action for, lies.

When action for, lies.

SEC. 404. As wrongs unconnected with fraud in the settlement of contracts or accounts are in their nature personal, partners will have the same remedies between themselves in respect to these matters as other persons have. Thus, if one tenant in common destroy the thing in common, the other may bring trover, for this amounts to a wrongful conversion.[1] Hence, where one tenant in common of a ship took it away and sent it to the West Indies, where it was lost in a storm, Lord King left it to the jury whether this were not a destruction by the defendant; and they found it so accordingly.[2] It has likewise been laid down that unless there be an authority for that purpose, either expressed or implied, a sale of the whole property by one tenant in common is, with respect to the other, a wrongful conversion of his undivided part.[3] How far this general *dictum* will apply to partners must, in a great measure, depend on the mode, extent, and subject of their trade.

But although trover may be maintainable by one partner against another, in the case of a wrongful conversion, yet the general rule is that one joint tenant or tenant in common cannot bring trover against his companion for a thing still in his possession, because the possession of one is the possession of both; if he do, it is good evidence upon not guilty.[4] And hence, the mere taking and refusal to deliver up by one of two joint tenants or tenants in common will not give the other a right of action against him.[5]

Upon the bankruptcy of one of two partners, the assignees become

[1] B. N. P. 34.

[2] Barnardiston v. Chapman, id.; S. C., 4 East, 121, cited. See Cubitt v. Porter, 2 Man. & Ryl. 267.

[3] Per Bayley, J., 5 B. & Ald. 403. But see Co. Litt. 200, a.

[4] B. N. P. 34; Brown v. Hedges, 1 Salk. 290; Holliday v. Camsell, 1 T. R. 658. It has been held in America, that a surviving partner may maintain detinue against the representatives of the deceased partner for the books of account. Murray v. Mumford, 6 Cow. 441.

[5] Fenning v. Lord Grenville, 1 Taunt. 241.

tenants in common with the solvent partner, his representatives, or assigns, and cannot sue any of these parties in trover for the partnership goods.[1]

It may here be remarked that ejectment will lie by one partner against his copartners on a demise by him to the firm, and that the lessees in such case cannot dispute their lessor's title on the ground of partnership.[2]

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[1] Fox v. Hanbury, Cowp. 445; Smith v. Stokes, 1 East, 363; Smith v. Oriel, id. 368; Salomons v. Nissen, 2 T. R. 674.

[2] Francis v. Doe, 4 M. & W. 331.

CHAPTER XVII.

OF THE RELATIVE RIGHTS OF PARTNERS AND THIRD PERSONS.

SEC. 405. Of the liability of partners for acts of their copartners.
SEC. 406. Trustee and *cestui que* trust liable in certain cases.
SEC. 407. Agreements between partners not binding on third persons, unless.
SEC. 408. Disclaimer of one partner operative when.
SEC. 409. Limitations upon the authority of a partner, when operative.
SEC. 410. Rule in Hawken v. Bourne.
SEC. 411. As regards partnerships.
SEC. 412. Each partner general agent for the others.
SEC. 413. Assignment of partnership property made by one partner.
SEC. 414. Liability of firm for acts of individual members thereof.
SEC. 415. Ratification of acts done in excess of authority.
SEC. 416. Of liabilities for loans effected in firm name.
SEC. 417. For purchases made by one partner.
SEC. 418. For sales made by one partner.
SEC. 419. Property pledged by one partner.
SEC. 420. Power to pledge.
SEC. 421. Of liabilities under bills of exchange, notes, etc.
SEC. 422. Power not confined to general partners.
SEC. 423. Absence of name of partner does not defeat his liability.
SEC. 424. Firm bound by note drawn by one partner in name of firm.
SEC. 425. Debt contracted for, but before company was formed.
SEC. 426. Of liabilities under guaranties given in firm name.
SEC. 427. Must relate to partnership transactions.
SEC. 428. Rule in Ex parte Gardam.
SEC. 429. Cannot give guaranty outside scope of business.
SEC. 430. Of liabilities under acts and assurances in general.
SEC. 431. Promise of one partner, promise of all.
SEC. 432. Payment by one, payment by all.
SEC. 433. In case of joint and several notes.
SEC. 434. Rule in Burleigh v. Scott.
SEC. 435. Payment by assignee of drawer, effect of.
SEC. 436. Distinction between admission of simple and joint debtor.
SEC. 437. Admission operative as to one making it.
SEC. 438. Part payment by one, effect of.
SEC. 439. Effect of undertaking of one relative to firm business.
SEC. 440. One partner may insure for the firm.

SEC. 441. Cannot submit to arbitration.
SEC. 442. General rule as to powers of partner.
SEC. 443. Signature of one partner binds the firm when.
SEC. 444. Notice to one, notice to all.
SEC. 445. Power of one partner in bankruptcy proceedings.

Of the liabilities of partners for the acts of their copartners.

SEC. 405. Generally one partner has an implied authority to bind the firm by contracts relating to the partnership, whether such contracts be evidenced by bare agreements, oral or written, or by negotiable securities, as bills of exchange and promissory notes.[1] To use a strong expression of Lord Kenyon, "One partner may pledge the credit of the other to any amount" The exceptions to this general rule will be noticed in another chapter. The rule is applicable both to dormant and nominal partners. For, notwithstanding some few *dicta* which tend to a contrary doctrine,[2] it is now an undoubted and

[1] The firm, however, are not bound by entries in the partnership books which have not been communicated to their customer. Simpson v. Ingham, 2 B. & C. 65.

[2] D. Gibbs, J., Young v. Hunter, 4 Taunt. 583; D. Lord Tenterden, Lloyd v. Ashby, 2 Carr. & P. 138. He may transfer, assign, or otherwise dispose of any debt due the firm, or any of the partnership effects, so far as the same can be transferred or assigned by law, Arnold v. Brown, 24 Pick. (Mass.) 89; Wells v. Mitchell, 1 Ired. (N. C.) 484; McClellan v. Remsen, 36 Barb. (N. Y.) 622; Lamb v. Durant, 12 Mass. 54; Fromme v. Jones, 13 Iowa, 474; Cullum v. Bloodgood, 15 Ala. 34; Boswell v. Green, 25 N. J. L. 390; Clark v. Rives, 33 Mo. 579; U. S. Bank v. Binney, 5 Mas. (U. S.) 176; Williams v. Barnett, 10 Kan. 455; Steele v. First National Bank, 60 Ill. 23; if the sale be free from fraud on the part of the purchaser, Dickard's Case, 5 Watts (Penn.) 22; Whitton v. Smith, 1 Freem. Ch. (Miss.) 231, however fraudulent may have been his own intention. Wells v. Mitchell, 1 Ired. (N. C.) 484. But, as he merely acts as the agent of his copartners, they are only bound by his acts within the scope of the partnership business, and of his apparent authority as such; consequently, if he sells the property of the firm to discharge his private debts, the purchaser acquires no title thereto against his copartners, as he is charged with notice of the fraud, and is put upon inquiry whether the partner has the consent of his copartners to make such sale. In Stegall v. Coney, 49 Miss. 761, the court happily expresses the rule thus: "The authority of a partner is limited to things done in the regular course of the business of the firm; outside of this he has no authority. If he attempts to mortgage or assign under suspicious circumstances, such act would be of no effect as against the parties injured thereby. A transfer by a partner of the joint effects in fraud of a copartner will constitute the transferee who received them with notice, or without consideration, a trustee for the benefit of the firm or its creditors. If the joint funds were employed by one partner to purchase property, either in his own name or that of another, with the intent to defraud his copartners, or the creditors of the firm, the property so purchased will be treated as trust funds for the firm and its creditors, and it seems that the rule is not affected by the fact either of the creditor's knowledge or ignorance of the partnership ownership. Ackley v. Stachlin, 56 Mo. 558. Upon the general proposition that one partner cannot sell the partnership goods in payment of his own debts, or otherwise beyond the scope of his real or apparent power as partner, see Caldwell v. Scott, 54 N. H. 414; Todd v. Larch, 75 Penn. St. 155; Dunklin v. Kimball, 50 Ala. 251; Rogers v. Batchelor, 12 Pet. (U. S.) 221; Pierce v. Pass, 1 Port. (Ala.) 232; Burwell v. Springfield, 15 Ala. 273; Nall v. McIntyre, 31 id. 532; Filley v. Phelps, 18 Conn. 294; Bourne v. Woolbridge, 10

universal proposition, that a dormant partner is in all cases liable for the contracts of the firm during the time that he is actually a partner;[1] and we have already seen that a nominal partner is similarly liable during the time that he holds himself out to the world as partner.[2]

B. Monr. (Ky.) 492; Jackson v. Holloway, 14 id. 133; Jones v. Lusk, 2 Metc. (Ky.) 356; Minor v. Gow, 19 Miss. (11 Smed. & M.) 322; Buck v. Mosley, 24 Miss. 170; Dob v. Halsey, 16 Johns. (N. Y.) 34; Leonard v. Winslow, 2 Grant's (Penn.) Cas. 139; Purdy v. Powers, 6 Penn. St. 492; McKinney v. Brights, 16 id. 399; Sauntry v. Dunlap, 12 Wis. 364. In such cases, as the purchaser acquires no title to the property, the other partners may follow it and treat it as trust property held for the benefit of the firm by the partner, or by any person in whose hands it may come, except a *bona fide* purchaser who is not charged with notice of the fraud. Kelly v. Greenleaf, 3 Story (U. S.), 93; Craughton v. Forrest, 17 Miss. 131. In Dunklin v. Kimball, 50 Ala. 251, two of the partners (the firm becoming insolvent) assigned the partnership assets to a trustee without the consent of the third partner. The trustee sold the property and it was held that he was liable to the partner for $1,000, the amount of the property which by law was exempt from attachment. And such a sale is also fraudulent and void as against partnership creditors, particularly if the firm is insolvent, and they may in equity pursue the property. Yale v. Yale, 13 Conn. 185; French v. Lovejoy, 12 N. H. 458; and no better title is acquired even though the firm is actually largely indebted to the partner making the sale. Saylor v. Mockbie, 9 Iowa, 209. But a partnership in fact must exist. The mere circumstance, that by law the parties might be regarded as *quasi* partners, will not have this effect, unless the circumstances are such as to create an equitable estoppel. A person not dealing with them as partners cannot charge them as such. This was well illustrated in a recent case in New York. Central City Savings Bank v. Walker et al., 67 N. Y. 425. In that case it was sought to hold the defendants reponsible as partners under circumstances detailed by Allen, J. In the opinion he said, "the defendants are sought to be charged as makers of a promissory note, under the name of 'The Utica Steam Woolen Company,' a corporation whose charter had expired by its own limitation, and of which the defendants were stockholders. The corporation became such by filing a certificate pursuant to the act of 1811, relative to incorporations for manufacturing purposes, and the acts amendatory thereof, by the terms of which the corporate existence was limited to twenty years from the day of filing the certificate. 3 R. S. (Edm. ed.) 726. The defendants served with process, became stockholders after the organization of the corporation, and were ignorant in fact of the day of filing the certificate and of the expiring of the charter. The plaintiff dealt with the corporation as such not with the individual stockholders as copartners or associates in a joint-stock association. The defendants did not hold themselves out as copartners, neither did they by word or act assent to the making of the note in suit, or to the transaction of any business in the name of the corporation in their behalf or with knowledge that its legal existence had terminated. Some six months after the expiration of the charter a dividend was paid to the defendants, as from the earnings of the corporation, by the check of the treasurer, as annual dividends had been paid in former years, but without due notice to them that it was not paid from the earnings of the corporation, or that the corporation had ceased to exist, and there was no proof that it was paid from the earnings of the business transacted in the name of the company after the lapse of the twenty years from its organization. The claim to recover is based solely on the fact that the agent of the corporation, without any authority other than that conferred by resolution of the trustees and under an appointment by them during the existence of the corporation, continued to carry on the busi-

[1] Hubert v. Nelson, Davies' B. L. 8; Hoare v. Dawes, 1 Doug. 371; Coope v. Eyre, 1 H. Bl. 37; Robertson v. Wilkinson, 3 Price, 538; Wintle v. Crowther, 1 Cromp. & Jerv. 316.

[2] *Ante*.

Trustee and cestui que trust liable as partners in certain cases.

SEC. 406. It makes no difference, as to third persons, whether the partnership is carried on for the benefit of the partners themselves, or for the benefit of their *cestui que trusts*.[1] Both the trustees and the *cestui que trusts* are liable. In regard to the liability of the latter,

ness and contract debts, including that in controversy, in the name of the corporation, after the term for which it was created had expired. The contention is that there was "an implied contract of copartnership" between the stockholders, by which they became liable as copartners to third persons. The property and property rights of the corporation were not owned by the individual stockholders, either during the existence of the corporation or after its dissolution. During the life of the corporation the body corporate was the legal owner, and upon the expiration of the charter the legal title vested in the trustees in office, at the time, in trust for the creditors and stockholders. 1 R. S., 600, § 1; Mickles v. The Rochester City Bank, 11 Paige's Ch. (N. Y.) 118. The stockholders were merely *cestuis que trust*, entitled to share ratably in the property after the payment of debts. They did not assume to exercise any rights of ownership in the property. It is true that individuals may *quoad* third persons be charged as partners when they are not in fact partners *inter sese*, by voluntarily and knowingly sharing in the profits of the business or by holding themselves out as partners and thus inducing a credit on the faith of a partnership. Story on Part., §§ 63, 64. A liability may be created by an equitable estoppel, but when it is sought to be established upon the footing of a contract of partnership between the parties, an agreement must be shown, and it will not be implied from the joint ownership of property, nor will the relation arise by operation of law. Story on Part., §§ 2, 3, 32. A partnership does not result from a joint ownership of property, but there must be an agreement, express or implied, to participate in the profits or losses of the business. Chase v. Barrett, 4 Paige's Ch. (N.Y.) 148; Porter v. McClure, 15 Wend. (N.Y.) 187; Livingston v. Lynch, 4 Johns. Ch. (N.Y.) 573. The stockholders, who were but *cestuis que trust* cannot, without other evidence than the proof of their interest, be held to have authorized each other as partners, to pledge the credit of the whole and to have empowered any one of the number to bind all in any matter within the ordinary course of the business of the defunct corporation. As *cestuis que trust* having a common interest, each had dominion over his own share, but had no power over that of the others. There was an entire absence of any intent of the parties to subject themselves to the risks and to the powers which are vested in each member of a partnership. By the Law Merchant, if the individual shareholders have received any part of the earnings of the business carried on by the trustees after the corporation ceased to exist, or have shared in the property of the corporation, they may, perhaps, be held to account in equity to the extent they have profited; but this does not make them liable in an action at law upon the contracts of the trustees or of the corporation. Clavering v. Westley, 3 P. Wms. 402. Neither is there any evidence that the defendants ever constituted Clogher their agent to contract in their name or incur obligations in their behalf, or that they ever received the benefit of his acts so as to charge them with his obligations within the maxim, *qui sentit commodum sentire debet et onus*. The only act that is relied upon as an adoption of his acts is the receipt of the dividend in August, 1866. But this wants the essential fact that it was paid or received as the profits of a partnership business, as well as the element of knowledge of the acts now claimed to have been ratified, or that the dividend was not, in fact, from the earnings of the corporation, for and as which it was paid and received. A ratification can only be implied after knowledge of all the material facts is brought home to the party. A receipt of money as a part of the earnings of a corporation is no ratification of acts of business carried on outside of the corporation without knowledge of him who is sought to be charged with them that the moneys came from such business. Baldwin v. Burrows, 47 N Y. 199; Dounce v. Myrick, 45 id. 180; Rowan v.

[1] Thicknesse v. Bromilow, 2 Crom. & Jerv. 428.

this rule has been carried so far that where A took a lease of a mine for twenty-one years, and declared himself a trustee for five persons who worked the mine in partnership, it was held that the lessee being insolvent the lessor might recover the rent from the partners for the time during which they took the profits, they being deemed in equity in the same situation as if they had been assignees of the lease.[1]

Agreements between partners not obligatory on third persons, except those having notice thereof.

SEC. 407. Of course, any arrangement between the partners themselves cannot limit or prevent their ordinary responsibilities to third persons, unless the latter assent to such arrangement. "Suppose a case," said Lord Tenterden, "where two persons in partnership for the sale of horses agree between themselves never to warrant any horse, yet though this be their course of business, there is no doubt that if, upon the sale of a horse, the property of the partnership, one should give a warranty, the other would be thereby bound."[2] Again, as we shall see presently, it is within the general authority of a partner to bind the firm by drawing, accepting or indorsing bills of exchange in the partnership name. Now, even if it be agreed that a partner shall not have such authority, and he transgress the terms of the agreement in

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Hyatt, id. 138. The case of The National Bank of Watertown v. Landon, 45 N. Y. 410, is distinguishable from this by the fact that in the case quoted there was a special agreement between the stockholders under which the business was continued after the legal expiration of the charter, by which they made themselves partners in fact as well as in law, and they were held liable as bound by the acts of one as a partner having power to bind all, and not by reason of any special agency in the individual by whom the debt was incurred. Fuller v. Rowe, 57 N. Y. 23, relied upon by the plaintiff's counsel, is fatal to the plaintiffs, the court there expressly adjudging, that to make parties assuming to act in a corporate capacity, without a legal organization as a corporate body, liable as partners, it must be shown that the individuals sought to be charged were so acting at the time the contract sued upon was made, or that upon some consideration they agreed to become liable with the others as partners. To constitute a partnership there must be the assent of the individuals to the creation of that relation between them, and in the cases relied upon by the counsel for the plaintiff there has been a partnership by express agreement, or an authorization in advance and a consent to be bound by the acts of others as partners, or by the particular act in question, or a ratification of the acts after they were performed with full knowledge of all the circumstances necessary to an intelligent avowal or disavowal of them, or some acts by which an equitable estoppel has been created—none of which circumstances exist in this case. Thicknesse v. Bromilow, 2 C. & J. 425; Anthony v. Butler, 13 Pet. (U.S.) 423; Eastman v. Clark, 53 N. H. 276; Vassar v. Camp, 14 Barb. (N. Y.) 341."

[1] Clavering v. Westley, 3 P. W. 402. For an instance of a partner being considered at law in the light of a tenant, see Doe v. Sales, 1 M. & S. 297.

[2] 2 Barn. & Ald. 697. See Smith v. Jameson, 5 T. R. 601; Lord Craven v. Widdows, 2 Chan. Cas. 139. An arrangement of this kind by a dormant partner is not more effectual. Hubert v. Nelson, Davies' B. L. 8; Wats. Partn. 168.

this respect, the firm will nevertheless be bound, as far as regards all third persons who have no notice of the arrangement. In the case of the South Carolina Bank v. Case,[1] Crowder, Perfect, and J. B. Clough carried on business in copartnership, as factors and commission merchants in England and America; in England, under the firm of Crowder, Clough & Co.; in America, in the name of Clough alone. When Clough went to America, he had written instructions from his partners, one of which was — "It is understood that our names are not to appear on either bills or notes for the accommodation of others, and that they should appear as little as possible on paper at all, and then only as regards direct transactions with the house here." Crowder, Perfect, and Clough, in order to obtain consignments from America, made advances, or granted drafts or bills of exchange, or indorsements of them, to their principals, on the security of the goods consigned. In order to obtain a consignment from Weyman, of Charleston, Clough in his own name indorsed bills for him, which were to be provided for by others drawn by Weyman on Crowder, Clough & Co., in England, which were to be provided for by the proceeds of the consignment. Before the latter bills were presented for acceptance, Crowder and Perfect had become bankrupts; it was held that the indorsement of the bills by Clough must be considered as an indorsement by the firm, and that the bankrupts and Clough were liable as indorsers of the bills.

A stipulation in partnership articles that one partner shall not contract debts without the consent of the other does not affect third persons dealing with the firm in the usual course of business.[2] The principle upon which this rule rests is, that each partner is the general agent of the others, consequently, as to all matters within the scope of his real or apparent power, he may bind them, and if his powers are special or limited to be operative, notice must be given of the extent of such limitations, or persons dealing with him in ignorance thereof are not bound thereby.[3]

On the other hand, where the creditor has express notice of a private arrangement between the partners, by which either the power of one partner to bind the firm, or his liability in respect of partnership contracts, is qualified or defeated, in such case, it is clear that the creditor himself must be bound by the arrangement between the part-

[1] 8 Barn. & Cres. 427; 2 Man. & Ryl. 459.

[2] Frost v. Hanford, 1 E. D. S. (N. Y. C. P.) 540.

[3] Pahlman v. Taylor, 75 Ill. 629; Kenner v. Alvater, 77 Penn. St. 34; Blodgett v. Weed, 119 Mass. 215; Zuel v. Bowen, 78 Ill. 234; National Bank v. Landon, 66 Barb. (N. Y.) 189.

ners.[1] In Minnet v. Whitney, three persons were in partnership as sugar brokers, and after trade had been carried on some time, one of the partners gave notice of his intention to withdraw from the firm, which was agreed to. Afterward the other partners treated with a trader for some raw sugar. The retiring partner then gave notice to the trader, that he would not be accountable for any sugars which the remaining partners might buy of him; and the trader having answered that he was satisfied with the security of the remaining partners only, the retiring partner was held not liable. So, in the case of Ex parte Harris,[2] wines were ordered in the joint names of two partners, A and B. Before the delivery of them the partnership was dissolved, and the creditors had notice of the dissolution. The creditors drew a bill upon both partners for the wines, but when it was presented at the house where the partnership had formerly been carried on, and where A, the remaining partner, carried on his separate concern, A refused to accept the bill in the partnership firm, and accepted it only on his separate account, and in his own name, and the wines were afterward delivered to A, it was held that the delivery of the wines was made to A only, and that B was not liable in respect of this contract.

Upon the same principle where the creditor has express notice that by an arrangement between the partners one of them, though appearing to the world as a partner, is not to participate in the profit and loss, and is not to be liable as a partner, the creditor will be bound by the arrangement.[3]

Disclaimer of one partner, operative when.

SEC. 408. It seems, also, that the mere disclaimer by one partner, of the future contracts of his copartner, will be binding on third persons, whatever be the effect of such an act between the parties themselves, or whether it be or be not in conformity with the partnership agreement. Thus, in Willis v. Dyson,[4] one of two partners sent a circular in these words: "I am sorry that the conduct of my partner compels me to send the annexed circular. I recommend it to you to be in possession of my individual signature before you send any more goods." The partnership was afterward dissolved. There appears to have been no proof of any misconduct on the part of the accused

[1] 5 Bro. P. C. 489; 16 Vin. Abr. 244. See Vice v. Fleming, 1 Younge & Jerv. 227.

[2] 1 Madd. 583.

[3] Alderson v. Clay, 1 Camp. 404. But see Brown v. Leonard, 2 Chit. 120

[4] 1 Stark. 164. See, also, —— v. Layfield, 1 Salk. 291; Minnet v. Whitney, *supra*; Rooth v. Quin, 7 Price, 193; Lord Galway v. Mathew, 1 Camp. 438.

partner. But Lord Ellenborough ruled that a person who had supplied goods between the times of the receipt of the letter and of the dissolution could not charge the firm, unless he could prove some act of adoption by the partner who gave the notice, or that he derived some benefit from the goods.

Limitations upon the authority of a partner, when operative.

SEC. 409. When an agreement is entered into between the members of a firm that each shall be individually liable for goods purchased by him for the firm all persons dealing with the individual members of the firm *knowing* of the existence of such agreement are bound to look to the members of the firm with whom they dealt, and cannot charge the firm with goods sold to him for its use.[1] In the absence of knowledge of the real contract between the partners, third persons are justified in dealing with any partner in reference to any matter within the scope of the partnership business, but if limitations are under the contract imposed upon the powers of any or all the partners, any person dealing with them with knowledge of such limitations is bound thereby and cannot charge the firm as to any matter in excess of such limitations. In this respect the same rules apply, as in the case of an ordinary agency.[2] But, as to limitations imposed *after* the contract is entered into, unless assented to by all the partners, so as to form a new contract to that extent, they are not obligatory, and one of the partners, nor even a majority of them, cannot by notice or otherwise free themselves from liability for the acts of the others as to any matter within the scope of the business in which they are engaged, if the partnership had the benefits of his contract, or there is any thing upon which an adoption by the firm express or implied can be predicated.[3] If, however, there is no adoption of the act by the other partners, it seems that *positive notice brought home to the plaintiff before the contract is made* that the firm will not be liable for the contracts of one of the partners will shield the company from liability. In an English case,[4] an action was brought against the defendants as surviving partners of T. Whitsmith, upon a promissory note made and signed by J. Matthew, one of the firm. The note was as follows :

[1] In Urquhart v. Powell, 54 Ga. 29, such an arrangement existed as to the share of labor that each partner was to furnish in the working of a farm, and it was held that a laborer hired by one partner, who knew of the arrangement, could not recover against the partnership for his services.

[2] Alderson v. Pope, 1 Camp. 404.

[3] Willis v. Dyson, 1 Stark. 164.

[4] Galway v. Matthew, 10 East, 264. See, also, Greenwood's case, 3 DeG. M. & G. 476.

"Sixty days after date I pay Lord Viscount Galway, or order, 200*l.*, value received. For J. Matthew, T. Whitmarsh and T. Smithson. J. MATTHEW."

Lord Ellenborough held that this note bound the firm *prima facie.* Subsequently, however, it was proved that before the date of the note Smithson had advertised in a newspaper *read* by the plaintiff, that he would not be answerable for any bills or notes issued by Matthew in the name of the firm, and upon this ground there was a verdict for the defendant, which the Court of King's Bench refused to set aside.

Rule in Hawken v. Bourne.

SEC. 410. What would seem to be the true rule in such cases was announced by Parke, B., in Hawken v. Bourne.[1] In that case a joint-stock company was formed to work a mine, in which the defendant was a stockholder and participated in its proceedings. The prospectus issued on the formation of the company stated that all supplies for the mine were to be purchased at cash prices, *and that no debts were to be incurred,* and the script certificates bore the same indorsement. The plaintiff supplied goods for the necessary working of the mine on the order of a resident agent, who was appointed by the directors to manage the mine, which was the customary course in such concerns. The court held that the defendants were liable notwithstanding the notice in the prospectus and certificate *unless it was also shown that the agent had in fact no authority from the defendants, and that the plaintiff had notice thereof.* "Any restriction," said Parke, B., "which any agreement among the partners which is attempted to be imposed upon the authority which one possesses as *general* agent for the other, is operative only between the partners themselves, and does not limit the authority as to third persons, who acquire rights by its exercise, *unless they know that such restriction is made.*"[2] Mr. Lindley, in his work upon Partnersnip,[3] discusses this question, and carefully reviews the cases.

As regards partnerships.

SEC. 411. He says, "by law every member of an ordinary partnership is the agent of the firm, so far as is necessary for the transaction of its business in the ordinary way, and to this extent his authority to act for

[1] 8 M. & W. 703.
[2] See Smith v. Craven, 1 Cr. & J. 509; Ernest v. Nicholls, 6 H. L. Cas. 423; Ridley v. Plymouth Grinding Co., 2 Exch. 711; Alderson v. Pope, 1 Camp. 404.
[3] Vol. 1, p. 261.

the firm may be assumed by those who know nothing of the real limits of his authority. If his copartners have restricted his authority to narrower limits (which they are perfectly at liberty to do), still they will be bound to all persons dealing with him *bona fide* without notice of the restriction, so long as he acts within the wider limits set by law, as above explained. On the other hand, if a person seeks to fasten upon the firm liability in respect of some act of one of the members which does not fall within the limits of his authority as set by law, a more extensive authority must be shown to have been actually conferred upon him by the other partners; and if no sufficient authority can be shown, the firm will not be liable, even though the person seeking to charge it had no notice of the real authority possessed by the partner with whom he dealt.

The immateriality of notice or of want of authority in the last place, and its materiality in the former, is a necessary consequence of the law of agency. A firm can only be made liable for what is done by one of its members on the supposition that the act in question was authorized by the other members. Now, as by law they are held *prima facie* to authorize all acts necessary for carrying on the business of the firm in the usual way, they cannot escape liability for any act of this character, unless they can show that the apparent authority to do it did not exist, and could not have been relied upon, because its non-existence was known. But when it is sought to make the firm liable for some act not *prima facie* authorized by it, an actual authority by it must be shown, and if this cannot be done, no case is made out against the firm, however ignorant the person seeking to charge it may have been of what was authorized and what was not. In the case now supposed the firm did not mislead him, and if he was misled by the representations of the partner with whom he dealt, his remedy is against that partner,[1] just as when an agent untruly repsents his authority, a person, dealing with him, acquires no right against the principal, but must look to the agent for indemnity.[2]

It follows that actual notice of excess of authority becomes important only where the firm seeks to escape liability for some act done by one of its members, with the apparent, but without the real authority of the others. So long as one partner does nothing beyond the scope of his apparent authority, as determined by the principle already explained, so long is the firm responsible for his conduct, although he

[1] See Collen v. Wright, 7 E. & B. 301; Randell v. Triman, 18 C. B. 786; Lewis v. Nicholson, 18 Q. B. 503.

[2] Ex parte Agace, 2 Cox, 312; see, too, Lloyd v. Freshfield, 9 Dowl. & Ry. 19.

may have acted beyond or in direct violation of the authority within which his copartners may have attempted to confine him. Restrictions placed by the partners upon the powers which each shall exercise do not affect non-partners, who act *bona fide* and without notice of the restriction.[1] If, for example, the business of a firm requires a subdivision of labor, and it is agreed between the partners that one shall attend to one department and another to another, the firm will nevertheless be bound by the acts of one of the partners out of his department, provided they are such as, on the principles already explained, would be binding on the firm.[2]

So, if one partner acts in fraud of his copartners, still they will be bound, if he has not exceeded his apparent authority, and if the person dealing with him had no notice of the fraud. Thus, in Bond v. Gibson,[3] where one partner ordered goods on the credit of the firm, and immediately pawned them for his own benefit, the firm was held liable for the price of the goods. So, if one member of an ordinary trading partnership draws, accepts, or indorses a bill in the name of the firm, but for some private purpose of his own, and in fraud of his copartners, they will be liable upon the bill at the suit of any holder for value, without notice of the fraud.[4] So, as has been already seen, if one partner fraudulently misapplies money for which the firm is answerable, the firm is liable to make it good, although the other partners may have been grossly deceived, and may themselves have been morally blameless.

Upon the same principle, if a person known to the partner retires, and does not notify his retirement, he will continue to be bound by the acts of his late partners as if his partnership with them continued.

On the other hand, a person who has notice that the authority of a

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[1] As regards such persons, it is of no use for one partner to tell the others he will not be bound by their acts. See Gleadon v. Tinkler, Holt's N. P. Ca. 586. It is otherwise where there is notice. See Ex parte Holdsworth, 1 M. D. & D. 475.

[2] Morans v. Armstrong, Arm. McArt. & Ogle, Ir. N. P. Rep. 25.

[3] 1 Camp. 185.

[4] Ex parte Bushell, 3 M. D. & D. 615; Ex parte Meyer, De Gex, 632 (an accommodation bill); Lane v. Williams, 2 Vern. 277; Wintle v. Crowther, 1 Cr. & J. 316; Thicknesse v. Bromilow, 2 id. 425; Ridley v. Taylor, 13 East, 175; Sanderson v. Brooksbank, 4 Car. & P. 286; Musgrave v. Drake, 5 Q. B. 185; Lewis v. Reilly, 1 id. 349; Sutton v. Gregory, 2 Peake, 150; Swan v. Steele, 7 East, 210. See, as to the plea of *non accepit*, Jones v. Corbett, 2 Q. B. 828. It seems now settled that if a bill is drawn or accepted by one partner in fraud of the firm, the holder cannot recover against the firm unless he can show that he gave value for the bill. Compare Bailey v. Bidwell, 13 M. & W. 73; Smith v. Braine, 15 Jur. 287, Q. B.; Harvey v. Towers, 6 Ex. 656; Berry v. Alderman, 14 C. B. 95; Heath v. Sansom, 2 B. & Ad. 291; Musgrave v. Drake, 5 Q. B. 185.

partner is restricted, cannot hold the firm liable if he chooses to deal with that partner in a matter beyond his authority as restricted.[1] Therefore, where the defendant, who was in partnership, sent the plaintiff a circular telling him not to supply goods to the firm without the defendant's written order, and the plaintiff, notwithstanding, supplied goods to the defendant's partner, it was held that the defendant was not liable for the goods.[2] So, the authority of any partner to accept bills in the partnership name may be determined by a public notice, and such notice will affect those whom it reaches, subject to the qualification that an indorsee with notice may avail himself of the ignorance of his indorser.[3]

In Galway v. Mathew,[4] the defendants, Mathew and Smithson, were partners; Smithson caused an advertisement to be published warning all persons not to give credit to Mathew on his, Smithson's, account, and stating that he would not be liable for any bills or notes issued by Mathew in the name of the partnership. The plaintiff had seen this advertisement, but he was nevertheless prevailed upon by Mathew to accept a bill for the accommodation of the firm, taking in exchange a promissory note drawn by Mathew in the name of the firm. Mathew got the bill discounted, and *bona fide* applied almost all of the money thus procured in payment of the debts of the firm. The plaintiff paid his acceptance at maturity, and then brought an action against the firm on the note. But it was held that having seen the advertisement, he could not recover.

Lord Ellenborough in that case said: "The general authority of one partner to draw bills or promissory notes to charge another is only an implied authority, and that implication was rebutted in this instance, by the notice given by Smithson, who is now sought to be charged, which reached the plaintiff, warning him that Mathew had no such authority. It is not essential to a partnership that one partner should have power to draw bills and notes in the partnership firm to charge the others; they may stipulate between themselves that it shall not be done; and if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it in breach of such stipulation, nor in defiance of a notice

[1] Alderson v. Pope, 1 Camp. 404, stated and observed upon hereafter.

[2] Willis v. Dyson, 1 Stark. 164; Minnit v. Whitney, Vin. Ab. Partn. A. pl. 12, and 5 Bro. P. C. 489; see, too, Vice v. Fleming, 1 Y. & J. 227; Ex parte Holdsworth, 1 M. D. & D. 475.

[3] Booth v. Quin, 7 Price, 193.

[4] 1 Camp. 402, and 10 East, 264; see, too, Ex parte Holdsworth, 1 M. D. & D. 475, where the drawer of bills accepted by the firm had notice that they were accepted without authority.

previously given to him by one of them that he will not be liable for any bill or note signed by the others."[1]

Again, a person who knows that a partner is using the name of the firm for a private purpose of his own, knows that he is *prima facie* committing a fraud on his copartners. Therefore, notwithstanding the implied power of a member of an ordinary trading firm to accept bills or make notes in the name of the firm, if he accepts a bill or makes a note in its name, and gives it in payment of a private debt of his own, the creditor who takes the bill or note, knowing that he has so accepted or made it will not be able to enforce it against the firm, unless it was, in fact, given with the authority of the other partners, which it is for the creditor to prove.[2] It must not, however, be forgotten that a partner may be a *bona fide* holder, for his own separate use, of the paper of his firm, and that, therefore, if he has paper of the firm in his possession, and he gives such paper in payment of a debt of his own, this is not, on the face of it, an irregular proceeding or a fraud on his copartners. Consequently, even though he may have come by the paper improperly, his creditor, if he takes it *bona fide*, and without notice of the impropriety, will be in a position to compel the firm to pay it.[3]

As a partner has no implied authority to pledge the partnership name for purposes of his own, so neither has he, for similar purposes, any implied power to pledge its goods. Therefore, if two firms are jointly interested in consignments, and one of them pledges the bills of lading with its bankers as a security for advances on its separate account, the bankers cannot hold these goods against the other firm, if they knew when the goods were pledged what the real facts were respecting them.[4]

Another case, illustrating the want of authority of one partner to bind the firm by transactions enuring only to his advantage, is afforded by Bignold v. Waterhouse.[5] There the defendants were pro-

[1] It was also sought in this case to make the firm liable, because it had had the benefit of plaintiff's money. But this was met by the question, "Can an assumpsit be raised by one man's discharging the debt of another who desires him not to do it on his credit?" See, too, Smith v. Craven, 1 Cr. & J. 509; Ridley v. Plymouth Grinding Co., 2 Ex. 711; Kingsbridge Flour Mill Co. v. Plymouth Grinding Co., id. 718; Ernest v. Nicholls, 6 Ho. Lo. Ca. 428, per Lord Wensleydale.

[2] Wells v. Masterman, 2 Esp. 371; Green v. Deakin, 2 Stark. 347; Ex parte Thorpe, 3 M. & A. 716; Ex parte Austen, 1 M. D. & D. 247; Arden v. Sharpe, 2 Esp. 524; Ex parte Agace, 2 Cox, 312; Miller v. Douglas, 3 Ross' L. C 500 Ex parte Bonbonus, 8 Ves. 540; Frankland v. McGusty, 1 Knapp, 274; Shirreff v. Wilks, 1 East, 48; Ex parte Goulding, 2 Gl. & Jam. 118; Wilson v. Lewis, 2 Man. & Gr. 197.

[3] Ex parte Bushell, 3 M. D. & D. 615; Ridley v. Taylor, 13 East, 175.

[4] Smith v. Burridge, 4 Taunt. 684.

[5] 1 M. & S. 255.

prietors of a coach running between London and Norwich, and they, by notice affixed in their office, stated that they would not be accountable for any parcel above the value of 5*l.*, unless the same was entered and paid for accordingly. The plaintiffs were bankers at Norwich, and one of the defendants, for a consideration moving to him alone, agreed that the plaintiffs' parcels should always go free by the coach. This agreement was acted on for some time, but it did not appear that the other defendants were aware of its existence, or of the fact that the plaintiffs were treated differently from other people. A parcel of the plaintiffs sent by the coach being lost, it was held that the contract entered into by the one defendant was not binding on the others, and that they were not liable for the loss of the parcel, its value not having been declared as required by the notice.

The same principle was acted upon in the important and well-known case of Shirreff v. Wilks.[1] There the plaintiffs sold some porter to Bishop and Wilks, who were partners; and the porter was entered in the plaintiff's books in the names of Bishop and Wilks. Afterward, Robson became a partner with Bishop and Wilks, and the plaintiffs, knowing this, drew a bill on all three partners for the price of the porter, and Bishop accepted the bill in the name of the three. It was held that Robson was not liable on this bill, there being no evidence to show that he knew any thing of it. Lord Kenyon went so far as to say that the transaction was fraudulent on the face of it; but that is going rather far, as it is not uncommon for in-coming partners to agree to take upon themselves the existing liabilities of the firm. When such an agreement is entered into, the in-coming partner can hardly say he has been defrauded if a bill in the name of the new firm is accepted for a debt of the old firm without any specific authority on his part. But if the creditor cannot show any authority on the part of the in-coming partner for the acceptance of a bill in his name for a debt of the old firm, the principle acted on in Shirreff v. Wilks will apply, for that case is clear law, and has often been followed as such.[2]

The doctrine that a person who deals with a partner, knowing that he is exceeding his authority, cannot impute the acts of that partner to the firm, is further illustrated by the decisions establishing the non-liability of a retired partner, for acts done by his copartners

[1] 1 East, 48.

[2] Ex parte Goulding, 2 Gl. & Jam. 118; Wilson v. Lewis, 2 Man. & Gr. 197, E. C. L. R. 40, and 9 Dowl. Pr. Ca. 18, *sub nomine* Wilson v. Bailey.

after notice of his retirement. These decisions will be examined at length hereafter.

Granting that a person, knowing the limits of a partner's authority as set by his copartners, cannot hold them responsible for an act done by him in excess of his authority, it still remains to determine the effect of notice by non-partners of stipulations entered into between the partners themselves.

In Galway v. Mathew,[1] Lord Ellenborough is reported to have said, "it is not essential to a partnership that one partner should have power to draw bills and notes in the partnership firm to charge the other, they may stipulate between themselves that it shall not be done, and if a third person, having notice of this, will take such a security from one of the partners, he shall not sue the others upon it in breach of such stipulation."

Again, in Alderson v. Pope,[2] the same judge held, "that where there was a stipulation between A, B, and C, who appeared to the world as copartners, that C should not participate in profit and loss, and should not be liable as a partner, C was not liable, as such, to those who had notice of this stipulation."

These *dicta* appear to authorize the statement that if partners stipulate amongst themselves that certain things shall not be done, no person who is aware of the stipulation is entitled to hold the firm liable for what may be done by one of the members contrary to such stipulation. But it is submitted that this proposition is too wide. A stranger dealing with a partner is entitled to hold the firm liable for whatever that partner may do on its behalf within certain limits. To deprive the stranger of this right, he ought to have distinct notice that the firm will not be answerable for the acts of one member, even within these limits. Now notice of an agreement between the members that one of them shall not do certain things is by no means necessarily equivalent to notice that the firm will not be answerable for them if he does. For there is nothing inconsistent in an agreement between the members of a firm that certain things shall not be done by one of them, and a readiness on the part of all the members to be responsible to strangers for the acts of each other, as if no such agreement had been entered into. It is immaterial to a stranger what stipulations partners may make amongst themselves, so long as they do not seek to restrict their responsibility as to him; and it is only when knowledge of an agreement between partners necessarily involves

[1] 10 East, 264. [2] 1 Camp. 404.

knowledge that they decline to be responsible for the acts of each other within the ordinary limits, that a stranger's rights against the firm can be prejudiced by what he may know of the private stipulations between its members.

In Galway v. Mathew,[1] the plaintiff's knowledge of want of authority was derived, not from notice of any agreement between the partners, but from an advertisement published by one of them, warning all persons that he would no longer be liable for drafts drawn by the others on the partnership account.[2] The passage, therefore, in the judgment, and extracted above, was by no means necessary for the decision of the case. With respect to Alderson v. Pope,[3] if all that was meant was that a person knowing that C did not authorize A or B to act on his behalf, could not hold C liable for their acts, the case presents no difficulty; but if any thing more than this was meant, the authority of the decision becomes at least doubtful, it having been held in another case that a person who holds himself out as a partner with others with whom he has no concern, is liable for their acts, even to persons having notice of the true state of affairs; and the decision was based upon the very ground that a person, who holds himself out as a partner with others, expresses his readiness to incur the responsibilities of a partner as regards strangers, whatever he may intend shall be the case between him and those with whom he associates his name.

Against the general proposition in question it may be further urged that if partners agree not to be liable beyond a certain amount, and a stranger has notice of that agreement, the notice avails nothing against him. Such an agreement, coupled with notice of it on the part of a person dealing with the firm, is by no means equivalent to a contract between him and it that he shall not hold the members responsible beyond the amount which they may have agreed between themselves to contribute respectively.[5]

The writer is not acquainted with any case in which it has been decided that persons who are aware of the terms upon which partners have agreed together to carry on business are deemed to contract with them upon the basis of the agreement come to amongst themselves. In all cases of this description the real question to be determined is, *whether there was distinct notice that the firm would not be answerable*

[1] 1 Camp. 403, and 10 East, 264.

[2] Distinct notice to the same effect existed in Minnitt v. Whitney, 16 Vin. Ab. 244, and 5 Bro. P. C. 489; Willis v. Dyson, 1 Stark. 164.

[3] 1 Camp. 404.

[4] Brown v. Leonard, 2 Chitty, 120.

[5] See Greenwood's case, 3 De G. M. & G. 476.

to strangers for acts which, without such notice, would clearly impose liability upon it; and in case of any doubt upon this point, the firm ought clearly to be liable, the *onus* being on it to show sufficient reason why liability should not attach to it.[1]

Each partner general agent for the others.

SEC. 412. As an incident of all general or commercial partnerships, each partner is a general agent for all, and is invested with full and ample authority to transact any or all business of the firm, and to bind the firm for all his engagements within the scope of the business in which it is engaged. As between themselves, the partnership articles or agreement control, but third persons are not bound to inquire as to restrictive powers placed upon a partner, but may deal with one or all of them upon the faith of their *apparent* authority, and as to any matter incident to the business generally, as well as to matters which one partner has before been permitted to do with the assent of his copartners, he can bind the firm although the act was fraudulent, and for his own private benefit, or contrary to the instructions of the firm, or the provisions of the partnership contract, provided the person so dealing with him acted in good faith and in ignorance of any restrictions upon his authority, or of his fraudulent intentions.[2] His

[1] It has been held that one partner has power to dispose of partnership property against the protests of his copartners, and that if there is even slight proof of intended fraud, such sale will be held void. Williams v. Roberts, 6 Cold. (Tenn.) 497. So it has been held that the implied authority to bind the firm by note or bill may be overcome by proof of notice that the power is revoked, Leavitt v. Peck, 3 Conn. 128; and generally, where a person has notice of any restriction upon the power of a partner he is bound by it. Vice v. Fleming, 1 Y. & J. 227; Willis v. Dyson, 1 Starkie, 165; Baxter v. Clark, 4 Ired. (N. C.) L. 127; Fegley v. Sponeberger, 5 W. & S. (Penn.) 564; Matthews v. Dare, 20 Md. 274; Cargill v. Corby, 15 Mo. 425; Johnston v. Dutton, 27 Ala. 245. Thus where one who was alleged to be a partner with another, gave notice to a party not to give credit to the other partner, and that he would not be bound by any contract made, it was held that he was not liable for future debts contracted by the other partner with the party so notified Monroe v. Conner, 15 Me. 179. In another case four partners agreed to carry on the business of sugar-boilers. It was provided in the articles that none of the partners should buy sugars for the trade, without the consent of a majority. After the withdrawal of one of the partners and notice thereof, two of the partners purchased sugars. It was held that the withdrawing partner was not liable to the vendor. Minnit v. Whinnery, 2 Bro. P. C. 323. In another case it was held that where a vendor, before he sells to a partner, has notice that there is a partnership, but each partner is to be liable only for his own purchases, the vendor cannot look to the partnership for payment. But where the vendor is informed there is no partnership existing, he may, on discovering the partnership, make all partners responsible for goods he has sold to any one, that are carried into the firm. Baxter v. Clark, 4 Ired. (N. C.) L. 127.

[2] Stover v. Hinkley, Kirby (Conn.), 147; Manufacturers', etc., Bank v. Gore, 15 Mass. 75; Galloway v. Hughes, 1 Bailey (S. C.), 553; Willett v. Stringer, 17 Abb. Pr. (N. Y.) 87; Pahlman v. Taylor, 75 Ill. 629; Winship v. Bank of The United States, 5 Pet. (U. S.) 530; Beek v. Martin, 2 McMull. (S. C.) 260; Heartt v.

power to this extent is full and absolute, and unless there is bad faith on the part of the person with whom he deals, it is a matter of no consequence whether he acts fairly with his copartners or not. The only question is, whether his acts were within the scope of his apparent authority, and professedly for the firm;[1] and the firm cannot escape liability for matters within the scope of his real or apparent authority, merely because one member has notified the person with whom he deals not to give credits to him on account of the firm.

Walsh, 75 Ill. 200; Moorehead v. Gilmore, 77 Penn. St. 118; Nat. Union Bank v. Landon, 66 Barb. (N. Y.) 189; Blodgett v. Weed, 119 Mass. 215; First Nat. Bank v. Carpenter, 41 Iowa, 518; Sage v. Sherman, 2 N. Y. 418; Capelle v. Hall, 12 Bank. Reg. 1; Dickinson v. Dickinson, 25 Gratt. (Va.) 321; Leffler v. Rice, 44 Ind. 103; Tapley v. Butterfield, 1 Metc. (Mass.) 515; Bissell v. Hobbs, 6 Blackf. (Ind.) 479; Wolf v. Mills, 56 Ill. 360; Braches v. Anderson, 14 Mo. 441; Chambers v. Clearwater, 1 Abb. Ct. of App. Dec. (N. Y.) 341; Barrett v. Russell, 45 Vt. 43; Smith v. Hill, 45 id. 90; Potter v. Price, 3 Pittsb. (Penn.) 136; Willett v. Sawyer, 17 Abb. Pr. (N. Y.) 84; Morrison v. Mendenhall, 18 Minn. 232; Roger v. Aydelotte, 1 Cinn. (Ohio) 81; Davis v. Richardson, 45 Miss. 499; Crocker v. Colwell, 46 N. Y. 212: Bidwell v. Eastman, 106 Mass. 525; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251; Dupre v. Boyd, 23 La. An. 495; Smith v. Lasher, 5 Cow. (N. Y.) 689; Le Roy v. Bayard, 2 Pet. (U. S.) 187; Bryant v. Hawkins, 47 Mo. 410; Barker v. Mann, 5 Bush (Ky.), 672; Adee v. Demorest, 54 Barb. (N. Y.) 433; Haskinson v. Elliott, 62 Penn. St. 393; Whittaker v. Brown, 16 Wend. (N. Y.) 505; Onondaga Bank v. Du Puy, 17 id. 47; Hutchins v. Hudson, 8 Humph. (Tenn.) 415; Griffith v. Buffum, 22 Vt. 181; Roth v. Moore, 19 La. An. 86; Tucker v. Peaslee, 36 N. H. 167; Given v. Sebert, 5 W. & S. (Penn.) 333; Boswell v. Green, 25 N. J. L. 390.

[1] Pahlman v. Taylor, 75 Ill. 629; Heartt v. Walsh, id. 200. See, also, Leffler v. Rice, 44 Ind. 103, where it was held that money borrowed by a partner in the milling business, to be used in purchasing stock for the mill, bound the firm. But, *contra*, see Wittram v. Wormer, 44 Ill. 425, where it was held that where one of two partners in a sawmill gave the firm note in payment of a balance due for saw logs, that it did not bind the firm. One member of a firm, without the knowledge of his partner, signed a draft with the partnership name, and delivered it to a third party for his accommodation. The latter filled in his own name as payee, and that of his own firm as drawees, in the presence of the plaintiff, and having indorsed it procured it to be discounted by the plaintiff. It was held that the plaintiff was not chargeable with notice that it was accommodation paper, and that the partner of the drawer was liable, although, in fact, the firm had been dissolved a short time before, but no notice of such dissolution had come to the plaintiff. Chemung, etc., Bank v. Bradner, 44 N. Y. 680. The members of a law firm are liable, jointly and severally, to their client for money collected for him. And when such moneys are collected, after the dissolution of the firm, by a retiring party who had no authority to make such collection, the other partners continue liable therefor. Bryant v. Hawkins, 47 Mo. 410. When one partner makes purchases of goods not connected with the known business of the firm, although in the name, such purchases will not bind the firm unless an express or implied authority is shown or a subsequent ratification is proved. Bankhead v. Alloway, 6 Cold. (Tenn.) 56. But where two parties are jointly interested in the operation of buying and shipping oats, one party may bind both in borrowing oats to be paid in oats, in their common business and for their common benefit. Adee v. Demorest, 54 Barb. (N. Y.) 433. The rule that the partnership is liable for money borrowed by one of its members on the credit of the firm, within the general scope of its authority, and according to the usual course of its business, applies as well to partnerships formed for mechanical or manufacturing purposes, as to commercial partnerships, and to special as well as general partnerships. Hoskinson v. Eliott, 62 Penn. St. 393.

His real or apparent power cannot be abridged or curtailed by his copartners. Thus, where several persons were jointly engaged in running a plantation, it was held that they could not escape liability for supplies for the plantation furnished upon the order of one of their members, although they had notified the person furnishing them not to give him credit on account of the firm.[1]

It must be understood, however, that this rule is subject to the qualification that, if there is any thing in the transaction itself, the circumstances surrounding it, or the relation of the parties, that ought to put a third person upon inquiry as to the real power or purpose of the partner in that particular transaction, he deals with him at his peril. Thus, where one member of a firm made a promise to another firm, having dealings and an open account with his firm, *in which he individually had an interest adverse to the firm*, that upon closing the account certain concessions should be made by his firm, it was held that such promise being made without the knowledge of his copartners, *and clearly in his own interest*, and to the pecuniary prejudice of his copartners, was not binding upon the firm.[2]

If the act is not within the scope of his apparent authority, or if it is apparently fraudulent, or there are circumstances calculated to put a man of ordinary prudence upon inquiry, it has the same effect as a special notice, limiting the partner's implied authority. As where he gives a partnership note in settlement of his individual debts, or outside the scope of the partnership business.[3]

Where a partner gave a firm note in renewal of a policy of insurance upon his own property, it was held that the company was charged with notice that it was outside the scope of his partnership authority, and that it would not charge the firm thereon.[4] And under such circumstances a person dealing with him cannot claim the benefit of the presumption that an instrument or contract made in the name of the firm was made on its account and with its authority, but must show

[1] Campbell v. Brown, 49 Ga. 417.

[2] Goodwin v. Einstein, 51 How. Pr. (N. Y.) 9; Bankhead v. Alloway, 6 Cold. (Tenn.) 56.

[3] Zuel v. Bowen, 78 Ill. 234; Graves v. Kellenberger, 51 Ind. 66; Blodgett v. Weed, 119 Mass. 215; Merchant v. Belding, 49 How. Pr. (N. Y.) 344; Hotchkiss v. English, 4 Hun (N. Y.), 369; Caldwell v. Scott, 54 N. H. 414; Ditts v. Lonsdale, 49 Ind. 521; Harper v. Wrigley, 48 Ga. 495; Tompkins v. Woodyard, 5 W. Va. 216; Williams v. Barnett, 10 Kan. 455; Stegall v. Coney, 49 Miss. 761; Ackley v. Stachlin, 56 Mo. 558; Walton v. Tussen, 49 Miss. 569; Russell v. Anable, 104 Mass. 72.

[4] Lime Rock, etc., Ins. Co. v. Treat, 58 Me. 415. In Williams v. Roberts, 6 Cold. (Tenn.) 493, it was held that the sale of all the partnership property by one partner is *per se* suspicious, particularly when such sale is made against the prohibition of his partner, and that a person purchasing it does so at his peril.

authority in fact, or the assent of the other partners. Thus, a deed of lands made in the name of the firm, is acknowledged by only one of the partners,[1] or a bond to dissolve an attachment on partnership property, executed by only one of the members of the firm, cannot be enforced against the other partners without showing their assent thereto,[2] either before or after its execution,[3] but if such assent is shown the firm is bound thereby,[4] even though the instrument did not pertain to the partnership business,[5] but such ratification will not be effectual against partnership creditors.[6] The power of each member of a partnership to sign the firm name to a negotiable instrument is one so essential to the conduct of the business, and one so usually exercised, that it may be implied from the existence of the firm, and, although actually in a given case, this power is by the partnership contract restricted to a certain member, yet this will not be operative against persons dealing with a member of the firm without notice of this restriction, and whenever the firm name appears upon commercial paper, the firm *prima facie* is bound thereby, and the burden of disproving its liability is upon the firm.[7]

While one member of a firm may assign or indorse a partnership note for partnership purposes, and convey a good title thereto, yet he cannot bind the firm by such assignment or indorsement in liquida-

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Walton v. Tussen, 49 Miss. 569.

[2] Russell v. Anable, 104 Mass. 72.

[3] Gibson v. Warden, 14 Wall. (U. S.) 244.

[4] Cockroft v. Clafflin, 64 Barb. (N. Y.) 464; Easter v. Farmers' Nat. Bank, 57 Ill. 215; Baldwin v. Richardson, 33 Tex. 16.

[5] Succession of Arick, 22 La. An. 501.

[6] Kidder v. Page, 48 N. H. 380; but see Stokes v. Stevens, 40 Cal. 391, where it was held that a sale of partnership assets made in good faith by one partner to satisfy his individual debt, with the assent of his copartners, was valid against the creditors of the firm. A chattel mortgage, given by one partner in the name of the firm, is valid, if subsequently ratified by his copartners. Hawkins v. Hastings, 1 Dill. (U. S.) 462. But in all cases, in order to render a subsequent ratification binding, it must appear to have been done with knowledge of the facts. McElvoy v. Melear, 7 Cold. (Tenn.) 140.

[7] Sylverstein v. Atkinson, 45 Miss. 81; Faler v. Jordan, 44 id. 283. Thus in Chemung Bank v. Bradner, 44 N. Y. 680, one member of a firm, without the knowledge or assent of his partner, signed a draft with the partnership name, and delivered it to a third party for his accommodation. The latter filled in his own name as payee, and that of his own firm as drawees, in the presence of the plaintiff, who, upon such person indorsing the draft, discounted it for him; and it was held that this was not sufficient to charge the bank with notice that it was accommodation paper, and that the firm was liable thereon, although, unknown to the plaintiff, the firm had been dissolved before the draft was drawn. And it seems that, when one member of a firm which receives the note of another firm that it was given without consideration, and as a mere accommodation note, will not defeat a recovery upon the note in the hands of a subsequent holder, although he took the same with full knowledge of the circumstances under which it was issued. Ross v. Whitfield, 1 Sweeney (N. Y.), 318; but see Hendric v. Berkowitz, 37 Cal. 113, where it was held that a firm were not liable upon an accommodation indorsement made by one partner, to a person who took the note with notice of the facts.

tion of his private debts, or for purposes outside the scope of the partnership business without the assent of the firm; but if he takes notes on account of the firm in his own name and transfers them in payment of his own debts, the holder, being ignorant of the fact, will be protected as a *bona fide* holder for value.[1]

In Mead v. Shepard[2] the implied power of a partner, to be gathered from the business, was well illustrated, when it was held that persons jointly engaged in business speculations, involving the purchase of land, and the cutting and selling of the timber thereon, were responsible for contracts for lands made for such purposes by one partner, and for the wages of help hired to cut timber, and supplies furnished to them. The rule may fairly be said to be that, in order to bind a firm for the acts of one partner, something more than the mere fact that the firm had the benefits of the act must be shown, whether there is any evidence to whom the credit was given, or not. In order to make the firm responsible, the act must be one within the ordinary, the apparent scope of the business, or it must have been expressly authorized or subsequently ratified by the firm. To say that the fact that money borrowed by one partner, either upon his own credit or that of the firm, went into and for the benefit of the firm, raises a presumption that the loan was made by him as partner, and that the firm is thereby rendered liable therefor, unless the presumption is rebutted, is not, and so far as I have been able to learn from the cases, never has been the doctrine of the courts. No such presumption applies, except as to indebtedness created in the ordinary or usual course of the business.[3] Persons, associated in trade, are

[1] Kellogg v. Fancher, 23 Wis. 21.

[2] 54 Barb. (N. Y.) 474.

[3] If the loan or purchase was for the firm, the firm would be liable, although the lender or vendor supposed himself dealing with, and giving credit to, an individual partner, not knowing of the existence of the firm. Reynolds v. Cleveland, 4 Cow. (N. Y.) 282; Roth v. Moore, 19 La. An. 86; Tucker v. Peaslee, 36 N. H. 167; Baxter v. Clark, 4 Ired. (N. C.) L. 127; Given v. Albert, 5 Watts & S. (Penn,) 333; Bisel v. Hobbs, 6 Blackf. (Ind.) 479; Griffith v. Buffum, 22 Vt. 181. But see Watt v. Kirby, 15 Ill. 200; Sinklen v. Lambert, 5 Phil. (Penn.) 36. But to bind a partnership to the payment for goods delivered to third persons, it is not enough to show that one of the partners requested the furnishing of the goods to such third persons. Pinckney v. Keyler, 4 E. D. S. (N. Y.) 469. If there be an agreement of partnership, common or special, for the purpose of purchasing property at certain sales, all the purchases made at such sales by either of the partners will be considered as made on the partnership account, although the advances by one exceed those of the other. Taylor v. Taylor, 2 Murph. (N. C.) 70. If a partner purchase goods in the name of the firm, although he applies them to his individual use, the partnership is liable for the price to the vendor. Dickson v. Alexander, 7 Ired. (N. C.) L. 4; Venable v. Levick, 2 Head (Tenn.), 351. But the declaration of a partner after he had purchased a chattel, that he had bought it for the firm, is not sufficient nor competent evidence to render a copartner liable. White v. Gibson, 11

presumed to be agents for each other in all matters necessary to carry on the business in the ordinary way, and, in the absence of any notice to the contrary, to those dealing with them as to all such matters, the firm would be responsible; and this furnishes not only the test of authority, but, as a consequence, of liability. The fact that the act was reasonable, or that it was really advantageous to the firm, does not, in the absence of proof that it was in some way authorized or subsequently assented to by the firm, bind the partnership. "To allow one partner," says Parke, B., in Brettel v. Williams,[1] "to bind another by contracts *out of the scope of the partnership dealings* because they were reasonable acts toward effecting the partnership purposes, would be attended with great danger. Could one of the defendants in this case have bound the others by a contract to lease or buy lands, or a coal mine, though it might have been a legitimate object of partnership business? Our opinion is that one partner cannot bind the others in such a case, simply by virtue of the partnership relation;"[2] and the burden of proving that the act was one within the scope of the partner's authority, or that it was subsequently ratified by the firm, is upon the person seeking to hold the firm responsible therefor.[3]

The fact that the act was necessary for the preservation of the interests of the firm, will not fix the responsibility of the firm, unless the act was one incident to the prosecution of the business in the usual way, and under ordinary circumstances. If it was an extraordinary act, outside of and beyond the ordinary and usual course of the business, no degree of necessity will give it validity. *What is necessary for carrying on the business of the firm under ordinary circumstances,*" says Mr. Lindley in his work on Partnership, "*and in the usual way,* is the test; and therefore," he adds, "in a case where the nature of the business was one in which there was no necessity to borrow money to carry it on under ordinary circumstances and in the ordinary manner, the court held the firm not liable for

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Ired. (N. C.) L. 288. In all cases, it may be said that a sale of goods on credit to one partner in the course of the business of the partnership, is a sale to the firm, unless it be made contrary to an express notice by the other partner not to trust the firm on his account, in which case he alone will be liable who made the purchase, and an action to recover the price cannot be maintained against the firm. Figley v. Shoneberger, 5 W. & S. (Penn.) 567.

[1] 40 Exchq. 630.

[2] See Sutton v. Irwin, 12 S. & R. (Penn.) 13; Hamil v. Purvis, 2 Penn. St. 177; Maudlin v. Branch Bank, 2 Ala. 502; Foot v. Sabin, 19 Johns. (N. Y.) 154; Whalley v. Moody, 2 Humph. (Tenn.) 495; Bank v. Brooking, 2 Litt. (Ky.) 41.

[3] Ralston v. Click, 1 Stew. (Ala.) 252.

money borrowed by its agent under *extraordinary* circumstances, *although money was absolutely* requisite to save the firm from ruin."[1]

In the case of Hawken v. Bourne,[2] the money was borrowed by an agent, who was employed by the defendants to manage their mine, to save the property from being sold upon executions, and Mr. Lindley, in commenting upon its applicability to questions of partnership, says: "This case is an authority for saying that *an authority for doing what is usual does not include a power to do what is unusual, however urgent;* and although in the case referred to the money was not borrowed by a partner, but by a person who was only an agent of the firm, the decision would, it is apprehended, have been the same if he had been a partner. For, notwithstanding the fact that every partner is, to a certain extent, a principal, as well as an agent, the liability of a copartner for his acts can only be established on the ground of agency. *As their agent he has no discretion except within the limits set by them to his authority,* and the fact that he is himself as one of the firm, a principal, does not warrant him in extending them except upon his own responsibility.[3]

Thus, it follows that in all cases, the question whether authority to borrow money, to buy goods, or do any other special act, is vested in a partner, is to be ascertained from the nature and character of the business, the method in which it is usually carried on, and the practice of those engaged in it. One member of a firm of lawyers would not have authority to give an undertaking of the firm to pay the debt and cost in a suit against a client to save him from being committed to jail,[4] nor

[1] Vol. I, page 194.

[2] Hawken v. Bourne, 7 M. & W. 595; Ex parte Chippendale, 4 De G. M. & G. 19.

[3] Dickinson v. Valpy, 10 B. & C. 128; Ricketts v. Bennett, 4 C. & B. 686.

[4] Holsman v. Young, 5 Q. B. 833. In Davis v. White, 1 Houst. (Del.) 228, the plaintiff offered evidence tending to show that F. owned a mill, running it as a merchant mill, and purchased grain to be ground at said mill; that said F. published in the newspapers a notice that he had taken into partnership in his milling business S., who would take upon himself the active duties of the business; that S. took charge of said mill about the time of the publication of the notice; that the flour ground there was sent to market in barrels, marked with the joint names of F. & S. with the knowledge of F.; that F. purchased grain that was brought to the mill for sale, during the time said S. was there, and gave a note signed by him in the name of F. & S., which F. afterward took up and paid; and also took up a note or due-bill given in the name of S. for corn delivered and sold at said mill, and gave in its place a note signed by him in the name of F. & S.; and that receipts in the name of F. & S. were given to the plaintiff for grain deposited at said mill. It was held that the facts submitted to the jury, if found by them, were legal evidence from which they might infer, not only the partnership, but also that the milling business conducted by F. & S. included the buying of grain to be ground at their mill. See, however, Wittram v. Van Wormer, 44 Ill. 525, where it was held that a note given by one partner in a saw mill in the firm name, for a balance due for a balance of saw logs, was not binding on the firm.

is a member of a law firm [1] a firm of physicians,[2] of farmers,[3] contractors,[4] or persons engaged as partners in any other than a commercial partnership, *prima facie* invested with authority to pledge the credit of the firm for a loan of money, however necessary the loan may be for the prosecution of the business, unless he is clothed with *actual* authority, or a general custom is established for persons engaged as partners in the particular business to borrow money upon the credit of the firm, or unless one member of the firm has, with the knowledge of his copartners, been in the habit of borrowing money upon the credit of the firm.[5]

All partnerships, in one sense, are limited, and the powers of a partner therein are, *prima facie*, such as are ordinarily or usually incident to the particular business to which the partnership relates. All that is requisite to render a debt contracted by one of the partners binding and obligatory on the others is, *that the debt relates to the partnership.* The authority delegated to each partner is, *to act in their particular trade or line of business;* and in all such transactions strangers have a right to trade with him upon the faith of the partnership credit, *whether the proceeds of the contract went into the partnership or not.*[6]

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[1] Hedley v. Bainbridge, 3 Ad. & El. (Q. B.) 316. Foster v. Mackreth, 2 Exch. 166; Breckenridge v. Shrieve, 4 Dana (Ky.), 378.

[2] Crosthwait v. Ross, 1 Humph. (Tenn.) 23.

[3] Dickinson v. Valpy, 10 B. & C. 128.

[4] Gray v Ward, 18 Ill. 32.

[5] In re Warren, Davies (U. S. C. C) 320, S. P.; see Wells v. Turner, 16 Ind. 133; Harman v. Johnson, 2 El. & Bl. 188; Breckenridge v. Shrieve, 4 Dana, (Ky.), 375; Holmes v. Burton, 9 Vt. 252; Cheney v. Clark, 3 Vt. 431; Cargill v. Corby, 15 Miss. 425; Vance v. Campbell, 8 Humph. (Tenn.) 524; Goodman v. White, 25 Miss. 163; Bentley v. White, 3 B. Monr. (Ky.) 363; Slocum v. Sibley, 2 Mart. (La.) 682; Yates v. Dalton, 4 H. & N. 850. In Skillman v. Lachman, 23 Cal. 207, the agent of a mining company gave a promissory note for the payment of one hundred and two dollars, with interest at the rate of 3 per cent a month, signed "H. P. Sprout, Foreman for Gold Hill Company." Suit was brought on this note against several of the shareholders to make them personally liable as partners. It was held that in the absence of authority given by the company to make any note, it was not binding on the company, nor any member of the company; that although a mining business partakes, in some respects, of the nature of a partnership, it differs from a partnership, and one shareholder cannot give a promissory note so as to bind his co-shareholders, as in an ordinary partnership.

[6] Walden v. Sherburne, 15 Johns. (N. Y.) 409; Church v. Sparrow, 5 Wend. (N. Y.) 223; Porter v. Lobach, 2 Bosw. (N. Y.) 188; Onondaga Co. Bank v. De Puy, 17 Wend. (N. Y.) 47.

Each partner is the general agent of the firm and has authority to bind it by a contract of guaranty, if such contract is within its scope of business, and no understanding between the partners can affect the right of the guarantee to recover. First Nat. Bank v. Carpenter, 41 Iowa, 518. Where one member of a copartnership made a promise to another firm having dealings and open accounts with his firm, in which he individually had an interest adverse to that of his firm, that, upon closing the accounts, certain concessions would be made by his firm favorable to the other parties, it was held that such promise, being made without the knowledge of

The question involved is identical with that involved in a question of ordinary agency, viz.: was the act of the partner sought to be charged upon the firm, within the scope of his real or apparent authority, or was it subsequently ratified by the firm? If so, the firm is liable therefor, if not, it is not responsible. As to all matters within the *apparent* scope of his authority, which is to be tested by the nature of the business and its usages, the presumption is, that he acted for and on account of the firm. As where a firm note is given [1] or the credit of the firm is pledged for goods such as are usually employed in the business, and in such cases the burden is upon the defendant to establish his want of authority;[2] unless the transaction related to matters out of the usual course of the business, in which case the burden is upon the plaintiff to establish his authority, or the subsequent assent of the firm.[3]

As to all matters within the scope of his real or apparent authority, the presumption that it was for and on account of the firm, and in the absence of actual knowledge on the part of the person seeking to enforce the claim, or facts that should have put him upon inquiry, the presumption is absolute and irrebuttable,[4] although in fact it was done without *actual* authority and contrary to the provisions of the partnership contract,[5] or after the firm was dissolved.[6] If the act is

his copartners, and made clearly in his own interest, and to the pecuniary prejudice of his copartners, was not binding upon them, it appearing that the accounts had been regularly rendered, and the charges made in the accounts were the same as those against other dealers with the firm. Goodwin v. Einstein, 51 How. Pr. (N. Y.) 9. A delivery in good faith to one partner, according to a contract, is a delivery to both, each having authority to receive it. Kenney v. Altvater, 77 Penn. St. 34. Where one, without authority, purchases goods for persons about to enter into partnership, and in their name and on their credit as partners, and they receive the goods and dispose of them for their own purposes, after being informed that the goods were so purchased, whether they are partners, in fact, or not, they are liable as partners to the seller for the value of the goods. Pike v. Douglass, 28 Ark. 59. Where in a partnership to work a farm it was agreed that each partner was to supply and pay for his portion of the labor, and a laborer who was contracted with had knowledge of such agreement, it was held that he could not recover against the partnership in an action for services rendered on the farm. Urquhart v. Powell, 54 Ga. 29.

[1] Whittaker v. Brown, 16 Wend. (N. Y.) 505; Elwyn v. Drake, 8 Johns. Cas. (N. Y.) 594.

[2] Vallett v. Parker, 6 Wend. (N. Y.) 615; Austin v. Vandermark, 4 Hill (N. Y.), 459.

[3] Bank of Vergennes v. Cameron, 7 Barb. (N. Y.) 143; Wilson v. Williams, 14 Wend. (N. Y.) 146; Prince v. Crawford, 50 Miss. 344; Smith v. Sloan, 37 Wis. 385. Where one member of a firm had put in as stock his saw mill and a quantity of saw logs, against a money equivalent put in by the other, it was held that a firm note the former had given for a balance due upon the saw logs would not bind the firm, although it had received the benefit of the logs, no acquiescence of the copartner being shown. Wiltram v. Van Wormer, 44 Ill. 525.

[4] Bank of Rochester v. Monteath, 1 Den. (N. Y.) 402; Stall v. Catskill Bank, 18 Wend. (N. Y.) 466; Gould v. Homer, 12 Barb. (N. Y.) 601.

[5] Bank of Rochester v. Monteath, *ante*.

[6] Gould v. Homer, *ante*.

not within the scope of the partnership business, in order to bind the firm therefor, either actual authority or a subsequent ratification of the act must be shown.[1] In determining the question whether the act of one partner is binding upon the firm, it is competent to show the general nature and character of the business as well as any general usage relating thereto, or any special usage adopted by the firm.[2]

Thus, if a member of a firm engaged in the brewing business should purchase a stock of dry goods, or if a partner in a firm engaged in the pork packing business should purchase a cargo of cotton, and give the note of the firm therefor, the firm would not be liable thereon unless actual authority to pledge its credits therefor was given, or the firm, knowing the facts, subsequently ratified the act, and the person taking the note could look only to the partner executing it. *Prima facie*, the authority of each partner is presumed to relate only to those matters within the ordinary scope of the partnership business as it is usually conducted.[3]

The rule is that each partner possesses *prima facie* full and absolute authority to bind all the partners by his acts or contracts in relation to the business of the firm, in the same manner and to the same extent as though he was expressly authorized by power of attorney from them; and as between the partners and third persons who deal with them in good faith, without notice of any limitations upon his apparent authority, it is immaterial whether the partner is acting fairly with his copartners or not. The simple question is, whether he acted within the scope of his apparent power, professedly for the firm.[4]

So, a note given by one partner in the partnership name, *within the scope of the partnership*, is binding upon the firm, but the payee is

[1] Venable v. Leveck, 2 Head (Tenn.), 357; Goodman v. White, 25 Miss. 163; Welles v. March, 30 N. Y. 344; Hotchkin v. Kent, 8 Mich. 526; Nichols v. Hughes, 2 Bailey (S. C.), 109; Cayton v. Hardy, 27 Mo. 536; McCotter v. McCotter, 16 Abb. Pr. (N. Y.) 265.

[2] Saltmarsh v. Bower, 34 Ala. 613; Catlin v. Gilders, 3 id. 536; McNeil v. Reynolds, 9 id. 313.

[3] Kimbro v. Bullitt, 22 How. (U. S.) 256; Winship v. Bank of The United States, 5 Mas. (U. S.) 176; Coate v. Bank of The United States, 3 Cr. C. C. (U. S.) 169; Witcher v. Brewer, 12 Bankr. Reg. 1; Cobb v. Ill. Cent. R. R. Co., 38 Iowa, 601. If the purchase was in fact made for the firm, and the property went for its benefit, the firm is liable. Braches v. Anderson, 14 Mo. 441.

[4] Capelle v. Hall, 12 Bank. Reg. 1. In Pohlman v. Taylor, 75 Ill. 629, the firm had allowed one partner frequently to fill up notes over their blank signatures, and to sign the names of the members of the firm to obligations. This partner borrowed money upon a note signed by himself, with the names of his copartners as indorsers. He indorsed the names of the members of the firm upon the note himself, and it was held that the firm was liable thereon, because by their conduct they had held him out to the world as possessed of authority to do what he did, and they could not shield themselves from liability except by notice restricting his authority.

bound to know whether it is within the scope of his apparent authority, and if it is in excess thereof, the firm is not responsible.[1]

Where a partner gives his individual note, obligation or promise, for money borrowed or goods purchased, *prima facie* he alone is liable. But the person to whom the note, obligation or promise is given may show that it was a transaction within the scope of his authority as a partner, and thus fix the liability of the firm. The fact that the firm received the property, and had the benefit of it, is probably *prima facie* sufficient to establish his authority. Thus, in a Massachusetts case,[2] W and B were partners in the manufacture of soap and candles, doing business in the name of W, who was the acting partner. For several years W exported to a foreign market, for sale, large quantities of soap and candles, and received in return articles of foreign growth, which were sold by B, and the proceeds paid over to W, who passed the same to the credit of the firm. On one occasion, W shipped to a foreign port all the soap and candles on hand, and, for this purpose, chartered a schooner, and in order to complete the cargo, he purchased pork and flour, for which he gave a note, signed in his own name. In an action upon this note against the partners, the jury were

[1] Natl. Union Bank v. Landon, 66 Barb. (N. Y.) 189; Zuel v. Bowen, 78 Ill. 284; Blodgett v. Weed, 119 Mass. 215.

If a partner, acting under the authority of the firm, given by parol, to take up money on joint account and draw therefor on A, does draw a bill of exchange in his own name, but directs the amount to be charged to account of the firm, and the parties, knowing the facts, receive the cargo, purchased with the funds so raised, without objection, the payee may recover of the partners as on a partnership draft, or a draft guaranteed to the holder by them. Reimsdyk v. Kane, 1 Gall. (U. S.) 630.

By making or receiving negotiable paper.—Where promissory notes, offered by the acting partner at a bank in the usual course of partnership business, are discounted, and the money is subsequently misapplied, the holders, not being privy thereto, have a right of action against the dormant partners. Winship v. Bank of United States, 5 Pet. (U. S.) 529. A partnership was formed for the purpose of carrying on a farm and a steam saw-mill, and the firm also engaged in trade, as the jury found. The managing partner drew bills in the name of the firm, on an accommodation acceptor, to raise money. It was held that the firm were bound by them. Kimbro v. Bullitt, 22 How. (U. S.) 256. If a note be signed by one partner in the name of the firm, the legal presumption is that the note was given for a partnership indebtedness in the regular course of business, until the contrary be shown. Thurston v. Lloyd, 4 Md. 283; Knapp v. McBride, 7 Ala. 19; Barrett v. Swann, 17 Me. 180; Eusminger v. Marvin, 5 Blackf. (Ind.) 210; Littell v. Fitch, 11 Mich. 525; Hogg v. Orgill, 34 Penn. St. 344. But a note in common form, signed by an individual in whose name a partnership is carried on, and who at the same time openly transacts business on his own account, does not, *prima facie*, bind his copartners. Manufacturers', etc., Bank v. Winship, 5 Pick. (Mass.) 11. If a partner give a negotiable note, in the name of the partnership, for his own private debt, a *bona fide* indorsee of the note, who had no notice of the purpose for which it was given, may recover the amount of the copartnership. Munroe v. Cooper, 5 Pick. (Mass.) 412; Chazournes v. Edwards, 3 id. 5; Livingston v. Roosevelt, 4 Johns. (N. Y.) 25; Mechanics' Bank, etc. v. Foster, 19 Abb. (N. Y.) Pr. 47; 29 How. Pr. 408; Ross v. Whitfield, 1 Sweeney (N. Y. S. C.), 318.

[2] Woodard v. Winship, 12 Pick. (Mass.) 430.

instructed that, *prima facie*, this purchase was not within the scope of the partnership business; but that, if they should find that the exportation of soap and candles was within the scope of the partnership business, and that W chartered the schooner on account of the firm, and for their use and benefit, to export their manufactured products to a promising market, and that the purchase of the pork and flour was made in behalf of the firm, and to promote the principal object, the exportation of the soap and candles; and that W acted *bona fide* and in the exercise of a reasonable discretion, then he might be considered as acting within the scope of his authority, and the note would bind the firm. It was held, that the defendants could not object to this instruction. The jury were likewise instructed that, if B had knowledge of the acts of W, and that the pork and flour were purchased for the use of the firm, and made no objection, this would be a ratification of the transaction, and would render B liable to pay the note, though he might have known that the purchase was made on credit.

In Doak v. Swan,[1] four out of five tenants in common of a paper mill, for the more convenient management of their business, entered into an agreement that one of their number should be sole manager, foreman, and book-keeper, another should perform general labor in the mill, another should be engineer, and the fourth should "collect stock and market the paper," at fixed compensations to each, it was held that this constituted a partnership of those who signed it in the business of making and vending paper, and that a promissory note given for stock in the name of the company, by the party appointed to the charge of that department, was binding on all the parties to the agreement.

In Everett v. Chapman,[2] A, B, and C entered into partnership in the business of tanning hides, stipulating in the articles that A should furnish hides for one-half of the stock necessary to keep the tannery in operation, and should receive and make market for one-half the leather, and that B and C should furnish the other half of the stock, and receive and make market for the other half of the leather; and that in making purchases each should use his own credit separately. B purchased of D, in another State, a quantity of hides, which D, being ignorant of the partnership, charged to B individually. These hides were received at the tannery and manufactured into leather, for the joint benefit of the partners. In an action against A, B, and C,

[1] 8 Mo. 170.

[2] 6 Conn. 347.

as partners, by D, to recover the value of the hides, it was held that the manner in which the goods were purchased and charged did not preclude the seller from resorting to the partnership when discovered; that the stipulated division of the manufactured article, specifically, among the partners, was equivalent to a participation in profit and loss; and that the stipulation as to the purchases of stock, though binding on the partners as between themselves, could not affect third persons ignorant of any partnership, and, consequently, that the defendants were liable as partners.

If money is lent to one partner on his individual credit, the fact that it is applied to the discharge of the liabilities of the firm will not enable the lender to recover it of the firm. "As to any rule," said Abbott, C. J., in Lloyd v. Freshfield,[1] "that if one partner borrows money on his separate credit, he, by applying it to partnership purposes, thereby makes the house liable; I wish it to be distinctly understood that I do not subscribe to that doctrine." It is not sufficient," said Bayley, J., in the same case, "to show that the money was applied to the purposes of the house *unless the firm had fair ground to presume that it was properly borrowed for them.*" For acts not within the apparent scope of the business he cannot bind the firm, as by an accommodation indorsement;[2] or a guaranty not in the usual course of business;[3] or a promise to pay the debt of another;[4] nor by a partnership note to pay his private debt;[5] nor by a fraudulent delivery of partnership property to pay or secure his private debt;[6] nor by a pledge of the partnership credit for a loan of money, when the lender knows that the firm is amply provided in that respect for all its partnership purposes.[7]

If he uses the partnership funds or goods to pay his private debts, without the assent of his copartners, express or implied, the firm may recover for the same in an action against the person receiving the same, or may pursue the property if they can identify it;[8] or if he pawns the same or disposes of it at a forced sale or otherwise out of the usual course of business, under such circumstances as ought to

[1] 2 C. & P. 333.

[2] Bowman v. Cecil Bank, 3 Grant (Penn.), 33.

[3] Sutton v. Irvine, 12 S. & R. (Penn.) 13; Hamil v. Purvis, 2 P. & W. (Penn.) 179.

[4] McQuewans v. Hamlin, 35 Penn. St. 517.

[5] Clay v. Cottrell, 18 Penn. St. 408; Bell v. Faber, 1 Grant (Penn.), 31.

[6] Porter v. Miller, 32 Leg. Int. 283; Todd v. Lamb, 75 Penn. St. 155.

[7] Jacobs v. Curtis, 11 Leg. Int. 27.

[8] Sauntry v. Dunlap, 12 Wis. 364; Rogers v. Batchelor, 12 Pet. (U. S.) 221; Filley v. Phelps, 18 Conn. 294; Dob v. Halsey, 16 Johns. (N. Y.) 34; Burwell v. Springfield, 15 Ala. 273; Wallace v. Yeager, 4 Phil. (Penn.) 251; Craughton v. Forrest, 17 Miss. 131.

put the purchaser on inquiry, the purchaser acquires no title thereto.[1] And either his copartners or the creditors of the firm, if it is insolvent, may pursue the purchaser for the property or its value;[2] and the fact that the firm is indebted to him does not change the rule. In order to give a valid title to the property of the firm, outside the scope of the business, the assent of his copartners, express or implied, must be shown.[3] Neither can he assign to his individual creditors any part of the partnership assets to the prejudice of the creditors of the firm. Under such an assignment his creditors would only acquire his interest in whatever remains after the partnership debts are paid.[4]

A partner cannot, without the consent of his partners, apply the firm property to the payment of his individual debts,[5] and such partner's consent will not be inferred from the mere fact that he knew of the transaction,[6] but his consent may be inferred from circumstances, and this is a strong circumstance tending to establish it.[7]

Assignment of partnership property made by one partner.

SEC. 413. Nor can one or more partners make a valid assignment of the partnership property for the benefit of partnership creditors, without the consent of *all* the partners; and such an assignment, however numerous the partners may be, is utterly void both as to the creditors and the partners not parties thereto, even though all but *one* of the partners execute the same.[8] But the rule is otherwise as to assignments made for the benefit of particular creditors,[9] when one of the partners is absent and cannot be consulted without unnecessary delay;[10] but an assignment, executed by one partner with the assent of his copartners, is valid and binding upon all,[11] and it seems that assent may be implied when the non-assigning partner is absent, and extraordinary circumstances arise rendering it necessary to place the property in the hands of an assignee or trustee for the protection of the interests of the firm or its creditors. The mere fact that he absents himself, leaving his copartners to manage the business of the firm,

[1] Wallace v. Yeager, *ante*.

[2] Yale v. Yale, 13 Conn. 185; French v. Lovejoy, 12 N. H. 458; Solomon v. Solomon, 2 Ga. 18.

[3] Saylor v. Mockbie, 9 Iowa, 207.

[4] Black v. Bush, 7 B. Monr. (Ky.) 210.

[5] Caldwell v. Scott, 54 N. H. 414.

[6] Todd v. Larah, 75 Penn. St. 155.

[7] Gansevoort v. Williams, 14 Wend. (N.Y.) 133; Joyce v. Williams, id. 141.

[8] Kirby v. Ingersoll, Harr. (Mich.) Ch. 172; Wetter v. Schleoper, 4 E. D. S. (N. Y.) 707; Wells v. March, 30 N. Y. 344; Hook v. Stone, 34 Mo. 329; Pettee v. Orser, 6 Bosw. (N. Y.) 123; Coope v. Bowles, 42 Barb. (N. Y.) 87; Bull v. Harris, 18 B. Monr. (Ky.) 195; Sloan v. Moore, 37 Penn. St. 217.

[9] Halsey v. Whitney, 4 Mas. (U. S.) 206; Anderson v. Tompkins, 1 Brock. (U. S.) 456; Hodges v. Harris, 6 Pick. (Mass.) 360; Harrison v. Sterry, 5 Cr. (U. S.) 289.

[10] Bowen v. Clark, 5 Am. L. R. 203.

[11] Baldwin v. Tynes, 18 Abb. Pr. (N. Y.) 32.

evidences the delegation of an implied power, on their part, to do any and all acts necessary to protect the interests of the firm;[1] but it must appear that he was not where he could be consulted without unreasonable delay;[2] and in any event an assignment made while one partner is absent, by a part of the firm, is only voidable, it is not void *per se,* and the absent partner may ratify and give validity thereto when knowledge of the assignment is brought home to him.[3]

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[1] National Bank v. Sackett, 2 Abb. Pr. (N. Y.) 386; Stein v. LaDow, 18 Minn. 412; Anderson v. Tompkins, 1 Brock. (U. S.) 456; Palmer v. Myers, 43 Barb. (N. Y.) 509; Forbes v. Scannell, 13 Cal. 242.

[2] Bowen v. Clark, 1 Biss. (U. S.) 128.

[3] Sheldon v. Smith, 28 Barb. (N. Y.) 593; Faley v. Winants, Liv. Jud. Op. (N. Y.) 43.

By the law merchant, although the effects of a copartnership, upon the insolvency of the firm, were, in equity, considered a trust-fund for the payment of the partnership debts, and any of the partners might apply to have them appropriated ratably among all the creditors, yet either of the partners before a dissolution, or all of them afterward, might appropriate them to the payment of one creditor in preference to another. The Revised Statutes have imposed a partial restriction upon this right, by depriving an insolvent debtor, who attempts to exercise it, of the benefit of the insolvent laws. But if he is willing to subject himself to this disability, the payment of one creditor to the exclusion of others is valid as against the others. And the surviving partners, upon a dissolution of the firm by death, may give a similar preference, with the consent of the personal representative of the decedent Egberts v. Ward, 3 Paige's Ch. (N. Y.) 517. The relation subsisting between partners is of the most intimate and confidential nature. They are joint tenants of the stock and effects of the company; their interests are joint and mutual, and each is seized *per my et per tout;* each has entire possession, as well of every part as of the whole, and not the undivided whole of a moiety. A partnership is a voluntary association, by which, in all the affairs connected with the business, an authority is impliedly given to every member to dispose of the partnership property, as if it were his own personal effects. Such is the indivisible nature of their interest, and the capacity of every member to act as the authorized agent of all, that whatever one does in the course of the partnership business has the same efficacy as if all had severally joined in the act, and he has authority in the absence of fraud, to sell and transfer all the copartnership effects directly to a creditor of the firm, in payment of a debt without the knowledge or consent of his copartner, although the latter is at the place of business of the firm, and might be consulted. Nor is such transfer invalid although the firm is insolvent, and thereby the one creditor gains a preference over the other creditors of the firm. Mabbett v. White, 12 N. Y. 442. A partner has not power, as such, to assign the assets of the firm to a trustee for the benefit of creditors. To support such an assignment by one partner, or any number short of the whole, it must be shown that it was made under circumstances that rendered it impossible to consult the other partners; or from their acts or declarations, either before or subsequent thereto, that it was executed with their assent or by their authority. Fisher v. Murray, 1 E. D. S. (N. Y. C. P.) 341. But a general assignment for the benefit of the creditors, made by one partner without the consent of his copartners, and not ratified by them, is void, not only as against them, but also as against judgment creditors, and may be set aside on a bill filed by them. Haggerty v. Granger, 15 How. Pr. (N. Y.) 243. But a general assignment of the firm effects will be valid although made by one partner alone, if the other partner has abandoned all control of the business, and an equable distribution of all the assets is directed. Kemp v. Carnley, 3 Duer (N. Y. S. C.), 1. The principle on which an assignment by one partner in payment of a partnership debt is sustained, is that there is an implied authority for that purpose, the payment of firm debts being a part of the necessary business of the firm. But it is no part of the ordinary business of a copartnership to appoint a trustee of all the effects for the purpose of distrib-

In Pennsylvania it is held that a general assignment, made by one partner for the benefit of the creditors of the firm, is valid, if possession of the property is delivered to the assignee;[1] and where one partner has sold his interest to his copartners, and left them in possession, they may pass a valid title to the same by assignment for the benefit of the creditors of the firm.[2]

Private restrictions placed upon the authority of partners do not affect the rights of strangers dealing with them on account of the firm. In order to be available, notice thereof must be brought home to such persons, or at least it must be shown that circumstances existed that should have put them upon inquiry.[3]

Liability of firm for acts of individual members thereof.

SEC. 414. For acts done by one partner not within the scope of his real or apparent authority, the firm cannot be held chargeable unless it assents thereto. Thus, where A was a member of two firms, it was held that one firm could not be held chargeable for acts done by him in the other, even though he attempted to bind such firm. In such cases, a person dealing upon the faith of such partner's representations is bound to make inquiry as to the real extent of his authority, and fails to do so at its peril.[4] And a person having knowledge of the fact that the transaction is not one relating to the business of the firm, can only have his remedy against the partner with whom he

uting among creditors. Havens v. Hussey, 5 Paige's Ch. (N. Y.) 30. See, also, Mills v. Argall, 6 id. 577. And this is so where, though there was no express dissent by the copartner, he resided abroad and had never ratified the assignment. Hitchcock v. St. John, Hoffm. Ch. (N. Y.) 511. Where one of three partners goes to a distant country, and an unexpected emergency arises in his absence, upon which he cannot be consulted, the resident partners may make a general assignment of the indvidual and partnership effects, for the benefit of the creditors. And an assignment in such case will be sustained where the partner who was absent does not join in the application to set it aside, and who, when informed by letter of the assignment, and furnished with a list of the preferred creditors, and asked to approve and confirm it, expressed no disapprobation of the steps taken by his partners, and who, before leaving the country, had given one of the partners a power of attorney to execute for him all instruments whatsoever, and all and every act and deed of whatsoever name or nature appertaining to his affairs. Robinson v. Gregory, 29 Barb. (N. Y.) 560. An assignment of partnership property, made by one or more copartners without the consent or authority of all, is valid. And where the partner has abandoned the concern, he invests his copartner with such authority, and the assignment is void. And where such an authority can be fairly inferred, the court will infer it. Kelly v. Baker, 2 Hilton (N. Y. C. P.), 531. A partner who is sole manager, his copartners being in distant countries, has power to assign all the firm property, especially in an urgent case. Forbes v. Scannell, 13 Cal. 242.

[1] Hennessey v. Western Bank, 6 W. & S. (Penn.) 300.

[2] Clark v. McClelland, 2 Grant's Cas. (Penn.) 31.

[3] Haskinson v. Elliott, 62 Penn. St. 393; Edwards v. Tracey, id. 374; Abpt v. Miller, 5 Jones (N. C.), 32; Heirn v. McCaughan, 32 Miss. 17.

[4] Cobb v. Ill. Centl. R. R. Co., 38 Iowa, 601.

contracted.[1] In such cases, the partner using the firm name without authority remains personally liable for the claim, either generally or upon a note or other instrument executed by him in the firm name.[2]

All the members of a firm are agents for it, and the acts of any of them within the scope of their real or apparent authority are binding upon the firm, even though such acts, as between the partners, are fraudulent;[3] or, even though the firm, without notice to persons dealing with it, was dissolved before the act was done,[4] or even though another partner has notified the party dealing with him not to give credit to him on account of the partnership.[5]

The firm is liable for the torts of one member, committed within the scope of the partnership business. Thus, where one partner hired a horse to be used in the business of the firm, and through his negligence lost it, the firm was held liable for the value of the horse;[6] but the acts must be such as are within the scope of the real or apparent authority of the partners, or liability does not attach against those members of the firm who never assented to the act. Thus, where G W and S, three New York members of a firm, without the knowledge of P, the Philadelphia member, and contrary to the articles of copartnership, entered into stock speculations with the trust funds of an estate of which S was an executor, whereby the estate sustained a serious loss, it was held that P could not be held chargeable for any portion of the loss.[7]

[1] Merchant v. Belding, 49 How. Pr. (N. Y.) 344; Fall River Bank v. Sturtevant, 12 Cush. (Mass.) 372; Cayton v. Hundy, 27 Mo. 536.

[2] Merchant v. Belding, *ante*.

[3] Capelle v. Hall, 12 Bankruptcy Reg. 1; Witcher v. Brewer, 49 Ala. 119; Pahlman v. Taylor, 75 Ill. 629. In Adee v. Demorest, 54 Barb. (N. Y.) 433, two persons were engaged in buying and selling oats. One of the partners borrowed a quantity of oats of a third party, and both were held liable therefor, they being for the common benefit of both. In Haskinson v. Elliott, 62 Penn. St., one partner borrowed money on the credit of the firm, and within the general scope of its authority, and the usual course of its business, and the firm was held responsible therefor, and the court held that the rule applied as well to partnerships formed for manufacturing or mechanical purposes, as to special or general partnerships. In Mead v. Shepard, 54 Barb. (N. Y.) 474, several persons entered into an agreement in writing, involving the purchase of land and the cutting of timber thereon, on joint account. H, one of the partners, was appointed acting agent in purchasing land and prosecuting the business. It was held that the firm was responsible for all his contracts for the purchase of land, for the employment of help and the supplies necessary to enable him to prosecute the business, Leffler v. Rice, 44 Ind. 103; that all the partners *prima facie* are agents for the firm, and authorized to bind it; see Mitchell v. Beatty, 1 Phila. (Penn.) 133; London Savings Bank Society v. Hagerstown, etc., Bank, 36 Penn. St. 498; Edwards v. Tracey, 62 id. 374; Tucker v. Penslee, 36 N. H. 167; Yeager v. Wallace, 57 Penn. St. 365.

[4] Dickinson v. Dickinson, 25 Gratt. (Va.) 321.

[5] Campbell v. Bowen, 49 Ga. 417.

[6] Witcher v. Brewer, 49 Ala. 119; Heim v. McCoughan, 32 Miss. 17; Chester v. Dickinson, 52 Barb. (N. Y.) 349; Billings v. Meigs, 53 id. 272.

[7] Guillon v. Peterson, 9 Phila. (Penn.) 225; Bankhead v. Alloway, 6 Cold. (Tenn.) 56.

Mr. Lindley,[1] in commenting upon the powers of a partner, says: "It is clearly settled that any member of an ordinary trading partnership can bind the firm by drawing, accepting, or indorsing bills of exchange, or by making and indorsing promissory notes in its name.[2] And if two partners unknown to each other give two bills in the name of the firm in payment of the same demand, the firm will be liable on both bills, if held by a *bona fide* holder for value."[3]

One partner, however, has no implied power to bind his copartners, otherwise than jointly with himself, consequently a joint and several promissory note, signed by one partner for himself and copartners, does not bind them severally,[4] although it does bind them and him jointly,[5] and him separately.[6]

In consequence of the doctrine that every member of an ordinary trading partnership has authority to draw, accept, and indorse bills in its name, if a member of such a partnership goes abroad and gives his copartner a power of attorney to manage his affairs, and draw, accept, or indorse bills in his name, this authority warrants the attorney in putting his principal's name to non-partnership bills only, his authority to put the partnership name to partnership bills being independent of, and unaffected by, the letter of attorney.[7]

With respect to partnerships which are not trading partnerships, the question, whether one partner has any implied authority to bind his copartners, by putting the name of the firm to a negotiable instrument, depends upon whether the business of the partnership is such that dealings in negotiable instruments are necessary for its transaction, or are usual in partnerships of the same description.[8] In the absence of evidence showing necessity or usage, the power has been denied to one of several mining adventurers,[9] quarry workers,[10] farmers,[11] solicitors.[12]

Whether directors, secretaries, or managers of companies have power to bind the companies to which they belong by bills of exchange or promissory notes, depends upon the company's charter, Act of

[1] Lindley on Partnership, pp. 214–237.

[2] See Pinckney v. Hall, 1 Salk. 126; Dickinson v. Valpy, 10 B. & C. 128; Sutton v. Gregory, 2 Peake, 150; Smith v. Baily, 11 Mod. 401; Lewis v. Reilly, 1 Q. B. 349.

[3] Davison v. Robertson, 3 Dow. 218.

[4] See Perring v. Hone, 4 Bing. 32; 2 Car. & P. 401.

[5] Maclae v. Sutherland, 3 E. & B. 1.

[6] See Elliot v. Davis, 2 Bos. & P. 338; Gillow v. Lillie, 1 Bing. N. C. 695.

[7] Attwood v. Munnings, 7 B. & C. 278.

[8] See Dickinson v. Valpy, 10 B. & C. 128.

[9] Brown v. Byers, 16 M. & W. 252; Dickinson v. Valpy, 10 B. & C. 128; Compare Brown v. Kidger. 3 H. & N. 853.

[10] Thicknesse v. Bromilow, 2 Cr. & J. 425.

[11] Greenslade v. Dower, 7 B. & C. 635.

[12] Hedley v. Bainbridge, 3 Q. B. 316; Levy v. Pyne, Car. & Marsh. 453; Harman v. Johnson, 2 E. & B. 61.

Parliament, or deed of settlement. *Prima facie* there is no such power. This has been decided in the cases of a salvage company,[1] mining company,[2] gas company,[3] washing company,[4] salt and alkali company.[5] *A fortiori* is there no power where the company's deed is express to that effect.[6]

On the other hand, instances have occurred in which companies have been held bound by bills and notes issued by their directors, they having been authorized to issue such instruments under the companies' deeds of settlement. Where this power exists, a bill or note issued on behalf of the company binds the company, although such bill or note may have been issued irregularly, and without the observance of all the precautions contained in the company's deed.[7]

It must be borne in mind that, although a person may not have authority to use the name of another, so as to render him liable on a bill or note, he may nevertheless have sufficient authority to transfer the property therein. Therefore, where A drew a bill on B who accepted it, and A indorsed it *in blank* and gave it to a company, and two of the directors of the company indorsed the bill in blank for the company and gave the bill thus indorsed to the plaintiff, it was held that the plaintiff was entitled to sue the acceptor, although the indorsement to him by the company was put in issue, and the directors had no power to render the company liable by indorsing bills in its name.[8]

Before leaving the subject of negotiable instruments, it may be observed that it is often difficult to say whether they purport to be the paper of a firm or company, or only that of some one or more of the partners or directors. Unless the paper purports to be the paper of a firm or company, no one whose name is not on the paper is liable to be sued on it. This subject will be adverted to hereafter.

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[1] Thompson v. Universal Salvage Co., 1 Ex. 694.

[2] Dickinson v. Valpy, 10 B. & C. 128; Brown v. Myers, 16 M. & W. 252.

[3] Bramah v. Roberts, 3 Bing. N. C. 963.

[4] Neale v. Turton, 4 Bing. 149.

[5] Bult v. Morell, 12 A. & E. 745; see the judgment of Coleridge, J.

[6] Scott v. Colburn, 26 Beav. 276.

[7] Gordon v. Sea Fire and Life Assurance Co., 1 H. & N. 599; Thompson v. The Wesleyan Newspaper Assoc., 8 C. B. 849; Allen v. Sea Fire and Life Assurance Co., 9 id. 574; Forbes v. Marshall, 11 Ex. 166; Maclae v. Sutherland, 3 E. & B. 2. In Aggs v. Nicholson, 1 H. & N. 165; and Lindus v. Melrose, 2 id. 293, and 3 id. 177, the point decided was, that the defendants were not personally liable on the notes there in question. These cases by no means decided that the companies would have been liable without proof of authority in their directors to issue notes on their behalf. The marginal notes of the reporters go too far, and are apt to mislead. In Holford v. Camerons, Coalbrook, etc., Co., 16 Q. B. 442; and Edwards v. Camerons, Coalbrook, etc., Co., 6 Ex. 269, the action was against the company, but the authority of the directors to bind it by bills was not in issue.

[8] Smith v. Johnson, 3 H. & N. 222.

One of the most important of the implied powers of a partner is that of borrowing money on the credit of the firm. The sudden exigencies of commerce render it absolutely necessary that such power should exist in the members of a trading partnership, and accordingly in a comparatively early case this power was clearly recognized. It has been already seen that one partner can bind the firm by a bill or note, upon which money may of course be obtained, by the every-day process of discounting, and the power of one partner to pledge partnership goods for advances is equally well established. At the same time, this power of borrowing money, like every other implied power of a partner, only exists where it is necessary for the transaction of the partnership business in the ordinary way; and consequently if money is borrowed by one partner for the declared purpose of increasing the partnership capital,[2] or of raising the whole or part of the capital agreed to be subscribed in order to start the firm,[3] or if the business is such as is customarily carried on on ready money principles, *e. g.*, mining on the cost-book principle,[4] the firm will not be bound unless some actual authority or ratification can be proved. Still less will the firm be bound where borrowing is prohibited, and the person advancing the money is aware of the prohibition.[5]

The mere fact that the money borrowed has been *bona fide* applied to partnership purposes is not sufficient to render the firm liable to repay it, where there was no actual or implied authority to borrow, and there has been no ratification of the loan.[6] There are, however, some decisions in equity which go to show that if directors, having no power to borrow, do *bona fide* borrow money for the purposes of the company, and apply the money to such purposes, they have a right to be reimbursed by the shareholders.[7] The propriety of this is, however, open to serious doubt, both in point of law and in point of expediency; in point of law, because the terms of the contract made between the directors and the shareholders, exclude

[1] See Lane v. Williams, 2 Vern. 277, 202; Rothwell v. Humphries, 1 Esp. 406; Denton v. Rodie, 3 Camp. 493; Lloyd v. Freshfield, 2 Car. & P. 333, E. C. L. R. 12; Ex parte Bonbonus, 8 Ves. 540; see, too, De Ribeyre v. Barclay, 23 Beav. 125, etc.; Gordon v. Ellis, 7 Man. & Gr. 607; Brown v. Kidger, 3 H. & N. 853.

[2] Fisher v. Taylor, 2 Ha. 218.

[3] Greenslade v. Dower, 7 B. & C. 635, E. C. L. R. 14.

[4] Hawtayne v. Bourne, 7 M. & W. 595; Burmester v. Morris, 6 Ex. 796; Rickets v. Bennett, 4 C. B. 686.

[5] Worcester Corn Exch. Co., 3 De G. M. & G. 180.

[6] See Galway v. Mathew, 10 East, 264; Worcester Corn Exch. Co., 3 De G. M. & G. 180; Burmester v. Norris, 6 Ex. 796 Ricketts v. Bennett, 4 C. B. 686. E. C. L. R. 56; Hawtayne v. Bourne, 7 M. & W. 595.

[7] Ex parte Chippendale, 4 De G. M. & G. 19; Ex parte Bignold, 22 Beav. 143.

the right of the former to any indemnity in respect of transactions done by them contrary to the trust reposed in them; and, in point of expediency, because the effect of the decisions is to place shareholders at the mercy of directors, by affording to the latter that which is, practically, unlimited credit—the very thing shareholders in unlimited companies so anxiously endeavor to avoid.

There is a practical difference between borrowing money and procuring work and materials on credit, which requires notice. The difference consists in this, that he who possesses power to borrow on the credit of another has a much more extensive, and therefore more easily abused, trust reposed in him than one who is empowered only to pledge the credit of another for value received, when the pledge is given. A power, therefore, to incur debt, which is necessarily incidental to almost every partnership and company, by no means involves a power to borrow money; and the cases which show that adventurers in cost-book mines are liable for supplies furnished to the mine,[1] but not for money borrowed for the purposes of the mine,[2] show that the difference here alluded to is judicially recognized.[3]

Connected with the subject of borrowing money is increasing capital. A sole trader who borrows money for the purpose of his trade cannot with propriety be said to increase his capital; but if two or more persons are in partnership, and each borrows money on his own *separate* credit, and the money is then thrown into the common stock, the capital of the firm, as distinguished from the capital of the persons composing it, may with propriety be said to be increased. But, in this case, the firm is not the borrower, nor is it debtor to the lender for the money borrowed. If a firm borrows money so as to be itself liable for it to the lender, the capital of the firm is no more increased than is the capital of an ordinary individual increased by his getting into debt. When, therefore, it is said that one partner has no implied power to borrow on the credit of the firm for the purpose of increasing its capital, what is meant is, that one partner, as such, has no power to borrow on the credit of himself and copartners, money,

[1] Tredwen v. Bourne, 6 M. & W. 461; Hawken v. Bourne, 8 id. 703.

[2] Hawtayne v. Bourne, 7 M. & W. 595; Burmester v. Norris, 6 Ex. 796; Ricketts v. Bennett, 4 C. B. 686, E. C. L. R. 56; Brown v. Byers, 16 M. & W. 252.

[3] The case of infants is analogous; an infant is liable for necessaries, but not for money lent, though applied in the purchase of necessaries. Darby v. Boucher, 1 Salk. 279. So, a husband is not liable for money lent to his wife to enable her to obtain necessaries, and applied by her for that purpose. Knox v. Bushell, 3 C. B. (N. S.) 334; see further Beldon v. Campbell, 6 Ex. 886; Ex parte Chippendale, 4 De G. M. & G. 40.

which each was to obtain on his individual credit, and then to bring in to the common stock.[1] Unless the expression means this, it means nothing.

In a late case the capital of a limited joint-stock company had been expended, and a majority of shareholders proposed to borrow money on the credit of the company. A dissentient minority sought to restrain the majority from so doing, and reliance was placed on the doctrine that the capital of the company could not be increased by borrowing money without the consent of all the shareholders. But it was held competent for the majority to borrow money on the credit of the company, and that the doctrine relied on had no application to the case; the capital of the company being one thing, and that which was sought to be increased by borrowing (viz., the cash in hand) being a different thing.[2]

Whether the directors of a company have power to borrow money on its behalf or not must depend upon the constitution and its charter, Act of Parliament, or deed of settlement. Railway and other companies governed by the Companies Clauses Act, usually have power to borrow by virtue of their special acts.[3] A power to borrow is so necessary to a banking company that its directors can scarcely be deprived of it; and there are several cases in the books in which their power was held to have been exercised so as to bind the company.[4] Where directors, having power to borrow on behalf of a company, exercise that power, the company will be liable to a *bona fide* lender, although the directors may not comply with all the provisions of the company's deed relating to the borrowing of money.[5] A loan by a director to a company of which he is a director appears to be invalid, unless confirmed by the shareholders of the company.[6]

In Byron v. The Metropolitan Saloon Omnibus Company,[7] it was

[1] See Greenslade v. Dower, 7 B. & C. 635; Fisher v. Taylor, 2 Ha. 218, as to the power of one partner to do this.

[2] Bryon v. Metropolitan Saloon Omnibus Company, limited, 4 Jur. (N. S.) 680 and 1262.

[3] Furness v. Catterham Railway Company, 25 Beav. 614, and the cases there cited; and see, also, as to loan notes, Campbell v. London and Brighton Rail. Co., 5 Ha. 519.

[4] Bank of Australasia v. Breillat, 6 Moore's P. C. 152, and 12 Jur. 189; Maclae v. Sutherland, 3 E. & B. 1, E. C. L. R. 77; Royal Brit. Bank v. Turquaud, 5 E. & B. 248, E. C. L. R. 85, and 6 E. & B. 27, E.C.L. R.88; Galloway's Ca., 18 Jur. 885, V. C S.

[5] Royal British Bank v. Turquaud, 5 E. & B. 248, and 6 id 327; Agar v. Athenæum Life Assurance Soc., 3 C. B. (N. S.) 725.

[6] Teversham v. Camerons Coalbrook Co., 3 De G. & Sm. 296; but see Murray's Ex. Ca., 5 De G. M. & G. 746; Re Baker's Claim, 6 Jur. (N. S.) 240, where it was held that advances by the directors were not prohibited by 7 & 8 Vict. c. 110, § 29.

[7] 4 Jur. (N. S.) 680, and 1262; Bryon v. Metropolitan Saloon Om. Co. is now reported (on appeal) in 3 De G. & J. 123.

held competent for a majority of the shareholders of a limited company to borrow money on the credit of the company; and in The Australian Auxiliary Steam Clipper Company v. Mounsey,[1] it was held that a limited company was bound by debentures sealed with its seal, and issued under the authority of a resolution come to at an extraordinary general meeting, and upon which money had been borrowed in pursuance of the same resolution. These decisions do not warrant any such propositions as that the directors of a company, governed by the Joint-Stock Companies Act, 1856, have power to borrow money on behalf of such company; they only show that where the directors have no such power by the original regulations of the company, it can be afterward conferred upon them without the concurrence of *all* the shareholders.

A power to borrow does not authorize the issue of debentures for any other purpose than to secure money lent.[2]

One partner has implied power to bind the firm by checks drawn on the bankers of the firm in the partnership name.[3]

If a debt is owing to a firm, payment by the debtor to any one partner extinguishes the claim of all, each partner being ostensibly the agent of all the rest to get in debts owing to the firm.[4] After a dissolution, payment to any one of the partners discharges the debtor,[5] even though a third person is appointed to collect the debts owing to the firm, and the creditor is aware of that fact; for it is said there is nothing in such an arrangement to *exclude* any partner from acting as usual.[6] So, if there are two firms, with one common partner, and a bill of exchange is given to one firm and is indorsed by it to the other, payment to the first is an answer to an action brought on the bill by the second.[7]

Moreover, when it is said that payment to one partner is payment to all, it is supposed that the payment is made in discharge of a debt due to the firm. If it is due, not to the firm but to one of the partners, the rule does not hold. Therefore, if an owner of goods sells them, the purchase-money must be paid to him or his agent; and payment to a person interested with him in the profits accruing from the sale

[1] 4 K. & J. 733.

[2] West Corn. Rail. Co. v. Mowatt, 12 Jur. 407, V. C. E.

[3] Laws v. Rand, 4 Jur. (N. S.) 74, C. P. As to checks drawn by directors, see Gloucester, Aberystwith, etc., Rail. Co., 18 Jur. 815, L. J.

[4] Anon., 12 Mod. 446.

[5] Duff v. The East India Co., 15 Ves. 198; Brasier v. Hudson, 9 Sim. 1. See Philips v. Philips, 3 Ha. 281, as to the receipts of a surviving partner.

[6] Bristow v. Taylor, 2 Stark. 50. E. C. L. R. 3; Porter v. Taylor, 6 M. & S. 156; King v. Smith, 4 Car. & P. 108, E. C. L. R. 19.

[7] See Jacaud v. French, 12 East, 317.

will not do; for though the two may be *quasi*-partners by reason of their community of interest in the profits, it does not therefore follow that he who is to share the profits is entitled to receive the proceeds of the sale of the goods themselves which belong exclusively to the other.[1] So, where a court orders payment to be made to one partner by name, the order must be strictly obeyed, and payment to the partner of the person named in the order will not suffice, though both are defendants in the suit in which the order is made.[2]

As one partner can accept payment of a debt due to the firm, so he can effectually release[3] and give a valid receipt for such debt.[4] It is, however, to be remembered, that although one partner has implied authority to get in debts owing to the firm and to give discharges for them, still a receipt is not conclusive evidence of payment; so that if one partner gives a receipt in fraud of his copartners, it will not preclude the firm from recovering the money.[5] Nor will a release given by one partner bind the firm if the releasing partner acts in fraud of his copartners and in collusion with the debtor.[6]

If one of several partners assents to a deed executed by a debtor of the firm in favor of his creditors, the firm is bound by the deed,[7] and the doctrine that one partner has no implied authority to bind his copartners by an instrument under seal, has no application to such a case.[8]

One partner can bind the firm by assenting to a transfer of a debt due to it, as for example, to a transfer of the firm's account from their banker to his successor in business.[9] So, where a creditor of the firm assigns the debt due to him, and one of the partners recognizes the transfer and promises to pay the transferee, the firm is bound by this promise.[10]

Again, one partner may receive a bill in payment of a debt due to the firm, and so preclude the firm from suing for the debt so long as the bill is running.[11]

Although each partner has power to receive payment of a partner-

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[1] See Smith v. Watson, 2 B. & C. 401.

[2] See Showler v. Stoakes, 2 Dowl. & L. 3. As to payments by the Accountant-General to one of several partners, see 10 Ord. of Aug. 1859, 5 Jur. (N. S.) 371, part 2.

[3] See Hawkshaw v. Parkins, 2 Swanst. 569.

[4] Henderson v. Wild, 2 Camp. 561.

[5] Farrar v. Hutchinson, 9 A. & E. 641, E. C. L. R. 36; Henderson v. Wild, 2 Camp. 561.

[6] Aspinall v. The London & N. W. Rail. Co., 11 Ha. 325.

[7] See Morans v. Armstrong, Arms. M'Art. & Ogle, Ir. N. P. Rep. 25; Dudgeon v. O'Connell, 12 Ir. Eq. 566.

[8] Dudgeon v. O'Connell, 12 Ir. Eq. 566.

[9] Beale v. Caddick, 2 H. & N. 326.

[10] Lacy v. M'Neile, 4 Dow. & Ry. 7 E. C. L. R. 16.

[11] See Tomlins v. Lawrence, 3 Moo. & P. 555.

ship debt, and to give a discharge for it on payment, it does not follow that he has power to compromise or settle the debt in any way he likes without payment. As a general proposition, an authority to receive payment of a debt does not include an authority to settle it in some other way; and if an agent, instead of receiving the money he is authorized to demand, arranges with the debtor that a sum owing to him by the agent himself, shall be set off against the money due to his principal, which shall be considered as paid, this is not such a payment as will bind the principal, or preclude him from suing his own debtor for the amount of his debt.[1]

A promise by one partner to pay a debt owing by the firm, undoubtedly binds the firm.[2] How far a promise by one will prevent the Statute of Limitations from running in favor of the others will be seen hereafter.[3]

If a debt is owing to a firm, tender to one partner is tender to all; and if a debt is owing by a firm, tender by one is tender by all;[4] and if, after tender by a firm, the creditor demands the sum tendered, a refusal to pay, made by the partner on whom the demand is made, is a refusal by the firm.[5]

One partner has no implied authority to bind his copartners by deed.[6] A release of a debt or demand stands on a peculiar ground, and will bind the firm though executed by one partner only.[7] A deed executed by one partner in the name and in the presence of his copartners is deemed an execution by them;[8] and if one partner executes a warrant of attorney in the partnership name, with the consent of his copartner, the court will not set it aside on the ground that the latter did not execute it.[9]

A joint and several bond executed by one partner in the name of himself and copartners binds him separately, although it is invalid against them;[10] and it has been held that a deed purporting to be

[1] See Young v. White, 7 Beav. 506; Underwood v. Nicholls, 17 C. B. 239; Story on Agency, § 98; and see as to the application of this principle to partners, Nottidge v. Pritchard, 2 Cl. & Fin. 379, and Wallace v. Kelsall, 7 M. & W. 264.

[2] Anon. v. Layfield, Holt, 434, E. C. L. R. 3; Lacy v. M'Neile, 4 Dow. & Ry. 7 E. C. L. R. 16.

[3] A promise to one inures to the benefit of all. White v. Williams, Willm. Woll. & Hod. 52.

[4] Douglas v. Patrick, 3 T. R. 683.

[5] Peirse v. Bowles, 1 Stark. 323.

[6] Harrison v. Jackson, 7 T. R. 207; Steiglitz v. Eggington, Holt, 141, E. C. L. R. 3. As to presuming an authority given by deed, see Holt, 141.

[7] See Hawkshaw v. Parkins, 2 Swanst. 539, and as to creditors' deeds, Dungeon v. O'Connell 12 Ir. Eq. 566.

[8] Ball v. Dunsterville, 4 T. R. 313; Burn v. Burn, 3 Ves. 578. In Orr v. Chase, 1 Mer. 729, a bond executed by one partner in the name and on behalf of the firm, was held to be the bond of the firm; and see Palmer v. Justice Assurance Soc., 6 E. & B. 1015.

[9] Brutton v. Burton, 1 Chitty, 707.

[10] Elliott v. Davis, 2 Bos. & P. 338.

made by all the partners of a firm, and to assign all their property to trustees for creditors, is operative against a partner who executes it although his copartners ultimately decline to execute it also.[1]

The inability of one partner to bind himself and copartners by deed, has little, if any, bearing on the validity of deeds entered into by incorporated companies. The question, whether an instrument sealed with the seal of an incorporated company is binding on the company, depends, 1, on the authority by which the seal was affixed to the instrument, and 2, on the nature of the instrument. An instrument to which the seal has been affixed by a person who has no authority to affix it, is in fact a forged instrument.[2] On the other hand, an instrument sealed by the proper officers is, *prima facie*, binding on the body corporate; and although the presence of the seal does not have the effect of binding the corporation with respect to matters altogether *ultra vires*, it does preclude it from taking advantage of the non-observance of preliminary formalities, if the person dealing with its managers had not notice of such non-observance.[3]

If several partners grant a lease, any one of them may distrain, or appoint a bailiff to distrain, in the name of all; and a distress by one partner, or by the bailiff appointed by him, will be lawful, although the other partners are no parties to the distress, and do not assent thereto.[4]

How far one partner can bind the firm by a guarantee obliging the firm to pay, if some other person does not, has been much disputed. The result of the latter cases appears to be, that unless it can be shown that the giving of guarantees is necessary for the carrying on of the business of the firm in the ordinary way, one of the members will be held to have no implied authority to bind the firm by them; for, generally speaking, it is not usual for persons in business to make themselves answerable for the conduct of other people.[5]

The subject was much considered in Brettel v. Williams.[6] There the defendants, who were railway contractors, made a sub-contract for the performance of part of some work they had undertaken. The sub-contractor required a quantity of coal, and one of the defendants,

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[1] Bowker v. Burdakin, 11 M. & W. 128; Cumberledge v. Lawson, 1 C. B. (N. S.) 709, and compare Latch v. Wedlake, 11 A. & E. 959.

[2] See Bank of Ireland v. Evans' Charities, 5 Ho. Lo. Ca. 389.

[3] Bateman v. The Mayor of Ashton, 3 H. & N. 323; The Australian, etc., Co. v. Mounsey, 4 K. & J. 733; The Royal Brit. Bank v. Turquand, 5 E. & B. 248, and 6 id. 327; Agar v. The Athenæum Life Insurance Co., 3 C. B. (N. S.) 725; Scott v. Colburn, 26 Beav. 276.

[4] See Robinson v. Hofman, 4 Bing. 562, and the cases there cited.

[5] See Crawford v. Sterling, 4 Esp. 207, and the cases in the text.

[6] 4 Ex. 623.

in the name of the firm, guaranteed to the plaintiffs, who were coal merchants, payment of coals supplied by them to the sub-contractors. It was held that this guarantee did not bind the partners of the contractor signing it.

In the prior case of Hasleham v. Young,[1] one of several solicitors guaranteed in the name of the firm payment of a debt and costs in order to release one of their clients from arrest; but it was held that this was not binding on the firm. Again, although one of a trading firm has power to indorse bills in the name of the firm, he has no implied authority to bind the firm by guaranteeing payment of bills of exchange, otherwise than by drawing or indorsing them.[2]

In opposition to these authorities there is a *dictum* of Lord Mansfield, and a decision of Lord Eldon. The former is reported to have said that if one partner gives a letter of credit or guarantee in the name of all the partners, it binds all;[3] and the latter held, but under what circumstances does not appear, that a guarantee by one partner in the name of the firm for payment of goods supplied on the faith of the guarantee was binding on the firm.[4] Neither of these cases can, however, be considered as entitled to weight after the decision in Brettel v. Williams, which is the most recent case on the present subject.

In Sandilands v. Marsh[5] a firm was held bound by a guarantee given by one of the partners, but in that case there was evidence of adoption and ratification by the firm of the contract of which the guarantee was part. This case cannot, therefore, be considered as opposed to those in which it has been held that one partner has no implied power to bind the firm by guarantees in its name.

Before leaving this subject, it may be observed that there is nothing in the statute of frauds to render a guarantee signed by one partner in the name of the firm invalid. The invalidity turns on want of authority generally, and not on the want of a written authority, or on the absence of signatures. If, therefore, the other partners have in fact authorized the giving of the guarantee, they will be bound, although no signature by them can be proved.[6]

Again, if one partner, in consideration that a person will accept a partnership bill, promises that the firm will put him in funds to meet the bill when due, this promise binds the firm.[7] But this is not guar-

[1] 5 Q. B. 833.
[2] Duncan v. Lowndes, 3 Camp. 478.
[3] Hope v. Cust, as cited in 1 East, 53.
[4] Gardom, Ex parte, 15 Ves. 286.
[5] 2 B. & Ald. 673.
[6] See Duncan v. Lowndes, 3 Camp. 478.
[7] Johnson v. Peck, 3 Stark. 66.

anteeing payment of the debt of another within the rule above discussed.

A company is not bound by an indemnity given by its directors, unless their power to give it can be shown.[1]

One partner can bind the firm by an insurance of the partnership goods.[2] And if one insures for all, he may give notice of an abandonment for all.[3]

The power of one partner to act for the firm in judicial proceedings may be conveniently noticed in the present place, although that power does not altogether depend on principles of agency.

A partner may sue in the name of himself and copartners, without the consent of the latter;[4] but if he sues against their consent, he must indemnify them against the costs.[5] So, one partner may defend an action brought against the firm, indemnifying the firm against the consequences of so doing, if he acts against the will of the other partners.[6]

But if it is competent for one partner to sue for the firm, it is as competent to any other partner to stay proceedings, or to put an end to the action altogether by means of a release, and although the court will not allow this to be done by collusion with the defendant, for the purpose of defrauding the other partners of their rights (see *post*, title RELEASE), a release will be effectual where there is no fraud in the case.

In Harwood v. Edwards,[7] one of the three partners, without the knowledge or consent of the other two, brought an action in his name and theirs for the recovery of a debt due to the firm. The other two afterward agreed with the defendant that proceedings should be stayed, and the court held that this agreement bound all three, and proceedings were stayed accordingly, although the partner who promoted the action disputed the validity of the agreement, and, by the partnership articles, it had been agreed between the partners, that one of them should not give a release without the assent of the others.

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[1] Ridley v. Plymouth Grinding Co., 2 Ex. 711; Kirk v. Bell, 16 Q. B. 290.

[2] Hooper v. Lusby, 4 Camp. 66; see Armitage v. Winterbottom, 1 Man. & Gr. 130, E. C. L. R. 39.

[3] Hunt v. The Royal Exchange Assurance Co., 5 M. & S. 47.

[4] Whitehead v. Hughes, 2 Cr. & M. 318; and see Harwood v. Edwards, *supra*, where it was held by Chapple, J., that the action must be considered as brought by all.

[5] Whitehead v. Hughes, 2 Cr. & M. 318.

[6] In Goodman v. De Beauvoir, 12 Jur. 989 and 1037, a solicitor employed by a managing committee to defend a suit, was held authorized to enter an appearance for a member of a provisional committee, who had made the managing committee his agents.

[7] Gow on Part. 65, note.

If an action is brought for the recovery of a debt due to the firm, one of the partners cannot bind the firm by consenting to a judge's order referring all matters in difference between the plaintiffs and the defendant to arbitration.[1]

In an action against a firm it has been held that one partner has no authority to bind the firm by consenting to an order for judgment against it,[2] or by giving a *cognovit* to pay the debt and costs.[3] But a warrant of attorney executed by one partner in the name of the firm with the consent of the other partners, is not invalid, simply because the others have not executed it.[4]

If in an action costs are ordered to be paid to one partner payment to another partner is not sufficient.[5]

One partner is not the agent of his copartner, except as to partnership matters; and if one partner is sued in respect of some private affair of his own, he must be proceeded against like any other individual, and service of writs, etc., must be made accordingly, and they must not be left at the place of business of the firm, or be served on the other partners.[6] And even in proceedings relating to partnership matters, although service on one partner is sometimes held equivalent to service on all, this is not the case where the service is relied on as the foundation of process of contempt, or of any proceedings of a penal nature.[7]

This subject, however, falls within the province of a treatise on practice, and not within the scope of the present work.

The power of one partner to act for the firm extends to proceedings in bankruptcy. Thus one partner only need sign a petition by the firm for adjudication of bankruptcy against a debtor to it.[8] So,

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[1] Hatton v. Royle, 3 H. & N. 500.

[2] Hambridge v. De la Croûe, 3 C. B. 742.

[3] Rathbone v. Drakeford, 4 Moo. & P. 57.

[4] Brutton v. Burton, 1 Chitty, 707.

[5] Showler v. Stoakes, 2 Dowl. & L. 3.

[6] See Petty v. Smith, 2 Y. & J. 111; Fairlie v. Quin, 1 Smythe, 189. See as to delivering a solicitor's bill of costs, Eggington v. Cumberledge, 1 Ex. 271.

[7] Young v. Goodson, 2 Russ. 255; and see Moulston v. Wire, 1 Dowl. & L. 527; Re Holliday, 9 Dowl. 1020; Grant v. Prosser, Smith & Batty, 95; Murray v. Moore, 1 Jo. Ir. Ex. 129; Nolan v. Fitzgerald, 2 Ir. Com. Law Rep. 79; Kitchin v. Wilson, 4 C. B. (N. S.) 483. In Carrington v. Cantillon, Bunb. 107; and Coles v. Gurney, 1 Madd. 187, service of a bill on one partner was allowed, the other being abroad, and it has been held at law that in ejectment against a firm, service on an acting partner is sufficient, Doe v. Roe, 9 Dowl. 1039, and that in an action against a firm on its promissory note, the rule to compute (after judgment by default) need only be served on one of the defendants. Figgins v. Ward, 2 Cr. & M. 424; Carter v. Southall, 3 M. & W. 128. See, as to the service of writs on companies, Pillbrow v. Pillbrow's Atmospheric, etc., Co., 3 C. B. 730; Towne v. London and Limerick Steamship Co., 5 C. B. (N. S.) 730; and as to foreign companies, see Ingate v. Lloyd. Austriaco, 4 id. 704.

[8] Rules and Orders in Bank. No. 21. See Brickland v. Newsome, 1 Camp. 474; S. C., *sub nomine* Buckland v. Newsame, 1 Taunt. 477.

when a trader debtor summons issues at a suit of a firm, the particulars of demand and notice which are required to be given may be signed by one partner on behalf of himself and copartners, adding the style of the firm.[1] So, one partner may prove a debt owing to the firm, and vote in the choice of assignees, and be heard against the bankrupt's certificate,[2] and, notwithstanding the general rule prohibiting one partner from binding the firm by deed, it has been decided that one partner may by a power of attorney executed by him alone, authorize a third person to represent the firm in the above matters, and to prove and vote on its behalf accordingly.[3] One partner may bind the firm by signing the certificate of its bankrupt debtor.[4]

One partner, as such, has no authority to contract on behalf of the firm for a lease of a house for partnership purposes.[5]

Where a lease is made by several partners jointly, a notice to quit given by one on behalf of all is sufficient.[6]

A legal mortgage cannot be made of partnership real estate without the concurrence of all the partners.[7]

It being, however, decided that a member of any ordinary trading partnership has power to borrow money on the credit of the firm, it follows almost necessarily that he should have power to pledge partnership property as a security for advances. The writer is not aware of any decision in which an equitable mortgage made by one partner by a deposit of deeds relating to partnership real estate, has been upheld, or the contrary, he can, therefore, only venture to submit, that such a mortgage ought to be held valid in all cases in which it is made by a partner having an implied power to borrow money on the credit of the firm.[8]

The implied authority of a partner to pledge the personal property of the firm for money borrowed is beyond dispute,[9] and the power is not confined to cases in which there is a general partnership; for, if several join in a purchase of goods to be sold for their common profit,

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[1] Rules in Bank. No. 68.

[2] Ex parte Mitchell, 14 Ves. 597.

[3] Id. and Ex parte Hodgkinson, Ves. 291-298.

[4] Ex parte Hall, 17 Ves. 62; Ex parte Fife, 2 M. & A. 577.

[5] See Sharp v. Milligan, 22 Beav. 606, however, where, specific performance was decreed against the firm, the contract having been ratified by the other partners.

[6] Doe v. Hulme, 2 Man. & Ry. 433; Doe v. Summersett, 1 B. & Ad. 135; Goodtitle v. Woodward, 3 B. & Ald. 689. See Right v. Cuthell, 5 East, 491.

[7] In Juggeewundas Keeka Shah v. Ramdas Brijbooken Das, 2 Moo. In. Ap. 487, a mortgage by one partner was under peculiar circumstances held to bind the firm.

[8] See Ex parte Lloyd, 1 Mont. & Ayr. 194.

[9] See Ex parte Bonbonus, 8 Ves. 540; Butchart v. Dresser, 10 Ha. 453, and 4 De G. M. & G. 542; Brownrigg v. Rae, 5 Exch. 489; Gordon v. Ellis, 7 Man. & Gr. 607.

a pledge of those goods by one of the persons interested is binding on them all.[1] It was held in a recent case that the majority of a steamship company had power to borrow money on the security of its ships.[2]

As to mortgages by companies governed by the Companies Clauses Consolidation Act, see 8 & 9 Vict., c. 16, § 41 *et seq.*[3]

Questions frequently arise as to whether notice to one partner is notice to all.

As a general rule, notice to a principal is notice to all his agents,[4] and notice to an agent is notice to his principal;[5] consequently, as a general rule, notice to one partner is notice to all,[6] and if two firms have a common partner, notice which is imputable to one of the firms is imputable to the other also.[7]

In conformity with these principles, if a firm claims the benefit of a transaction entered into by one of its members, it cannot effectually set up its own ignorance of what that member knew, so as to be in a better position than he himself would have been in had he been dealing on his own account as a principal. Thus, in Collinson v. Lister,[8] it was held that a banking company was not entitled to the benefit of a mortgage given to it by its own manager, in his character of an executor. For the mortgage was given as a security for money borrowed by the manager as executor, and advanced by himself as manager for improper purposes, and in breach of the trusts which, as executor, he had to perform, and the company, in taking the mortgage, knew that their manager was giving a security on his testator's estate for money previously taken by him from the funds of the company, and which moneys he had been requested to replace, or give security for. Under these circumstances it was treated as clear that the bank could stand in no better position than the manager would have done had he advanced the money himself, and taken a mortgage for it from himself.

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[1] Reid v. Hollinshed, 4 B. & C. 867; Re Gellar, 1 Rose, 297; Raba v. Ryland, Gow (N. P.), 133; Tupper v. Haythorne, id. 135; but see Barton v. Williams, 5 B. & Ald. 395, p. 405, per Best, J.

[2] Australian Steam Clipper Co. v. Mounsey, 4 K. & J. 733. One partner has power to mortgage ships of the firm. See Ex parte Howden, 2 M. D. & D. 574.

[3] As to the rights of the mortgagee, see Furness v. Catherham Railway Co., 25 Beav. 614, and the case there cited.

[4] See Mayhew v. Eames, 1 Car. & P. 550, and 3 B. & C. 601; Willis v. The Bank of England, 4 A. & E. 21.

[5] Per Ashhurst, J., Fitzherbert v. Mather, 1 T. R. 16; LeNeve v. LeNeve, 1 Ves. Sr. 64; Collinson v. Lister, 7 De G. M. & G. 634, and 20 Beav. 356.

[6] Alderson v. Pope, 1 Camp. 404; Porthouse v. Parker, id. 82; Bignold v. Waterhouse, 1 M. & S. 259; and see Solomons v. Nissen, 2 T. R. 647.

[7] See Porthouse v. Parker, 1 Camp. 82; Worcester Corn Exch. Co., 3 De G. M. & G. 180; Jacaud v. French, 12 East. 317; Powles v. Page, 3 C. B. 16, E. C. L. R. 54.

[8] 7 De G. M. & G. 634, and 20 Beav. 356.

The doctrine, however, that notice to one partner is notice to all, must be taken with some limitation. For, although every person has notice of what he himself does, and the firm in dealing with one of its own members is affected with notice of every thing of which he has notice,[1] yet it is not universally true that whatever is known to one partner is to be regarded as known to all. The following instances will suffice to establish this proposition.

In Bignold v. Waterhouse [2] one of a firm of carriers entered into an agreement to carry valuable parcels free of charge, but under such circumstances as to render the agreement not binding on the other partners. A parcel known to the partner who made the agreement to be of value, was sent, but was not entered or paid for as a valuable parcel. The other partners were held to be unaffected with the notice which their copartner had of the nature of the parcel, and not to be liable for its loss.

So, if one partner is a trustee, and he improperly employs the trust funds in the partnership business, his knowledge that he is so doing is not imputable to the firm, and, therefore, to affect the other partners with a breach of trust, further evidence must be adduced.[3]

This also shows what indeed is obvious of itself, *viz.*, that if a partner exceeds his authority, and it is contended that the firm is bound by what he has done on the ground that it has ratified his acts, evidence must be given to prove that at the time of the alleged ratification his copartners knew of those acts. It would be absurd to contend in such a case that knowledge by him was equivalent to knowledge by them.

Again, to take shares in companies out of the reputed ownership of the registered owner, notice of their assignment must be given, and notice to the secretary of the company is notice to the company. But if the secretary is the person whose shares are in question, the notice which he himself has of what he himself has done, is not imputable to the company, and, consequently, his shares, notwithstanding an assignment of them by him, continue in his order and disposition.[4]

When, therefore, it is said that notice to one partner is notice to all, what is meant is, (1) that a firm cannot, in his character of principal, set up the ignorance of some of its members against the knowledge of others of whose acts it claims the benefit, or by whose acts it is bound; and (2) that when it is necessary to prove that a firm had

[1] See Collinson v. Lister, 20 Beav. 356; and 7 De G. M. & G. 634.
[2] 1 M. & S. 255.
[3] See Ex parte Heaton, Buck. 386.
[4] Ex parte Boulton, 1 De G. & J. 168.

notice, all that need be done is to show that notice was given to one of its members as the agent and on behalf of the firm. This, however, is only true when the member, to whom the notice is given, is not the person from whom the notice proceeds.

A retired partner is not affected with notice on the part of the continuing partners of what has occurred since the partnership, if the agency subsisting between them has been dissolved.[1]

In companies, whether incorporated, or *quasi*-incorporated, notice on the part of a shareholder or a non-acting director does not affect the whole body.[2] But it is otherwise as regards an acting director.[3]

One partner may bind the firm under a penalty to observe a contract which he is authorized to enter into on its behalf.[4]

It has been long decided that every member of an ordinary trading partnership has implied power to purchase on the credit of the firm such goods as are necessary for the carrying on of its business.[5] This cannot be more strongly exemplified than by the case of Bond v. Gibson.[6] These two persons carried on business as harness makers; one of them bought on the credit of the firm a number of bits to be made up into bridles, but instead of using the bits for the partnership business, he pawned them for his own use. The seller of the bits was nevertheless held entitled to recover their price in an action against both partners.

The firm is liable although the goods may have been supplied to one only of the partners, and no other person may have been known to the supplier as belonging to the firm.[7]

The power of one partner to bind the firm by a purchase of goods on its credit is not confined to trading partnerships. Thus, where some printers and publishers agreed to share the profits of a work, and the publishers ordered the necessary paper and became bankrupt, the printers were held liable for its price to the stationers who supplied it.[8] It is of no consequence what the partnership business may be, if the goods supplied are necessary for its prosecution in the ordinary way.

If goods are sold to a firm on credit and are delivered to the firm, and then one partner returns them, the firm not being able to pay

[1] Adams v. Bingley, 1 M. & W. 192.
[2] See Powles v. Page, 3 C. B. 16.
[3] See Worcester Corn Exchange Co., 3 De G. M. & G. 180.
[4] Beckham v. Drake, 9 M. & W. 79.
[5] Hyatt v. Hare, Comb. 383.
[6] 1 Camp. 185.
[7] Ruppell v. Roberts, 4 Nev. & Man. 31; E. C. L. R. 30; City of London Gas Co. v. Nicholls, 2 C. & P. 365; Gardiner v. Childs, 8 id. 345.
[8] Gardiner v. Childs, 8 C. & P. 345; compare Wilson v. Whitehead, 10 M. & W. 503.

for them, the property will be revested in the vendor, subject in the event of bankruptcy to the question of fraudulent preference.[1]

Companies are clearly liable for goods supplied to them for the purpose of carrying on their business, if ordered by their agents. It has been held that the members of a cost-book mining company are liable for goods supplied to the mine by the order of its directors or resident manager,[2] and that an ordinary joint-stock company cannot escape liability for goods *bona fide* supplied to it for the purposes of its business, and by the orders of the superintendent of its works, simply because he may not have been appointed in strict conformity with the company's deed of settlement.[3] But the mere circumstance that goods have been supplied to a company in the course of its trade, and have been used by it, is not sufficient to render the company liable for them if they were supplied by the order of persons not authorized to obtain them for the company.[4]

A covenant by one partner not to sue for a partnership debt does not amount to a release of that debt by the firm,[5] although a covenant by all the partners not to sue would be equivalent to a release,[6] and a release by one partner operates as a release by the firm.[7]

This last proposition, viz.: that a release by one partner is, in point of law, a release by all, is strongly illustrated by those cases in which attempts have been unsuccessfully made by one partner to set aside a release given by a copartner without his consent.

In Furnival v. Weston[8] the members of a firm sued the defendant for a libel on the firm published by him. One of the partners, without the consent of the others, released the defendant, and there being no fraud in the case, the court refused to set the release aside. In Arton v. Booth,[9] the two plaintiffs, Arton & Dawson, had been partners, but they had dissolved partnership, and it was agreed between them that Arton should get in the debts of the firm, and that Dawson should not interfere with him. The defendant was sued for a debt owing to the plaintiffs, and after action brought, Dawson released him on receiving payment. Although the release deprived the plain-

[1] De Tastet v. Carroll, 1 Stark. 88.

[2] Newton v. Daly, 1 Fos. & Fin. 26; Tredwen v. Bourne, 6 M. & W. 461; Hawken v. Bourne, 8 id. 703. As to Vice v. Anson, 7 B. & C. 409, see the above cases, and Owen v. Van Uster, 10 C. B. 318.

[3] Smith v. Hull Glass Co., 11 C. B. 897.

[4] Kingsbridge Flour Mill Co. v. Plymouth Grinding Co., 2 Ex. 718.

[5] Walmsley v. Cooper, 11 A. & E. 216.

[6] Deux v. Jefferies, Cro. El. 352.

[7] 2 Ro. Ab. Release, 410 D.; Hawkshaw v. Parkins, 2 Swanst. 539.

[8] 7 Moore, 356.

[9] 4 Moore, 192; see, too, Jones v. Herbert, 7 Taunt. 421; E. C. L. R. 2, and compare Barker v. Richardson, 1 Y. & J. 362.

tiffs of their costs, the court would not interfere as no case of fraud was made out. So in the recent case of Phillips v. Clagett,[1] where partners brought an action against the defendant for illegally pledging their property, the court gave him leave to plead a release previously given by one of the partners.

However, if it can be shown that one partner has in fraud of his copartners and in collusion with the defendant executed a release for the purpose of preventing them from enforcing a just demand, the defendant will not be allowed to plead this release as a defense to an action against him. Thus, in Barker v. Richardson,[2] the plaintiffs, Barker and Owen, had been partners, but they had dissolved partnership, and it was agreed that Barker should get in the debts owing to the firm, and, if necessary, sue for the same. The defendant was indebted to the firm, and had notice of the above agreement. He was also a creditor of Owen on a private account, and Owen, against Barker's consent, gave a receipt for the partnership debt, and, after the commencement of the action by Barker for the recovery of that debt, gave the defendant a formal release. The evidence showed that the release was given to defeat the action, to prevent Barker from recovering the debt due to the firm, and as a part of a scheme for discharging Owen's private debt to the defendant. Under these circumstances the release was not allowed to be pleaded.

The firm is bound by all representations made by a partner whilst acting within the scope of his implied authority, and having reference to the business of the firm;[3] but not by statements made by him as to his authority to do that which the nature of the business of the firm does not impliedly warrant.[4] A joint-stock company is not bound by the statements of one of its members, unless he is also the agent of the company, and his business is to make statements on its behalf.[5] Nor is a company bound by statements made by one of its directors, if he is not singly an agent of the company.[6] But a company is bound by the statements of its directors, if made by them for the company and in the course of the business which it is their duty to transact.[7]

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[1] 11 M. & W. 84.

[2] 1 Y. & J. 262; see, too, Aspinall v. The London & N. W. Rail. Co., 11 Ha. 325; Phillips v. Clagett, 11 M. & W. 84.

[3] Rapp v. Latham, 2 B. & Ald. 795; Blair v. Bromley, 2 Ph. 354; Wickham v. Wickham, 2 K. & J. 478.

[4] Ex parte Agace, 2 Cox, 312.

[5] Burnes v. Pennell, 2 Ho. Lo. Ca. 497.

[6] Holt's case, 22 Beav. 48; Gibson's case, 2 De G. & J. 275; Nichol's case, 5 Jur. (N. S.) 205.

[7] See The National Exchange Co. of Glasgow v. Drew, 2 M'Queen, 103; Meux's Executor's case, 2 De G. M. & G. 522.

The admissions of one partner with reference to a partnership transaction is evidence against the firm,[1] but it is not necessarily conclusive.[2] An admission by one person who afterward enters into partnership with others is no evidence against them, merely because they and he are partners when the evidence is sought to be used.[3] Moreover, in a suit in equity against partners, the answer of one of them cannot be read against the others,[4] unless the cause is heard on a motion for decree, in which case every answer may, if due notice be given, be treated as an affidavit.

Companies are affected by admissions made by their directors or agents, and relating to matters within the scope of their authority, but not by other admissions.[5]

Any partner can dispose of any of the partnership goods,[6] and in one case it was even held that he could make a valid sale of the partnership books.[7]

If by any event the partners become mere tenants in common of the partnership goods and one assumes to sell them, the purchaser, although he may only become tenant in common with the other partners, will, nevertheless, if he gets possession of the goods, be able to retain them as against his cotenants, for no action lies at the suit of the latter for the recovery of the goods.[8]

One partner has implied authority to hire servants to perform the business of the partnership,[9] and the writer presumes that one partner has also implied authority to discharge them, although he cannot do so against the will of his copartners.[10]

Where necessary, one partner may bind the firm by chartering a ship on its behalf, and one partner may mortgage a ship belonging to the firm.[11]

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[1] Wood v. Braddick, 1 Taunt. 104; Pritchard v. Draper, 1 R. & M. 191; Nicholls v. Dowding, 1 Stark. 81; Sangster v. Mazarredo, id. 162; Thwaites v. Richardson, 1 Peake, 23; Grant v. Jackson, id. 268; Wright v. Court, 2 C. & P. 232. As to part-owners, see Jaggers v. Binnings, 1 Stark. 64.

[2] Wickham v. Wickham, 2 K. & J. 491, where the point in question was the amount of a debt.

[3] Tunley v. Evans, 2 Dowl. & L. 747; Catt v. Howard, 3 Stark. 3.

[4] Parker v. Morrell, 2 Ph. 453; Dale v. Hamilton, 5 Ha. 393.

[5] See Bell v. The London and Northwestern Rail Co., 15 Beav. 548; Meux's Executor's case, 2 De G. M. & G. 522.

[6] Lambert's case, Godb. 244.

[7] Dore v. Wilkinson, 2 Stark. 287.

[8] Litt., § 323; Fox v. Hanbury, Cowp. 445; and see Buckley v. Barber, 6 Ex 182.

[9] Beckham v. Drake, 9 M. & W. 79. A servant of the firm is a servant of each of the partners, and may be described accordingly in an indictment for stealing the separate property of one of the partners. R. v. Leach, 3 Stark. 70.

[10] Donaldson v. Williams, 1 Cr. & M. 345.

[11] See as to chartering, Thomas v. Clarke, 2 Stark. 451, E. C. L. R. 3, and as to mortgaging, Ex parte Howden, 2 M. D. & D. The circumstance that a person is registered as part owner does not, *per se*, render him liable for the acts of the other owners. Myers v. Willis, 17 C. B. 77, and 18 id. 886; Brodie v. Howard, 17 C. B. 109.

The foregoing from page 658 is from Lindley on Partnership.

Ratification of acts done in excess of authority.

SEC. 415. An act done by one partner beyond the scope of his powers may be ratified by the firm, so as to make the firm as such liable therefor, but a full and complete ratification must be shown, and a mere failure to deny its liability cannot be construed as a ratification.[1] All acts done by a member of a firm, in the firm name, are presumed to have been done for a partnership purpose, and within the scope of his authority as a partner, and the burden is upon the copartnership to establish the contrary.[2] This presumption, however, does not apply, except as to matters within the scope of his apparent power;[3] nor where the person with whom he deals knows, or ought to know, that the act is in excess of his authority,[4] although it is competent as evidence tending to show assent, and in connection with other matters may be sufficient to warrant a finding that the act was ratified; but standing alone, it is not sufficient for that purpose.[5] Express ratification need not be shown; it may be established bv circumstantial evidence.[6]

Of liabilities for loans effected in the name of the firm.

SEC. 416. Perhaps the most remarkable instances of partnership liabilities are those where loans, purchases, sales, or pledges are effected by one partner on the partnership account. Such transactions, if *bona fide* on the part of the creditor, are uniformly binding on the firm. Thus, money *lent* to one partner for his own expenses while engaged in the partnership business, is a partnership debt.[7] There are also other cases in which it should seem that money lent to one partner in the partnership name, and applied to partnership pur-

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[1] Reubin v. Cohen, 48 Cal. 545; Bankhead v. Alloway, 6 Cold. (Tenn.) 56.

[2] Carrier v. Cameron, 31 Mich. 373; Barker v. Mann, 5 Bush (Ky.), 672; Hickman v. Kunkle, 27 Mo. 401.

[3] Ditts v. Lonsdale, 49 Ind. 521; Hotchkiss v. English, 6 T. & C. (N. Y.) 658; McQuewans v. Hamlin, 35 Penn. St. 517; Bankhead v. Alloway, 6 Cold. (Tenn.) 56; Nichols v. English, 3 Brewst. (Penn.) 260.

[4] Merchant v. Belding, 47 How. Pr. (N. Y.) 344; Fall River Bank v. Sturtevant, 12 Cush. (Mass.) 372; Tompkins v. Woodyard, 5 W. Va. 216; Cayton v. Hardy, 27 Mo. 536.

[5] Reubin v. Cohen, *ante;* Smith v. Turner, 9 Bush (Ky.), 417.

[6] First Natl. Bank v. Breese, 39 Iowa, 640; Smith v. Turner, *ante.*

[7] This proposition is too broad and might be misleading. The firm is liable for a loan to one partner to pay his reasonable expenses *while engaged in partnership business.* Thus, in the case from which the author deduced the statement in the text, Lord Kenyon said that "though the money was loaned to one of the partners, *it was lent to him while employed on the partnership business, and on its account.*" The money, in this case, was lent to the partner who had visited the plaintiffs upon the business of the firm, to defray his expenses back to London. If he had been there upon his own business, a different question would have arisen. Rothwell v. Humphreys, 1 Esp. 406.

poses, will, even at law, be considered a debt due from the partnership, although the money may not be the subject of written securities. Thus, where an action was brought against partners on certain bills of exchange which had been indorsed by one partner, and it was doubtful whether the bills could be recovered upon as genuine bills, Bailey, B., asked whether, if the case failed on the bills, the plaintiff could not recover the consideration; and whether, if a partner borrows money in the partnership name, and applies it to partnership purposes, the party lending the money is to act at his peril, and the learned judge seemed to consider it as clear that, in such case, the lender is not bound to show that the money has been applied to partnership purposes.[1]

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[1] Thicknesse v. Bromilow, 2 C. & J. 431. The difference, however, seems to be considerable between the case which was before the learned judge, in which a negotiable security, though of questionable validity, had been given, and that where no security beyond a mere acknowledgment is taken by the lender. In the latter case it would depend on the special circumstances whether the firm would be bound by the act of their copartner. But see Etheridge v. Binney, 9 Pick. 272. The legal presumption is, that a loan made in the name of the firm, was made for partnership purposes, and if it was not, the partners must establish the fact *prima facie*, they are liable. Hogg v. Orgill, 34 Penn. St. 344; Thurston v. Lloyd, 4 Md. 283; Littell v. Fitch, 11 Mich. 525; Knapp v. McBride, 7 Ala. 19; Barrett v. Swan, 17 Me. 180; Eusminger v. Martin, 5 Blackf. (Ind.) 210. And when established, if the payee of the note or obligation given therefor, knew, or ought to have known, that it was not in fact for partnership purposes, no liability exists against the firm therefor. Taylor v. Hillyer, 3 Blackf. (Ind.) 433; Hickman v. Reineking, 6 id. 388; Maudlin v. Branch Bank, 2 Ala. 502; Robinson v. Aldridge, 34 Miss. 352; Hickman v. Kunkle, 27 Mo. 401; Stainer v. Tysen, 3 Hill (N. Y.), 279; Miller v. Manice, 6 id. 115; Weed v. Richardson, 2 Dev. & B. (N. C.) L. 535; Baird v. Cochran, 4 Serg. & R. (Penn.) 397; Porter v. Gunnison, 2 Grant's (Penn) Cas. 297; Burleigh v. Parton, 21 Tex. 585; Huntington v. Lyman, 1 D. Chip. (Vt.) 438. See Cotton v. Evans, 1 Dev. & B (N. C.) Eq. 284 *Prima facie* the law implies an authority in one of several partners to execute promissory notes in the name of the firm: 1. Where such authority is necessary to the successful carrying on of the business of the firm; or, 2, according to the usage of similar partnerships; or, 3, according to the course of trade of that particular partnership. Gray v. Ward, 18 Ill. 32; Storer v. Hinkley, Kirby (Conn.), 147; Newell v. Smith, 23 Ga. 170; Dow v. Phillips, 24 Ill. 249; Miller v. Hughes, 1 A. K. Marsh. (Ky.) 181; Waldo Bank v. Lambert, 16 Me. 416; Coursey v. Baker, 7 Har. & J. (Md.) 28; Bascom v. Young, 7 Mo. 1; Potter v. Dillon, id. 228; Partin v. Leiterloh, 6 Jones' (N. C.) Eq. 341; Kirkpatrick v. Turnbull, Add. (Penn.) 259. Thus, where the managing partner of a concern, who had been in the habit of borrowing checks for the purpose of meeting the firm's liabilities, a short time before the firm dissolved called at the office of S and requested his check, which he received, at his request made payable "to currency," promising to return the amount within an hour or so until he collect some bills of the firm, which he failed to do, it was held, that the other partner was liable to pay it, the check having been borrowed on the credit of the firm though the proceeds were not appropriated to the business of the firm. Stark v. Corey, 45 Ill. 431. In Raney v. Buckland, 4 Nev. 45, B, one of the partners of a firm obtained from the plaintiff three bonds of the United States payable to bearer, to be used by the firm, and returned to the plaintiff upon demand. B was on his way to California upon business of the firm to purchase goods for it, for which purpose the bonds were to be used. B lost his life before reaching California and the bonds were lost. The firm was held liable therefor. The rule is that the

For purchases made by one partner.

SEC. 417. Again, in a very early case, it was admitted that the firm were liable for goods *purchased* by one partner.[1] Upon the same principles, if one partner, having purchased goods for the partnership,

partnership relation makes each partner the agent of the others when acting within the scope of his power, but when his agency is denied, and his act forbidden by his copartner with notice to the party assuming to deal with him as the agent of the firm, his act is not that of the firm, but his individual act only. Yeager v. Wallace, 57 Penn. St. 365.

While, as previously stated, the presumption is, that a note executed by one partner in the name of the firm, is given on partnership account, Whittaker v. Brown, 16 Wend. (N. Y.) 505; Doty v. Bates, 11 Johns. (N. Y.) 544; yet, if there is any thing that should put the payee on inquiry, the presumption does not attach. Thus, in Boyd v. Plum, 7 Wend. (N. Y.) 309, one of the partners drew a bill in the firm name as *surety* for a third person, and the court held that the word surety added to the firm name was such as should have put the acceptor on inquiry as to whether all the partners assented to the drawing of the bill. So in Gansevoort v. Williams, 14 Wend. (N. Y.) 133, where a partner applied for the renewal of his individual note, and presented a renewal note signed by the name of a firm of which he had recently become a member, as makers, the court held that the facts were such as put the payee upon inquiry, and knowing that it was for the individual debt of the partner, he could not enforce it against the firm without proving that they assented thereto. For special instances as to what facts have been held sufficient to put a person upon inquiry, as to whether such a note was given for partnership business, see Austin v. Vandemark, 4 Hill (N. Y.), 257; Wilson v. Williams, 14 Wend. (N. Y.) 146; Elliott v. Dudley, 19 Barb. (N. Y.) 326. Where there is nothing that should put the payee upon inquiry, and he has in fact no notice that the note is not for a partnership transaction, the firm is bound, although the execution of the note is a fraud upon the firm. Wells v. Evans, 20 Wend. (N. Y.) 251. Where there is a general partnership, and one partner borrows money in the name and upon the credit of the firm, the lender may recover against the firm if he acted in good faith, *notwithstanding that the money was ultimately misapplied by the partner borrowing it.* It makes no difference that the money was advanced upon an exchange check. Onondaga Co. Bank v. De Puy, 17 Wend. (N. Y.) 47; but it must appear either that it was borrowed in the name of the firm, and upon its credit, or that it was applied to the use of the firm. Porter v. Lobach, 2 Bosw. (N. Y. S. C.) 188. It is not necessary to show the actual application of the money to the use of the firm, or the assent of the other members to such application thereof. Whittaker v. Brown, 16 Wend. (N. Y.) 505; see Thorn v. Smith, 21 Wend. (N. Y.) 365. They are liable where one of the firm borrows money (not expressly on his individual credit), and it is shown that it was borrowed for and appropriated to the use of the firm. Whether the money was so borrowed and appropriated, is a question which ought to be submitted to a jury. Church v. Sparrow, 5 Wend. (N. Y.) 223; Walden v. Sherburne, 15 Johns. (N. Y.) 409.

To charge the partnership for goods delivered on the request of one partner, there must be proof either that the request was made in the name of the firm, or that the goods were applied to the use of the firm. Pinckney v. Keyler, 4 E. D. S. (N. Y. C. P.) 469. The authority delegated is, to act in their particular trade or line of business; and in such transactions, strangers have a right to act on the credit of the partnership fund. It is not necessary that the money lent, or credit given, should appear to have been actually used for the benefit of the partnership. Walden v. Sherburne, 15 Johns. 409. He cannot by his acts or admissions bind his copartners, without their assent, for an individual debt of his own. Elliott v. Dudley, 19 Barb. (N. Y.) 326. Thus where two persons are joint owners or proprietors of a patent right or privilege, one of them is not, on that ground merely, responsible for any special contract entered into by the other, not connected with the enjoyment and exercise of their common right or privilege. Lawrence v. Dole, 3 Johns. Ch. (N. Y.)

[1] Hyatt v. Hare, Comb. 383.

become a bankrupt, and his vendor (without notice of the partnership) stop the goods *in transitu*, such stoppage will be good against the whole firm, although they may have paid the price of the goods

23. So, where the defendants were joint contractors in the construction of a railroad, and by their agreement each was to furnish his own team and teamsters, plaintiff had previously been hired as a teamster by one of the defendants for a year, and under such hiring drove a team on the work in question. It was held that the defendants were not jointly liable to him. His services were so much contributed to the common stock by the defendant who had hired him, and such defendant was alone liable. McGuire v. O'Hallaran, Hill & D. Supp. (N. Y.) 85. So, where the defendants agreed with the owner of a steamboat that if sufficient stock should be subscribed for, they would form a limited partnership with him to run the boat; he to be the general partner. While they were endeavoring to raise the fund the owner of the boat contracted a debt for repairs upon her. The intended partnership failed for want of a sufficient subscription. It was held by the court that defendants were not liable for the debt thus contracted by the owner; they having had no personal agency in contracting it. Until the limited partnership was formed, the owner had no authority, express or implied, to bind his proposed associates or partners. West Point Foundry Association v. Brown, 3 Edw. Ch. (N. Y.) 284.

Each partner is presumed to assent to all the acts of his copartners within the scope of the partnership business, or which he has in any way specially ratified or assented to. This was well illustrated in an Iowa case, Boardman v. Adams, 5 Iowa, 224, where in an action for pianos sold and delivered to one of the partners, he plead that the firm was not a general partnership, but was a partnership engaged in the newspaper and printing business only, and that the pianos were sent to the other partner to be sold on commission, and not to the said partnership firm, upon which plea issue was joined, and it appeared that each of the partners had written letters in relation to the pianos in their individual names; and the court charged the jury that the plaintiffs must recover for pianos sold and delivered, or they could not recover at all; that if the pianos were sold to one partner alone, and not to the firm, the plaintiffs could not recover in this action; that there must be satisfactory proof, either that the buying and selling of pianos was within the scope of the partnership business of defendants, or that they jointly ordered the pianos from plaintiffs, before they could recover; that the plaintiffs having sued for pianos sold and delivered, could not recover on proof that the pianos were sent to defendants to be sold on commission, or on any other proof falling short of proof of sale and delivery; and that the jury must examine the testimony with reference to each of the defendants separately; and one of the defendants asked the court to instruct the jury as follows: "That before A can be liable, it is necessary for the plaintiff to prove that he had knowledge of the whole transaction, and consented thereto, and that if the letter of plaintiffs does not accept the offer and terms of A, it is necessary to bring home to A a knowledge of the contents of the letter of the plaintiffs," which instructions were refused, and it was held that the court did not err in refusing to give the instructions. In Brown v. Kidger, 3 H. & N. 853, the defendants were partners for the purpose of working a coal mine. Two of them conducted the business of the colliery. The firm being in debt, and two actions having been brought against them, the managing partners borrowed of the plaintiff, upon the credit of the firm, money for the purpose of settling these actions, and accepted in the name of the firm a bill of exchange drawn by him on them. The partnership deed contained a clause "that if any partner should for his own use, or for any other purpose than the immediate use of the partnership, draw, accept or indorse any bill of exchange in the name of the firm," the others might determine his interest in the partnership. It was held that the managing partners had authority to bind the partnership by borrowing the money and accepting the bill.

One partner cannot bind the other members of the firm by note, indorsement, or acceptance, in any transaction unconnected with the partnership business, and known to be so by the party taking it, nor for the party's own debt.

to the bankrupt partner. In the case of Salomons v. Nissen,[1] one Hague bought 705 pigs of lead of the defendants at Liverpool, and ordered them to be shipped to Garvey & Co., at Rouen. The lead was accordingly shipped and the bill of lading was indorsed by the defendants, in blank, and sent to Hague. A few days afterward the plaintiff gave Hague his acceptances on account of the lead to a large amount, which acceptances were paid to the indorsees when due. Soon after the acceptances were given, the following agreement was made between

An act of one partner beyond the scope of his authority may be ratified by the other members of the firm; and that one member was in the habit of extending accommodations to others in the name of the firm, with approbation or without dissent, would be sufficient evidence of authority, and the firm would be bound. Scott v. Bandy, 2 Head (Tenn.), 197. His acts bind his firm only on the theory of an implied agency for the purposes of the mutual adventure, and the agency does not extend beyond what may fairly be regarded as coming within its reach. Hotchin v. Kent, 8 Mich. 526. A sale of goods to one partner within the scope of the partnership business is a sale to the firm, and the seller will not be affected by the fraudulent intent or subsequent misapplication of them by the purchasing partner, if the seller act in good faith; and the same principle applies to negotiable securities. But if one partner give the credit or property of the firm for his individual benefit to his creditor, who knows or has reason to know that it was for the private or individual debt of the particular partner, without the previous knowledge or consent of the other partners, it will be a fraudulent transaction as to them, and clearly void. If the public have the usual means of knowledge given them in regard to the business of a partnership, and no acts have been done or suffered by the partners to mislead, every one is presumed to know the nature and extent of the partnership with whose members he deals; and where a person takes a partnership engagement without the authority of the firm, for a matter not within the scope of its authority, he is guilty of a fraud, and cannot enforce such engagement. Venable v. Levick, 2 Head (Tenn.), 351. The partners may by their joint act convert the partnership property into individual property, and although neither partner can, without the consent of the others, apply the effects of the firm to his individual purposes or to the payment of his individual debts, yet he may do so by the consent of the others. The right of the partners, unitedly, to dispose of the firm property, is the same in all respects as the right which an individual has to control and dispose of his property; and the question as to whether this has been done or not in a given case is for the jury. Jones v. Lusk, 2 Metc. (Ky.) 356.

[1] 2 T. R. 674. In Woodward v. Winship, 12 Pick. (Mass.) 431, Winship & Biddles carried on, in the name of Winship alone, a large business in the manufacture of soap and candles. Winship purchased of plaintiffs, on a credit, a quantity of pork and flour and gave his note therefor. It appeared Winship was in the habit of exporting large quantities of soap and candles to foreign ports, and receiving in return produce of foreign growth, and that he also purchased large quantities of materials to be used for the manufacturing of soap and candles. On the occasion of purchasing the pork and flour, Winship had engaged two schooners to carry soap and candles to the West Indies, and to make up the cargo, purchased the flour and pork and shipped them with the soap and candles. There was evidence to show this had been done before with the knowledge of the Biddles. The court charged that *prima facie*, the purchase of provisions for a foreign market was not within the scope of the partnership business. If, however, Winship was the acting partner, if he was vested with a reasonable discretion to conduct the business of the partnership in such manner as in his opinion would best conduce to the interest or benefit of the concern, and the purchase was made to aid the principal object of the undertaking, *bonâ fide*, and in the exercise of a reasonable discretion, he was acting within the scope of his authority as a partner.

Hague and the plaintiff: "That the said J. Salomons shall pay for and send in his name to Messrs. Garvey & Co., merchants at Rouen, a cargo consisting of 705 pigs of lead, to be shipped at, etc., to be sold by Messrs. G. & Co., at the best price, etc., and the net proceeds to be remitted to the said J. Salomons. And it is hereby agreed that the profit and loss arising from the said cargo of lead shall be equally divided between the said E. Hague and J. Salomons." The vessel sailed with the lead for Rouen, but was forced back by stress of weather, and Hague having become a bankrupt, and the defendants not having received the price of the goods, stopped them while on board the ship in England and took them away. The lead not being paid for by Hague or any other person, and the defendants having refused to deliver it up, the plaintiff brought trover against them, but failed in his suit. Ashurst, J.: "It appears, upon the contract, that the plaintiff made himself a complete partner with Hague, *quoad* this transaction, and that he also made himself the paymaster, therefore he put himself in the place of the original consignee, and must take the bill of lading subject to the same rights. That being the case, it follows, as a necessary consequence, that the defendant had a right to stop the goods *in transitu.*"

For sales made by one partner.

SEC. 418. In a very early case "it was agreed by the court that the sale of one partner is the sale of them both;"[1] and in more recent times the power of one partner to bind the firm by simple contract has been continually recognized in cases of sale of the partnership effects. Lord Mansfield, in a celebrated case,[2] decided that even after an act of bankruptcy committed by one partner, an assignment *bona fide* of partnership effects by the solvent partner to a creditor of the firm, in payment of his debt, was binding on the firm.

Property pledged by one partner.

SEC. 419. Again, if one partner *pledge* the partnership effects to a *bona fide* pledgee, this contract will bind the firm, if made in the ordinary course of business; and it should seem from an early case that such a contract is consistent with the business of a general trading partnership.[3] The more modern decisions on the subject have related to particular adventures, and the contract has been held binding on the firm, where the pledgee *has had no notice of the joint interest.* Thus, in Raba v. Ryland,[4] the plaintiffs, Raba and Robles, were mer-

[1] Lambert's case, Godbolt, 244.

[2] Fox v. Hanbury, Cowp. 445. Lord Mansfield, however, chiefly addressed himself to the form of the action.

[3] Metcalfe v. Royal Exch. Ass. Comp., Barnardist. 343.

[4] Gow, N. P. C. 132; see Ex parte Gellar, 1 Rose, 297.

chants at Bordeaux, and the defendants corn and seed factors in London. The plaintiffs purchased for the joint account of themselves and Caumont, in equal thirds, thirty-three bags of clover seed, and consigned them to Caumont who lived in London. Caumont pledged the seed to the defendants, who had no notice of the joint interest. Caumont became a bankrupt, and the defendants were his creditors to more than the amount of the clover seed. It was held that the plaintiffs could not maintain trover for the seed, Dallas, J., observing that Caumont being jointly interested in the seed with the plaintiffs as a partner, was in that character possessed of the entirety; that as a partner he had a clear right to sell; and that so far from its being pretended that the defendants had notice of the partnership, the contrary was admitted.

Another case of the same complexion was decided in the same manner. Tupper & Co. consigned to Smith & Co. a quantity of wool on the joint account of the two houses. T. & Co. were to be interested in one moiety, and S. & Co. in the other moiety. S. & Co. pledged the wool to H. & Co., who were ignorant that the consignment had been made on the joint account, and to whom, when the bills of lading were indorsed to them, it was represented that the wool was to be sold on the sole account of S. & Co. S. & Co. became bankrupts, and H. & Co. were greatly their creditors. Sir William Grant held that S. & Co., as partners, had a right to pledge the wool as against Tupper, their partner, there being no evidence of collusion and fraud between S. & Co. and H. & Co., and that, as against Tupper & Co., H. & Co. had a right to have their claim satisfied out of the proceeds of the cargo.[1]

So, where Reid & Co. and Davidson & Co. agreed to be jointly interested in an adventure in cottons, for which R. & Co. paid, and D. & Co. having possession of the cotton pledged it to H., who was ignorant of the interest of R. & Co. therein, and afterwards D. & Co. became bankrupts, and H. being their creditor by more than the value of the cotton, refused to deliver it up, the Court of King's Bench held clearly, on the authority of the two preceding cases, that R. & Co. could not maintain trover against H. for the cotton.[2]

But in Ex parte Copeland,[3] doubt was entertained by two of the judges of the Court of Review, as to the power of one partner to

[1] Tupper v. Haythorn, Gow, 135.
[2] Read v. Hollinshead, 4 Barn. & Cres. 199.
[3] 2 Mont. & A. 177; 3 Dea. & Chit. 867; 7 Dowl. & Ryl. 444.

pledge the goods of a joint adventure where the pledgee has notice of the joint interest in the goods. In that case, A, B, and C, being partners in a joint adventure for the shipping and sale of goods, C found the goods, and A and B gave their acceptance to bills drawn upon them by C, which were to be answered by the proceeds of the sales. After the goods had been shipped, C procured discount of the bills, and pledged the goods as a security to the discounter. Upon the bankruptcy of all three, the discounter applied to prove the amount of the bills. It appeared that A and B had ratified the transaction of C, and that there were no joint creditors of the three, and on this ground the petitioner was permitted to prove; but Erskine, C. J., said that if the case had rested merely on the letters of C, by which he pledged the goods, he should have thought the case distinguishable from Reid v. Hollinshead, because there the partner who created the lien had the possession of the goods and had an apparent right to deal with them as his own, and the receiver had no notice of the interest of other parties, and therefore it was decided the partner might pledge the goods, and bind not only his own share, but the whole interest. But here, where those circumstances did not occur, if it depended merely on the letter of C, his Honor would have been inclined to doubt the power of one partner in such a transaction to bind the joint property, it being out of the ordinary course of trade. And Rose, J., appears to have thought that, except under the special circumstances of the case, it would have been difficult for C to have bound the whole interest of the partners, though he might have incumbered his own interest.

Power to pledge partnership property.

SEC. 420. Partners in a particular adventure, as well as they who are engaged in general trade, have power (at least with certain limitations) to bind their copartners by pledge or sale of the partnership effects. But care must be taken to distinguish a partnership in a particular adventure from a mere joint purchase or sub-purchase made without any view to a joint sale. In the case of Barton v. Williams,[1] it was decided. There Moon & Co. and Barton & Co. agreed to purchase cottons on their joint account. In pursuance of this agreement, Moon gave orders to his brokers to purchase cottons on his own account, not acquainting them with the joint transaction. The purchases were made and the goods left in the hands of the brokers,

[1] 5 Barn. & Ald. 395.

and Barton & Co. paid Moon & Co. for their share. Before the purchases were completed, the interest of Barton & Co. was known to the brokers. In November, 1818, Moon wishing to borrow 20,000*l.*, he and the brokers, unknown to Barton, pledged the whole of the cotton warrants to the defendants for that sum, which was advanced by the defendants by means of the discount of bills. In February, 1819, by consent of all parties, the cottons were divided between Barton & Co. and Moon & Co., according to their respective shares. In March following, Moon paid off half the 20,000*l.* by the produce of the cottons, and gave renewed bills for the other half. On that occasion the brokers received the warrants from the defendants and divided them, returning to the defendants, as a security for the renewed bills, the warrants of the plaintiffs, Barton & Co., and retaining the warrants of Moon. Throughout the transaction no notice was given to the defendants of the interests which the plaintiffs had in the cottons. The court held clearly that the plaintiffs might maintain their action of trover for the value of the warrants so pledged. There were two grounds on which to rest their decision, and they chose that upon which it was the most difficult to raise a question, namely: that upon the partition being made between the plaintiffs and Moon, the tenancy in common was determined; that the second pledge, therefore, was not of an undivided moiety, but a specific chattel, of which the property was at that time vested in the plaintiffs, and made by a person having no authority to pledge. But they likewise held, without hesitation, that at the time of the original pledge, Moon & Co. and the plaintiffs were not *partners* with reference to the goods, but *part-owners*, each of them being entitled to an undivided moiety. That Moon & Co., taking upon themselves to pledge the whole, the legal operation of such pledge would be to give the pawnee no better title than Moon & Co. had, which would be an undivided moiety. Therefore, that even if there had been no partition, the sale was a conversion of the undivided interest, and consequently that trover would be maintainable.

Of liabilities under bills of exchange and promissory notes negotiated in the name of the firm.

SEC. 421. If a partner in trade draw, accept, or indorse a bill of exchange in the name of the firm, or if he give a promissory note in the name of the firm, such a bill or note will be binding on the firm jointly in the hands of a *bona fide*, holder.[1] The

[1] Pinkney v. Hall, Salk. 126; S. C., Lord Raymond, 176; Anon., Styles, 370; Smith v. Trivas, 2 Lord Raymond, 1484; Harrison v. Jackson, 7 T. R. 207; Smith

power of one partner, in this as in other contracts, is implied by law, no express authority from his copartner being necessary for that purpose; and in the case of bills of exchange, it exists by the custom of England. Thus, P., a partner in the house of Lewis & Potter in London, and also in the house of Gregory & Potter in America, in order to accommodate the former house, directed the clerk of that house to draw a bill in the name of Gregory & Potter. The bill, though drawn in London, was dated at Boston. It was accepted by another clerk of the London house the moment it was drawn. In an action by the indorsees against the drawers, the American partner was held liable.[1]

Power not confined to general partners.

SEC. 422. The power of binding by bill of exchange is not confined to general partners; it has been laid down that one of several *adventurers* will be bound by the indorsement and acceptance of the other.[2]

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v. Bailey, 11 Mod. 401; Swan v. Steele, 7 East, 200; B. N. P. 279; as to the effect of a *bankrupt* partner's acceptance in the name of the firm. Even though the note was given for the payment of his private debt, or other purpose outside the scope of the partnership business. Mechanics' Bank v. Foster, 29 How. Pr. (N. Y.) 408; Munroe v. Cooper, 5 Pick. (Mass.) 412; Hayward v. French, 12 Gray (Mass.), 453; Pohlman v. Taylor, 75 Penn. St. 629; Blodgett v. Weed, 119 Mass. 215.

[1] Sutton v. Gregory, 2 Peake, 150.

[2] Davidson v. Robertson, 3 Dow. 229. Whether the partnership is general or special, in order to bind the firm by a note or for any purpose, the act must be one done within the scope of the partnership business, and within the scope of his real or apparent authority. Each partner is the agent of the other to sign the partnership name to notes given within the scope of the partnership business, but not to sign the firm name to notes relating to business outside of the scope of the partnership. Zuel v. Bowen, 78 Ill. 234; Blodgett v. Weed, 119 Mass. 215; S. P., Nat. Union Bank v. Landon, 66 Barb. (N. Y.) 189. Two persons were partners in the milling business, one owning the mill, and the other furnishing the money for carrying on the business, but having no interest in the mill. The former, without the knowledge, consent, or ratification of the latter, gave the firm note to a third person for a lightning-rod put on the mill. These facts being proved on a trial of an action on the note against the makers, wherein the partner who furnished the money answered under oath denying the execution of the note, it was held that there could be no recovery thereon against him, the transaction not being one within the scope of the ordinary affairs of the partnership. Graves v. Kellenberger, 51 Ind. 66. Each partner has the same right to raise money for the use of the firm by indorsement of negotiable paper as to do so by means of paper already issued. The public would not be affected by any private restriction on the power of each partner. Moorehead v. Gilmore, 77 Penn. St. 118. One partner in a non-trading partnership cannot bind his copartner by a bill or note, drawn, accepted, or indorsed by him in the firm name, even though it be for a debt of the firm, unless either he has express authority therefor from his copartner, or the giving of such instruments is necessary to the carrying on of the partnership business, or is usual in similar partnerships, and the burden is upon the party suing on such note or bill to prove such authority, necessity, or usage. Smith v. Sloan, 37 Wis. 285. See Prince v. Crawford, 50 Miss. 344. The question whether one partner can bind another by a note, bill or indorsement, will depend entirely upon the nature and character of the business in which the firm is engaged, and the usages incident thereto. Thus agricultural partners whose business merely relates to the carrying on of a farm, have no such author-

This, however, is to be received with some limitation, for in adventures, conducted by a joint-stock company, the power of the adventurers to bind each other by bills of exchange is not co-extensive with the power of ordinary partners.[1] Neither does the right of one partner to bind the firm by bill exist in certain partnerships of a particular nature. Thus, it has been laid down by a learned judge that one of several persons jointly interested in a farm has no power to bind the others by drawing or accepting bills, because such a practice is not necessary for carrying on the farming business.[2] And the same observation will apply to partnerships in mines, and to other partnerships, where bills of exchange are neither usual nor necessary for conducting the partnership business; but the mere circumstance that the business consists in making profits out of real estate, as in working a stone quarry, will not take the case out of the operation of the general rule.[3]

Absence of the name of a partner does not defeat his liability.

SEC. 423. A partner may be liable in an action on a bill of exchange negotiated in the name of the firm although his own name individu-

ity. Kember v. Bullett, 22 How. (U. S.) 267; Greensdale v. Dower, 1 M. & R. 641; Unquerhart v. Powell, 54 Ga. 29. So it has been held that the agent of a mining company cannot issue a negotiable note in the name of the company. Thus in Skillman v. Lachman, 23 Cal. 207, the general agent of the company gave a note signed "H. P. Sprout, for Gold Hill Mining Co." The court held that the members of the firm, in the absence of express authority given to the agent to issue the note, were not liable, following the rule adopted in Dickinson v. Valpy, 10 B. & C. 140. So it has been held, one partner of a firm of attorneys. Foster v. Mackreth, 2 Exch. 166; Hidley v. Bainbridge, 2 G. & D. 483; Breckenridge v. Shrieve, 4 Dana (Ky.), 378; or physicians, Crossthwaite v. Ross, 1 Humph. (Tenn.) 30; carpenters, Brown v. Robinson, 6 La. An. 423; in a saw mill, Lanier v. McCabe, 2 Fla. 32; or other business not amounting to a commercial partnership, Lyon v. Hancock, 35 Cal. 272, are not, in the absence of authority, express or implied, liable upon a bill or note drawn by one member of the firm. But in all cases, if the *manner* in which the business is to be conducted is such as to imply such a power, it will be implied, and in all cases, where the partnership is admitted, whatever may be the nature of the business, the defendants take the burden of showing that the note or bill was made without authority. Holmes v. Porter, 39 Me. 157; Ex parte Bonbonus, 8 Ves. 540; Doty v. Bates, 2 Johns. (N. Y.) 546; Vallett v. Parker, 6 Wend. (N. Y.) 617. In all such cases the firm is liable if it expressly authorized the act, or expressly or impliedly ratified it afterward. Falkland's Exrs. v. Cheyney, 1 Bro. C. P. 90. In the case of non-commercial firms, persons are bound to inquire as to the actual powers of a partner. Thus in Cocke v. Branch Bank of Mobile, 3 Ala. 175, the plaintiff gave in evidence a note for four thousand six hundred and nine dollars, signed J. F. & W. Cocke, payable to Lea & Langdon, who indorsed it to the plaintiff. The firm of J. F. & W. Cocke carried on the business of tavern-keepers as partners. The note was signed by one of the partners, in the firm name, for the accommodation of Lea & Langdon, without the knowledge of the other partners. Held, that tavern-keepers are not merchants, and have no authority to issue commercial paper so as to bind the firm, unless for the partnership business; held, also, the bank, receiving the note in liquidation, was bound to inquire into the authority of the partners.

[1] *Post*, Book 5, chap. 1, sec. 3.

[2] D. Littledale, J., 10 Barn. & Cres. 138. See D. Parke, J., S. C.; D. Holroyd, J., 7 Barn. & Cres. 639, and D. Bolland, B., 2 C. & J. 435.

[3] Thicknesse v. Bromilow, 2 C. & J. 425.

ally is not used in the firm, and therefore does not appear on the instrument. This may happen either when a partnership, consisting of several members, or of minor partnerships, is conducted in the general name and style of A & Co, or A & B; or else, when it is conducted in the particular name of A only.[1] Suppose the firm to be

[1] A note given in the name of the firm by one of the partners is, *prima facie*, binding upon all the parties. If the other partners claim it was given for an individual debt, or for an indebtedness created in relation to a matter foreign to the business of the partnership, it devolves upon the partners to show the facts in order to escape liability. Hickman v. Kunkle, 27 Mo. 401; Hamilton v. Summers, 12 B. Monr. (Ky.), and in all cases where one partner executes firm notes in the absence of the other partner, in payment of articles in which the firm is dealing, both partners are liable. Bascom v. Young, 7 Mo. 3. Although one partner cannot bind his copartner in regard to a matter which is exclusively his own, yet the fact of its being his private business must affirmatively appear by some fact known or properly deducible from circumstances which ought to inform a prudent person of the nature of the true character of the transaction. The legal presumption is, that a partnership note was given or indorsed on partnership business. Manning, Stimpson & Co. v. Hays, 7 Md. 9; Thurston v. Lloyd, 4 Miller (Md.), 288. Where a bill is drawn by a partnership in favor of a creditor of the firm, upon another firm, and is accepted by the firm drawn upon, by a partner thereof, who is a member of the drawing firm, it cannot be inferred from these facts alone that the purpose of the parties, or the effect of the transaction, is to subject the funds of the accepting firm to payment of the debt. The acceptance is, *prima facie*, on partnership account. If evidence is given that the draft was accepted by one partner, to pay his individual debt, without the knowledge or consent of his copartner, a different result will be produced, the *prima facie* evidence being rebutted. Tutt v. Addams, 24 Mo. 191. Where one partner gives a single bill, in his own name, on a purchase of goods in his own name, which is not paid, and new notes are given in the name of the firm for the amount, held, these notes are valid as partnership obligations. Davidson v. Kelly, 1 Md. 501. A promissory note made in the partnership name is, *prima facie*, binding. Those who desire to impeach it must produce evidence to destroy the *prima facie* case. Jones v. Rives, 3 Ala. (N. S.) 13. The existence of a partnership is a question of fact for the jury to decide. The fact that the parties conducted a smithing business together is *prima facie* evidence of a copartnership. Where a note is given by one of the partners in the firm name it is *prima facie* binding on the firm, although it may be shown by evidence that it was not given for partnership purposes. McMullan v. Mackenzie, 2 Iowa, 369. Where an administrator, who is a member of a copartnership, applies to the partnership concerns money which belongs to the estate of his intestate, and afterward gives the note of the firm to a creditor of the intestate to whom such money was due in discharge of such creditor's claims on the estate, the firm is bound to pay the note, although the money was not in the hands of the firm when the note was given. Richardson v. French, 4 Metc. (Mass.) 577. *Prima facie*, a note made in the name of the firm is binding on the firm. But where it is shown the only consideration for the note is the discharge of the individual debt of one of the partners, the legal presumption is rebutted, and in order to recover against the other partner, the holder must show the note was executed with the assent of the other partners, or that they subsequently ratified the transaction. Robinson v. Aldridge, 34 Miss. 356. Where the ostensible partner, in whose name alone the business was transacted, borrowed three thousand dollars, representing it to be for the use of the business, and that other parties who were dormant partners were abundantly able to meet any engagements, held that a note, given in the individual name of the maker *prima facie* only, binds the maker, but if at the time of making the loan representations are made to the lender that the money is for the use of the firm which does business in the name of an individual, the note will be binding on the firm. Etheridge v. Binney, 9 Pick. (Mass.) 272.

that of A & Co, or A & B, and a bill is drawn, indorsed, or accepted in the name of the firm. In this case, it is evident from the instrument itself that a *partnership* name is pledged. Now, it has been clearly decided on various occasions, and emphatically laid down in a modern case, that, where a partnership name is pledged, the partnership, of whomsoever it may consist, and whether the partners are named or not, and whether they are known or secret partners, will be bound, unless the title of the person who seeks to charge them can be impeached.[1] In Baker v. Charlton,[2] an action of *assumpsit* was brought on a bill of exchange by the indorsees against one of the drawers, the others having become bankrupt. The bill was drawn in the firm of "James King & Co.," under which firm the defendant and his partners had traded. It also appeared that there were other partnerships carried on under the firm of "James King & Co.," in which the other drawers were concerned, but in which the defendant had no share. The defendant offered to show that this bill was not drawn on account of the partnership in which he was concerned, but on account of one of the others, and that he knew nothing of it. But Lord Kenyon was of opinion that the defendant was nevertheless liable; he had traded with the other partners under that firm, and persons taking bills under it, though without his knowledge, had a right to look to him for payment. The plaintiffs obtained a verdict.

In the case of M'Nair v. Fleming,[3] this doctrine was carried still further, for there the several partnerships did not trade *generally* under one name, but they conducted a particular business apart from their general trade, in respect of which they negotiated bills under one name, which name was that of one of the firms, and not of all the firms collectively. The facts were shortly these: A partnership under the firm of Hugh Mathie & Co., carried on trade at Greenock. Another branch of trade was undertaken by Mathie & Fleming to Nassau in New Providence, Fleming having no share in the partnership of H. Mathie & Co. The Nassau trade was carried on at Greenock by Hugh Mathie & Co., without any distinction; in Nassau by one Home, and at London by A. Fleming & Co. Mathie kept separate accounts for

[1] Per Bayley, B., 1 Cromp. & Jerv. 318; but in Jones v. Hunter, Danson & Lloyd, 214, where A, B and C, partners, were sued as acceptors by an indorsee, Lord Tenterden seemed inclined to admit evidence to show that C was not engaged in the India business, on which account the bill was drawn. The evidence was rejected for reasons unconnected with this point. *Quere*, whether the indorsee had not notice of the circumstances under which the bill was drawn.

[2] 1 Peake, 111.

[3] 2 Bell's Comm. 672; Mont. Partn. 37; see D. Lord Eldon, 3 Dow. 229.

the concern, distinguished by the letters N. C. for Nassau concern, and those accounts were clear. Certain bills had been discounted at the branch of the Bank of Scotland in Greenock, having the firm of H. Mathie & Co. subscribed to them, and no explanation was required or given at the time they were so discounted. H. Mathie & Co. failed, and M'Nair, as agent for the bank, on the ground of his having relied on Fleming's credit as included in the firm, made his demand against him. A proof was taken, and the Court of Session was satisfied that Fleming was not a general partner with H. Mathie & Co., but that bills having formerly been discounted under that firm for the use of the Nassau concern, and sanctioned by Fleming, a credit was raised, entitling bill-holders to rely on his credit; and on that ground the court held Fleming liable. Upon appeal to the House of Lords the general principle of this decision was confirmed; but they considered it to be still a question whether M'Nair, by proving his debt and receiving a dividend under the sequestration against Mathie & Co., had not barred himself of all further remedy, and according to an opinion, given by Sir Samuel Romilly, they expressly reserved to the defendant the benefit of that defense. The same learned person adds: "The House of Lords was (as I understood that decision) of opinion that where several partnerships, consisting of different individuals, carry on business under the same firm, and enter into negotiable securities under the same signature, the holder of such securities has a right to select which of those partnerships he chooses for his debtors; but it never, as I conceive, entered into the minds of any of the Lords that he could take all the partnership as his debtors."

The case of M'Nair v. Fleming is, in many of its circumstances, similar to that of Baker v. Charlton, and it has therefore been thought right to state the two cases consecutively. But perhaps the decision of most practical importance upon this subject is that of Swan v. Steele.[1] Wood and Payne carried on business as wholesale grocers under the firm name of Wood & Payne, and Wood, Payne and Steele carried on business as cotton merchants under the same firm of Wood & Payne. Steele was never interested in the grocery business, and was unknown as a partner in the cotton trade. The plaintiff sold to Wood & Payne, as grocers, a quantity of sugar, for which they gave their acceptance. Being unable to provide for this acceptance when due, Wood & Payne, without the knowledge of Steele, indorsed to the plaintiffs, in the name of Wood & Payne, a bill drawn by one Maitland, and which they

[1] 7 East, 210; 3 Smith, 199.

had received in payment for some cotton. The question was, whether, in the absence of any fraud on the part of the plaintiffs, Steele was liable in an action on the bill; and the Court of King's Bench held that he was, and that the case was too clear for argument. Lord Ellenborough: "It would be a strange and novel doctrine to hold it necessary for a person receiving a bill of exchange, indorsed by one of several partners, to apply to each of the other partners to know whether he assented to such indorsement, or otherwise that it should be void. There is no doubt that, in the absence of all fraud on the part of the indorsee, such indorsement would bind all the partners. There may be partnerships where none of the existing partners have their names in the firm. Third persons may not know who they are; and yet they are all bound by the acts of any of the partners in the name or firm of the partnership. Now, here the three persons were trading under the firm of Wood & Payne, and in the course of their dealings as partners received the bill in question; and it was competent to either of them, by his indorsement in the name of the firm, to pass their interest in the bill; and the plaintiffs, ignorant of any fraud at the time, take it by such indorsement from one of the partners; then, if the interest of the plaintiff in the bill were once well vested, no subsequent knowledge that such indorsement was made without the consent of one of the partners will divest it. And it would be highly inconvenient that it should, because, if the plaintiffs had been apprised at the time that the partner who indorsed the bill had no authority to do so, they might have obtained some other security for their demand."

The case of Vere v. Ashby[1] was not so strong in its circumstances, but was decided on the same principles. Ashby and Rowland were partners, trading under the firm of that name. They opened an account in that name with the plaintiffs, who were bankers, and who discounted bills for them, carrying the proceeds to that account. A short time after this account had been opened, Shaw joined the partnership of Ashby & Rowland, but the business of the firm was conducted as before. Shaw never appeared in the business, nor was he introduced or known to the plaintiffs, nor even to the clerks of the partnership, as a partner; moreover, he was abroad from the commencement of the partnership until about the time of its dissolution. During the period of Shaw's partnership, Rowland indorsed two bills in the firm of Ashby & Rowland, to the plaintiffs, who discounted

[1] 10 Barn. & Cress. 288; Lloyd & Welsby, 20.

them, and carried the proceeds, as usual, to the account of Ashby & Rowland. The plaintiffs were not aware that the money raised by these bills was intended to be applied to other than partnership purposes. At the dissolution of the partnership, and not before, the plaintiffs ascertained that Shaw had an interest in the firm. In an action against Ashby, Rowland and Shaw, as indorsers of these bills of exchange, a question being raised as to the liability of Shaw, the Court of King's Bench held that he was clearly liable.

The same principles apply to *acceptances*. In the case of Lloyd v Ashby,[1] Ashby, Rowland and Osborne were partners under the firm of Ashby & Co. In May, Osborne left the partnership, which was thenceforth carried on in the name of Ashby & Rowland. In June, Shaw entered the firm as a dormant partner. In July, the plaintiff supplied goods to Hugh Rowland, the father of the defendant Rowland, who, in payment of the amount, drew and delivered to the plaintiff a bill payable to the plaintiff's order, and addressed to Ashby & Co. The bill, after delivery to the plaintiff, was accepted by the partner Rowland in the name of Ashby & Rowland. On an action brought against Ashby, Rowland and Shaw, as acceptors, the Court of King's Bench held, notwithstanding the variance between the names to which the bill was addressed, and those in which it was accepted, that the three defendants must be taken to be the persons designated by the acceptance in the name of Ashby & Rowland, and that the acceptance was binding on them all.

[1] 2 Barn. & Adolph. 23. If one partner draws a bill in his individual name, and procures it to be discounted, the party discounting it has no claim upon the other partners, although it be proved the money was used for the benefit of the firm by the partner drawing the bill. Eurly v. Burrough, 15 East, 7. He has no authority to bind his copartners by an acceptance, except in the true name and style of the partnership, so as to bind the other partners. Kirk v. Blurton, 9 M. & W. 283. Where a note is made in a different name from that of the company, it is not to be presumed the note was made with the authority of the firm. It is a question of fact for the jury. Faith v. Richmond, 3 Perry & D. 187. A partner may be liable on a bill accepted in his name alone, by his partner, for partnership purposes, though directed not to the partnership place of business, but to the defendant's own place of business, provided the jury find the partnership business was carried on under the name of the defendant. Stephen v. Reynolds, 2 F. & F. 147. In Farmers' Bank v. Bayliss, 35 Mo. 428, a note was executed by one of a firm in his own name, which the plaintiff discounted. It was discounted on the credit of the maker, not on the credit of the firm. The proceeds were applied by the maker to the benefit of the firm. It was held, no suit could be sustained on the note against the other members of the firm. Whether a suit for money loaned to the firm could have been sustained. Quere? Lessing v. Sulsbacher, 35 Mo. 445. In Cunningham v. Smithson, 11 Leigh (Va.), 50, N. & J. Dick, and W. Davidson were partners in Virginia, carrying on business in the name of Dicks, Moore & Co., W. D. residing in London. S. drew a bill on W. D. alone, but expressed in the body of the bill that it was on account of D. M. & Co.; W. D. wrote a general acceptance. It was held the acceptance was W. D.'s acceptance, and D. & M., not being parties to the bill, were not liable on it.

In the case of Wintle v. Crowther,[1] Crowther & Combes carried on the business of coal merchants at Bristol, Combes being a secret partner, residing at Newport; Crowther also carried on the business of a slop-seller at Bristol, on his own separate account. In the latter business, Crowther contracted a separate debt with the plaintiffs, for which they drew on him two bills of exchange, one of which was dishonored. Upon the other bill becoming due, it was delivered, together with the dishonored bill, to Crowther, who instead thereof gave the plaintiffs a bill, accepted in the firm of Crowther & Co., which greatly exceeded the amount of his separate debt. The plaintiffs had likewise in their hands another bill accepted by Crowther & Co. At the time these latter bills were taken by the plaintiffs, they knew nothing of Combes, and they made no inquiry after him, until long after the bills were due, treating Crowther as if he only were the person bound by the bills. In an action against both Crowther and Combes, as the acceptors of these bills, the plaintiffs recovered a verdict, which the Court of Exchequer permitted to stand, subject to the deduction of the amount of Crowther's separate debt.

Even if the bill be accepted in the name of one partner only, and not in that of the firm, yet, if the bill be addressed to the firm, all the members of it, whether dormant or not, will be bound by such acceptance, for, as Lord Ellenborough said, "The acceptor must be understood to exercise his power to bind his copartners, and to accept the bill according to the terms in which it is drawn."[2] Two cases had been decided in conformity with this doctrine. In Wells v. Masterman,[3] an action of *assumpsit* was brought on two bills of exchange drawn by the plaintiffs on the defendant, by the style of James Masterman & Co., accepted by James Masterman only, without the words "& Co." James Masterman carried on a separate trade, and the plaintiff had had dealings with him before his partnership, but he also had dealings with the partnership, and there was nothing to show any fraud on the part of the plaintiff. Lord Kenyon held that all the firm were liable, observing, that, "if a bill is drawn upon the partnership in their usual style and firm, and it is accepted by one of the partners, it certainly binds the partnership to the payment of it." So, where a bill was drawn on Messrs. R. & Co., and R. accepted it thus: "Accepted, T. R." Lord Ellenborough said, "The partners are bound by this acceptance. It would have been enough

[1] 1 Cromp. & Jerv. 316; 1 Tyr. 210. [2] 1 Camp. 384. [3] 2 Esp. 731.

if the word 'accepted' had been written on the bill, and the effect cannot be altered by adding 'T. R.'"[1]

Suppose the partnership to be conducted in the name of an individual partner, as A, and that a bill is drawn, indorsed, or accepted in the name of A. In this case it does not appear by the instrument that a partnership name is pledged; therefore if A and B be the partners, carrying on trade under the firm of A, and an action is brought against A and B, on a bill drawn by A, the plaintiff must be prepared to show that A drew the bill, not as A, but as A and B. In Ex parte Bolitho,[2] Peter Blackburn was a secret partner with Isaac Blackburn, in the business of ship-builder at Plymouth, and likewise carried on a separate trade as general merchant in his own name, in London. Isaac kept a banking account in his own name at Plymouth; Peter kept a banking account in his own name with Down & Co., in London. Isaac drew bills in his own name upon his correspondents in London in favor of himself. These bills he indorsed, and when the bills were accepted, Peter was in the habit of discounting them with Messrs. Down & Co., and when the bills were so discounted, Peter also indorsed them with his own name. The question was, whether Down & Co. were joint creditors of the two Blackburns, it being contended on the one hand that the bills were drawn and the money raised for the accommodation of Peter Blackburn's separate trade; and on the other, that Down & Co. supposed that the money to be raised by the bills was to be applied to partnership purposes, and that, as the bills were drawn in the name under which the partnership was carried on, the holder had a demand upon the partnership by force of the contract. Lord Eldon directed issues to try whether the bankrupts were jointly liable upon all or any of the bills, and whether they were jointly liable as for moneys lent and advanced.

In the South Carolina Bank v. Case,[3] it appeared that the business of the house of Crowder, Clough & Co., was carried on in England in that name, but that, in the United States, all the partnership business was transacted in the name of J. B. Clough alone. He had no individual business whatever, and the name of J. B. Clough was never used by him in trade, or in drawing, indorsing, or accepting, or negotiating bills of exchange, except for the benefit and on account of the partnership. The Court of King's Bench held that J. B. Clough was to be considered as the name of the firm for the purposes

[1] Mason v. Rumsey, 4 Camp. 384; Dolman v. Orchard, 2 Car. & P. 104.

[2] Buck, 100.

[3] 8 B. & C. 427.

of business in America, and consequently that he and the bankrupts were liable as indorsers of the bills, which were the subject of the issue in that case.

It has even been held that the indorsement of a bill by one partner, although not in the name of the firm, will nevertheless be binding on the firm, if it be proved that there has been a habit of so indorsing their bills. In a case where the declaration stated that a bill of exchange was indorsed by certain persons trading under the firm of H. & F., by procuration of A, it was held that this allegation was supported by evidence that there had formerly been a firm of H. & F.; that this firm was afterward changed to that of H. & Co., in which A was a partner, but in which there was no person of the name of F.; that A indorsed the bill in question; and that he, being managing partner of a firm which transacted all other business under the name of H. & Co., was in the habit of indorsing bills in the firm of H. & F.[1]

However, the general rule is that if a bill be drawn upon or indorsed in the name of A only, and the partnership firm is that of A & B, then, although the contract, in respect of which the bill is given, may in fact be a joint contract, still the firm will not be liable on *the bill*, because the bill, on the face of it, imports a several contract. In a case of this nature, the names of the other partners cannot be supplied by intendment.[2]

Firm bound by note drawn by one partner in the firm name or in their name.

SEC. 424. It has been observed that the firm are bound by *notes* drawn by one partner in their name. There are some cases where, from the form of the instrument, one partner may, and the other may not be individually liable on the note, and yet the firm are *jointly* liable. Thus, where A, B, and C are partners, and a note is drawn by A in this form:—"December 16th, 1805. Sixty days after date, I pay Lord Viscount G. or order, 200*l.*, value received. For A, B, and C.—A;" such a note binds the firm of A, B, and C; though it should seem that only A can be sued upon it separately, because, on the face of the instrument at least, his is the only separate contract.[3] So, in a case where the persons in whose names the note was

[1] Williamson v. Johnson, 2 Dowl. & Ryl. 281; 1 Barn. & Cres. 146.

[2] See *post*.

[3] Lord Galway v. Matthew, 1 Camp. 403; and see Clark v. Blackstock, Holt, 474; March v. Ward, 1 Peake, 131; Wilks v. Back, 2 East, 142. See the next note. The question in all such cases is, whether the note was *intended* to bind the firm. Kinsman v. Dallam, 5 T. B. Monr. (Ky.) 384. Thus, a note as follows: "I promise to pay, etc.," signed

drawn were partners, and the note was in this form :—"I promise to pay the bearer on demand 1*l.*, value received. Southampton, March 24th, 1818. For A, B, and C.—A ;" although it was held clearly, that A might be sued separately on this note, yet there was no question that all might have been sued jointly.[1]

A, B & Co., is binding on the firm. Doty v. Bates, 2 Johns. (N. Y) 544. If the note was in fact given in behalf of the firm, and the credit was not given to the partner signing it, the firm is liable, even though signed in the individual name of one partner only. Holden v. Bloxam, 35 Miss. 381; Hodge v. Eastin, 8 Martin (La.), 403; Bank of So. Carolina v. Case, *ante;* Kenyon v. Williams, 19 Ind. 46; Kendrick v. Tarbell, 27 Vt. 513; Gordon v. Buchanan, 5 Yerg. (Tenn.) 81. The law implies a power in each partner as the general agent of the firm, to do any act *necessary* for the transaction of its business as ordinarily carried on by others engaged in similar trade; but beyond that a person has no right to assume that any partner can go in pledging its credits. Mr. Lindley, vol. 1, p. 193, says: "The consequences of this principle are, 1st. That if an act is done by one partner on behalf of the firm, and it can be said to have been necessary for carrying on the partnership business in the ordinary way, the firm will *prima facie* be liable, although in point of fact the act was not authorized by the other partners; 2d. That if any act is done by one partner on behalf of the firm, and it cannot be said to have been necessary for the carrying on of the partnership business in the ordinary way, the firm will *prima facie* be not liable. In the first case the firm will be liable unless the one partner had in fact no authority to bind the firm, and the person dealing with him was aware of that want of authority; whilst in the second case the firm will not be liable unless an authority to do the act in question, or some ratification of it, can be shown to have been conferred or made by the other partners. See Dickinson v. Valpy, 10 B. & C. 128; and Crellin v. Brook, 14 M. & W. 11. It will be observed that what is necessary to carry on the partnership business in the ordinary way is made the test of authority where no actual authority or ratification can be proved. This is conformable to the most recent and carefully considered decisions; but by adopting it the liability of a firm for the acts of its copartners is not so extensive as non-lawyers sometimes imagine. The act of one partner to bind the firm must be *necessary* for the carrying on of its business: if all that can be said of it is that it was convenient, or that it facilitated the transaction of the business of the firm, that is not sufficient in the absence of evidence of sanction by the other partners. See Brettel v. Williams, 4 Ex. 630. Nor it seems will necessity itself be sufficient if it be an extraordinary necessity. What is necessary for carrying on the business of the firm under ordinary circumstances and in the usual way is the test; and, therefore, in a case where the nature of the business was one in which there was no necessity to borrow money to carry it on under ordinary circumstances and in the ordinary manner, the court held the firm not liable for money borrowed by its agent under extraordinary circumstances, although money was absolutely requisite to save the property of the firm from ruin. See Hawtayne v. Bourne, 7 M. & W. 595; and see Ex parte Chippendale, 4 De G. M. & G. 19. This case is an authority for saying that a power to do what is usual does not include a power to do what is unusual, however urgent; and although in the case referred to the money was not borrowed by a partner, but by a person who was only an agent of the firm, the decision would, it is apprehended, have been the same if he had been a partner. For notwithstanding the fact that every partner is to a certain extent a principal as well as an agent, the liability of his copart-

[1] Hall v. Smith, 1 Barn. & Cres. 407; 2 Dowl. & Ryl. 584. In this case it is said, *arguendo*, that all the parties might have been sued jointly, or any one severally; *sed qu.* On this point, D. Holroyd, J. "It is unnecessary to decide whether the defendant's signature to the note for himself and partners would make the partners severally liable." A note made by one partner, wherein he says, "I promise to pay, etc.," but subscribes the partnership name, is binding on the firm. Doty v. Bates, 11 Johns. (N. Y.) 544.

A note signed by one partner only, "for himself and partners," will satisfy the terms of an act of Parliament, which requires a writing to be signed "with his or their name or names," and will, therefore, be a valid note, and binding on the firm.[1] A joint and several promissory note will not be binding severally on such partners as do not sign it, where it is not subscribed in the name of the firm, but only by the individuals of the firm.[2] If a partner give his copartner his separate note as a security for his moiety of a debt due from the partnership, and the latter, instead of paying the debt, indorse the note over to the creditor, the creditor may sue the former partner on the note without showing for what consideration it was indorsed. In the case of Heywood v. Watson,[3] Morrall and Watson were partners. They obtained

ners for his acts can only be established on the ground of agency. As their agent he has no discretion except within the limits set by them to his authority, and the fact that he is himself, as one of the firm, a principal, does not warrant him in extending those limits, save on his own responsibility. See Ricketts v. Bennett, 4 C. B. 686; and Dickinson v. Valpy, 10 B. & C. 128. The question whether a given act can or cannot be said to be necessary to the transaction of a business in the way in which it is usually carried on, must evidently be determined by the nature of the business and by the practice of persons engaged in it. Evidence on both of these points is therefore necessarily admissible; and, as may readily be conceived, an act which is necessary for the prosecution of one kind of business may be wholly unnecessary for the carrying on of another, in the ordinary way. Consequently, no answer of any value can be given to the abstract question — can one partner bind his firm by such and such an act? unless, having regard to what is usual in business, it can be predicated of the act in question either that it is one without which no business can be carried on, or that it is one which is not necessary for carrying on any business whatever. There are obviously very few acts of which any such assertion can be truly made. The great majority of acts which give rise to doubt are those which are necessary in one business but not in another. Take for example, negotiable instruments: it may be necessary for one member of a firm of bankers to draw, accept, or indorse a bill of exchange on behalf of the firm, and to require that each member should put his name to it would be ridiculous; but it by no means follows, nor is it in fact true, that there is any necessity for one of several solicitors to possess a similar power, for it is no part of the ordinary business of a solicitor to draw, accept, or indorse bills of exchange. The question, therefore, can one partner bind the firm by accepting bills in his name? admits of no general answer. The nature of the business and the practice of those who carry it on (usage or custom of the trade), must be known before any answer can be given."

The firm is not liable for one of its members unless it comes within the scope of his real or apparent power; therefore, in considering the question as to whether a firm is liable for the contract of one of the partners, it is important to bear in mind the distinction between contracts under seal, ordinary contracts, and bills of exchange and promissory notes. We will examine the question first as to

Contracts under seal.—A distinction is taken between deeds and other instruments with respect to the person bound by them. If a deed is executed by an agent in his own name, he and he only can sue or be sued thereon, although the deed may disclose the fact that he is acting for another. Appleton v. Binks, 5 East, 148. Therefore, where a partner or a director covenants that any thing shall be done, he and he only is liable on the covenant, and the firm or company is not bound thereby to the covenantee. Hancock v. Hodgson, 4

[1] Meux v. Humphrey, 8 T. R. 267. [2] Perring v. Hone, 4 Bing. 28. [3] 4 Bing. 496.

permission to overdraw their bankers, and Morrall, as a security for the advances, gave his separate promissory note for 2,000*l.* The defendant, Watson, then gave Morrall a promissory note for 1,000*l.*, to meet Morrall's collateral security given in the note for 2,000*l.*; and to secure to Morrall the repayment of his, Watson's, moiety of the money

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Bing. 269; Hall v. Bainbridge, 1 Man. & Gr. 42. A person who has to execute a deed as an agent, should take care that the deed and the covenants in it are expressed to be made not by him, but by the person intended to be bound. Thus, if A is the principal and B is agent, the deed and covenants should not be expressed to be made by B for A, but by A; and the execution in like manner should be expressed to be made by A by his agent B. Combe's case, 9 Co. 76 b; Wilkes v. Back, 2 East, 141.

Ordinary contracts not under seal.—When a person enters into a contract as the agent of another, the name of that other may be either disclosed or not. If it is disclosed, the contract is treated as that of the principal, and not as that of the agent; Ex parte Hartop, 12 Ves. 352; Russell v. Reece, 2 Car. & Kir. 669; whilst, if it is not disclosed, the contract is considered as that of the agent. But in this last case, the person dealing with the agent can, when he discovers the unknown principal, hold him liable instead of the agent. See Patterson v. Gandasequi, 15 East, 62; Thompson v. Davenport, 9 B. & C. 78. If, therefore, one partner only enters into a written contract, care must be taken in determining whether the contract is confined to him or extends to him and his copartners, not to place too much reliance upon the terms of the contract. For supposing a contract to be entered into by one partner in his own name only, still if in fact he was acting as the agent of the firm, his copartners will be in the position of undisclosed principals, and they will therefore be liable to be sued on the contract, although no allusion is made to them in it. This was expressly decided in the well-known case of Beckham v. Drake, 9 M. & W. 79, and 11 M. & W. 315, overruling Beckham v. Knight, 4 Bing. N. C. 243. There, Drake, Knight & Sturgey were in partnership as type-founders; but Drake was a secret partner. A written agreement relative to the partnership business was entered into between the plaintiff and Knight and Sturgey, and for a breach of this agreement by them the action was brought. Drake's name did not appear in the agreement; he did not sign it; nor when the contract was made was he known to the plaintiff to be a partner. It was nevertheless held that all three partners were liable jointly for a breach of the agreement, inasmuch as the agreement itself was clearly entered into by the firm, and Drake, like any other undisclosed principal, was liable to be sued as soon as his existence was discovered. In conformity with the same principle, if one partner acting in fact for the firm, orders goods, and they are supplied to him, the firm will be liable to pay for them, although no mention was made of his copartners; City of London Gas Light and Coke Co. v. Nicholls, 2 Car. & P. 365; Whitwell v. Perrin, 4 C. B. (N. S.) 412; and their existence was unknown to the seller of the goods. Ruppell v. Roberts, 4 Nev & Man. 31 · Robinson v. Wilkinson, 3 Price, 538; Bottomley v. Nuttall, 5 C. B. (N. S.) 222. So, if A in his own name only underwrites a policy of insurance, but the profit or loss arising from the transaction is to be divided between him and B, both A and B will be liable to the insured. Brett v. Beckwith, 3 Jur. (N. S.) 331, M. R. These cases establish the important proposition that dormant partners are liable for the debts of the firm, notwithstanding their connection with the firm was unknown to its creditors when the debts were contracted. On the other hand, if one partner only is dealt with, and the circumstances are such as to show that he was dealt with as an ordinary individual, and that he was not acting as the agent of the firm, he alone is liable for it. Barton v. Hanson, 2 Taunt. 49. Mr. Collyer treats this as an exception depending on particular custom, but this view is not correct. The law is the same in Scotland; see Jardines v. McFarlane, 3 Ross' L. C. on Com. Law, 575. So, in the ordinary case of an agreement between an author and a

advanced. Morrall never repaid any of the advances, nor answered the note for 2,000*l.*, but indorsed Watson's note to the bankers, and for any thing that appeared at the trial, without consideration. In an action on the note brought by the bankers against Watson, the Court of Common Pleas held clearly that the plaintiffs were entitled

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publisher, to the effect that the latter shall pay for the paper, printing, and other expenses of publication, and that, after reimbursing himself and deducting a commission, the profits shall be divided equally, the author is not liable for the paper or printing which may have been supplied and executed for the publisher. See the Scotch case of Venables v. Wood, 3 Ross' L. C. on Com. Law, 529; Wilson v. Whitehead, 10 M. & W. 503; but see Gardiner v. Childs, 8 C. & P. 345. With respect to contracts in writing, it is to be observed that it is often a matter of difficulty to determine whether a particular contract is entered into by the firm through one of the partners or by that one partner only. There is nothing to prevent one person from entering into a contract *as a principal*, and yet for and on behalf of another; see, in addition to the cases cited hereafter, Tanner v. Christian, 4 E. & B. 591; Cooke v. Wilson, 1 C. B. (N. S.) 153; Parker v. Winlow, 7 E. & B. 942; and when A enters into a contract for B, it may not be easy to say whether it is B or whether it is A who contracts, though for B's benefit. And yet the true answer to this question determines whether B is, or is not, liable on the contract. The cases on this subject relate principally to bills of exchange and promissory notes, to which it is now proposed to pass.

Bills and Notes.—Although an ordinary contract not under seal, entered into by an agent for an undisclosed principal, is binding on that principal when discovered, and he can be sued upon it, the same rule does not apply to bills of exchange and promissory notes. For, subject to the qualification that the name of a firm is equivalent to the name of all the persons composing it. Swan v. Steele, 7 East, 10, no person whose name is not on a bill or note, is liable to be sued upon it. Lloyd v. Ashby, 2 C. & P. 138, E. C. L. R. 12; Ducarry v. Gill, 4 C. & P. 121, E. C. L. R. 19; Eastwood v. Bain, 3 H. & N. 738; Nicholson v. Ricketts, 8 W. R. 211. In order, therefore, that a bill or note may be binding on a firm, the name of the firm must be upon it, and if the names of one or more of the partners only are upon it, the others will not be liable to be sued upon the instrument, whatever may be their liability as regards the consideration for which it may have been given. Bottomly v. Nuttall, 5 C. B. (N. S.) 122, E. C. L. R. 35. First, as regards bills having the name of the firm upon them. A bill drawn, indorsed, or accepted in the name of the firm, is considered as bearing the names of *all* the persons who actually or ostensibly compose the firm at the time its name is put to the bill, and consequently all those persons, including as well dormant as *quasi*-partners, may be sued upon the bill. See, as to dormant partners, Swan v. Steel, 7 East, 210; Wintle v. Crowther, 1 Cr. & J. 316; and as to *quasi*-partners, Gurney v. Evans, 3 H. & N. 122. A clerk, who affixes the name of the firm, is not liable on the bill. Wilson v. Barthrop, 2 M. & W. 863. And not only so, but if there are two firms with one name, and some persons are partners in both firms, all the members in either firm are liable to be sued upon a bill bearing the common name by any *bona fide* holder for value, without notice that the paper is that of the other firm. In Baker v. Charlton, Peake, 30, two firms carried on business under the name of J. King & Co. The defendant was partner in one of them only, but his copartners were members of both firms. The defendant was sued by an indorsee on a bill drawn by "J. King & Co." The defendant resisted the action on the ground that the bill was not drawn by the firm to which he belonged, but by the other, but Lord Kenyon declared the defense invalid. Having traded with persons under the style of "J. King & Co.," the defendant was liable on bills drawn by them in that name. In Swan v. Steele, 7 East, 210, there were two firms of Wood & Payne. The defendant, Steele, was a partner in one of them only. A bill was indorsed in the name of "Wood & Payne" by Steele's copartners, for a debt owing to the plaintiff by the firm to which Steele did not belong. Steele was nevertheless held liable on this bill, the plaintiff

to recover. It did not appear, they said, that the plaintiffs knew of the circumstances under which the note was originally given, and even if they did, it was by no means clear that those circumstances would have furnished a defence to the action. It might have been different if Murrell had *deposited* the note with the bankers.

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being a bona fide holder for value, without notice that any fraud on Steele was being committed. In this case the bill was properly indorsed "Wood & Payne," and the only question was, who constituted that firm? Steele was not a member of it, though he was of another firm of the same name, and consisting of himself and those who constituted the firm by whom the bill was indorsed. Lord Ellenborough, however, held Steele's liability to be too clear for argument, and treated the case as if Steele had been a member of the indorsing firm, and as if his copartners in that firm had been guilty of a fraud on him, of which the plaintiffs had no notice. Had so these decisions seem to be, they are not open to dispute in point of authority, having been approved and acted on by the House of Lords. Davidson v. Robertson, 3 Dow. 226; McNair v. Fleming, 1 Mont. Part. 47, and 3 Bowl. 229. Their principle applies where the name of the firm is that of an actual individual. By the law of this country there is nothing to prevent any person from carrying on business under such names as A & Co., A & B, A, B, C & Co., etc. On the other hand, there is nothing to prevent a firm from carrying on business under the name of one individual, and if it can be shown that an individual allows his name to be used by a firm, and the firm uses it as its own, either always or only occasionally, and for some purposes, paper bearing the name in question may be treated by any *bona fide* holder for value, without notice whose paper it really is, either as the paper of the firm or as that of the individual whose name is used. Siebel Canadian Bank v. Case, 6 B. & C. 427; Ex parte Law, 3 Deac. 341. Secondly, as regards bills not drawn, accepted, or indorsed by the firm in proper form, in the absence of evidence to the contrary, a partner has no authority to use for partnership purposes any other name than the name of the firm. Kirk v. Burton, 9 M. & W. 304; Hamilton v. Hill and London Fire Ins. Co., 3 H. & N. 789; Stephens v. Reynolds, 1 Fox. & Fin. 739, and if he does, and there is any substantial variation which cannot be shown to be authorized by his copartners, the firm will not be liable. If, however, there is no substantial variation, the firm will be bound. In Fuch v. Richmond, 11 A. & E. 351, persons carrying business in partnership under the name of The Newcastle and Sunderland Wallsend Coal Company, were held not liable on a note issued in the name of The Newcastle Coal Company, and in Kirk v. Burton, 9 M. & W. 304, where two persons carried on business under the name of John Burton, one of them was held not liable on a bill drawn and indorsed by the other in the name of John Burton & Co. On the other hand, in Norton v. Seymour, 3 C. B. 792, where the name of the firm was Seymour & Ayton, a promissory note signed by one of the partners thus—"Thomas Seymour & Jonas Ayton," was held to bind both. In the above cases of Fuch v. Richmond, and Kirk v. Burton, the name used was not the name of the firm sought to be made liable, nor was there any evidence to show that the firm was in the habit of making use of the name in question. If there had been such evidence the firm would have been liable, for whatever the name used may be, if it is that ordinarily employed by a partner whose business it is to attend to the bills and notes of the firm, the other partners will not be heard to say that such name is not the name of the firm for the purpose for which he has habitually used it. Therefore, where the name of a firm was Hoggard & Co., but the managing partner was in the habit of indorsing bills of the firm in the name of Hoggard & Fowler, which had formerly been the name of the firm, it was held that such indorsement was valid, although the other partners were not shown to have authorized the use of the name in question. Williamson v. Johnson, 1 B. & C. 146. Upon a similar principle, in Wilde v. Keep, 6 Car. & P. 235, one person of the name of Joseph Keep was held liable on a bill accepted by himself in the name of John Keep & Co. Again, although in Fuch v. Richmond and Kirk v. Burton, the firm was held not bound, in consequence of the name of

Debt contracted for, but before partnership is formed good consideration for bill.

SEC. 425. The debt of one of several partners, incurred in respect of the copartnership, but before the completion of the partnership contract, is a sufficient consideration for a bill of exchange given in discharge of such debt by any of the other partners, after the comple-

the firm not being used, those members of the firm who actually made use of the names in question were held liable, for the name used was made theirs by their own act. Upon the same principle, if blank bills are drawn and indorsed by a firm, and before they are negotiated one partner dies and the name of the firm is changed by the surviving partners, and the bills previously drawn and indorsed are then negotiated, these bills will be binding on the new firm, although the name on the bills is that of the old firm and not that of the new. Usher v. Dauncey, 4 Camp. 97. If a change is made in a firm, and by mistake a contract is entered into with it in its old name, the members of the new firm may sue on it, provided the other party is not prejudiced by their so doing. Mitchell v. Lapage, Holt (N. P.) Ca. 253. But see Boulton v. Jones, 2 H. & N. 564. A bill drawn on a firm by a wrong name and accepted in its right name, binds the firm, Lloyd v. Ashby, 2 B. & Ad. 23, as does also a bill drawn on a firm and accepted by one partner in his own name only. Mason v. Rumsey, 1 Camp. 384. In such a case the acceptor may also be sued alone. Owen v. Van Uster, 10 C. B. 318; see Ex parte Harris, 1 Madd. 583. But there is no other case in which a firm is liable on a negotiable instrument made, drawn, or indorsed in the name of one of the partners only, Emly v. Lye, 15 East, 7; Ex parte Bolitho, Buck. 100; Lloyd v. Ashby, 2 C. & P. 138; Williams v. Thomas, 6 Esp. 18, unless indeed his name is the name of the firm. South Carolina Bank v. Case, 8 B. & C. 427. Even a bill drawn on one partner, and accepted by him on behalf of the firm, does not bind the firm, the other partners not being drawees, Nicholls v. Diamond, 9 Ex. 154; Mare v. Charles, 5 E. & B. 978, and on the same principle a bill drawn on the directors of a company, and accepted for the company by its manager and three of its directors, binds the three directors who accept the bill, but no one else. Bult v. Morell, 12 A. & E. 745. *A fortiori*, a bill drawn on the agent of a company, and accepted by him simply in his own name, binds him and not the company. Ducarrey v. Gill, 1 Moo. & M. 450, and 4 C. & P. 121; Thomas v. Bishop, 7 Mod. 189. On the other hand, a bill drawn on a company and accepted by its directors, secretary, or other authorized agent on its behalf or as agent, binds the company and not those who accept the bill, except so far as they are members of the company. See Edwards v. Cameron's Coalbrook Co., 6 Ex. 269; Halford v. Cameron's Coalbrook Co., 16 Q. B. 442, and Eastwood v. Bain, 3 H. & N. 738. But to this last rule there is an exception where the company is a limited company and the word limited is omitted, for then the agent accepting the bill is personally liable. Penrose v. Martyn, 5 Jur. (N. S.) 362, Q. B. This case is now reported in 1 Ell. Bl. & Ell. 499, under the name of Penrose v. Martyr. The following examples illustrate these propositions: In Thomas v. Bishop, 7 Mod. 180, the bill was drawn on John Bishop, Cashier of the York Buildings Company, and was accepted by Bishop in his own name, without reference to the company, and he was held by Lord Hardwicke to be personally liable on the bill. In Serrell v. The Derbyshire, Staffordshire, etc., Railway Company, 9 C. B. 811, a check was drawn on the bankers of a company, and was signed by three directors, and countersigned by the secretary, and on the check was a date stamp, with the name of the company in a circle round the date, but the company was held not liable upon the check, for it did not purport to be a check of the company. The persons who signed the check had not even signed it as directors. In Bult v. Morell, 12 A. & E. 745, the bill was drawn on The Directors of the Imperial Salt and Alkali Company and was accepted for the Imperial Salt and Alkali Company, and signed. Richard Parker, Manager. J. Rainsford, James Parker, Richard Garrett, Directors. The three last-named persons only were held liable on the bill. In Nicholls v. Diamond, 9 Ex. 154, the bill was drawn on "Mr. James Diamond, Purser, West

tion of such contract. A, B, and C were partners in a maritime adventure. A purchased on his own credit, for the adventure, a quantity of copper of the plaintiff S. A having become bankrupt, B and C, considering themselves as partners in the transaction, accepted bills for the amount of the copper. It was held, that although, from the terms of the partnership agreement, the contract of partnership was not complete at the time of the purchase of the copper, and that the purchase having been made by A, S could not sue B and C as his copartners in an action for goods sold and delivered, yet he could sue B and C in an action on the bills. There is no doubt,

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Downs Mining Company," and accepted thus: "James Diamond, accepted *per proc.* West Downs Mining Company." Diamond was held liable on this bill. In Mare v. Charles, 5 E. & B. 978, a bill was drawn on Wm. Charles, for goods supplied to a mine, and was "accepted for the company, Wm. Charles," and this acceptance was held to render Charles solely liable. If a bill is drawn on the firm and is accepted by one partner, although this binds the firm, Mason v. Rumsey, 1 Camp. 384, it also binds the partner accepting the bill who may alone be sued on it. This was held in Owen v. Van Uster, 10 C. B. 318, a bill was drawn on "Allty-Crib Mining Company," and was accepted "*per proc.* The Allty-Crib Mining Company, W. T. Van Uster, London Manager." The company in this case was a mere partnership. Where it was held that Van Uster was personally liable on this bill, he being one of the company on which the bill was drawn, and therefore one of the drawers, and also an acceptor. It appears from these cases that although a bill drawn on and accepted by one partner does not bind the firm, even if he accepts it for the firm, yet that a bill drawn on the firm and accepted by one partner in his own name is binding as well on all the partners jointly, as on the accepting partner separately. But this rule does not apply to incorporated companies so as to render a person liable on a bill who, as the agent and on behalf of the company, accepts a bill drawn on the company by its proper name. Thirdly, as regards promissory notes. With respect to promissory notes, the following rules are deducible from the cases:

1. If a partner promises for himself, and not for himself and copartners, he only is liable on the note, though he may promise to pay a partnership debt. Siffkin v. Walker, 2 Camp. 308; Murray v. Somerville, 2 id. 99, note; and see Ex parte Harris, 1 Madd. 583.

2. If several partners sign a note in this form, "I promise to pay," all who sign the note are liable on it, jointly and severally. Clarke v. Blackstock. Holt's N. P. Ca. 474; March v. Ward, 1 Peake, 177, ed. 3.

3. If one partner promises in the name of the firm to pay that for which he and not the firm is liable, the promise binds him at all events. As an illustration of this, reference may be made to Shipton v. Thornton, 9 A. & E. 314; see, too, Hudson v. Robinson, 4 M. & S. 475. There the defendant, a partner in the house of Thornton & West, was solely liable to the plaintiff for certain freight, and he gave the plaintiff a note in this form: "I hereby engage to pay the amount of freight, etc.

I am, etc., R. & R. THORNTON & WEST." On this note the defendant was held separately liable.

4. One partner has no authority, as such, to bind himself and copartners jointly and severally. Maclae v. Sutherland, 2 E. & B. 1, which shows that a joint and several promissory note is not void as a joint note, though it is not binding, as a several note, on any person who does not sign it. But if some members of a firm make a joint and several promissory note, they will be personally liable, although they may have signed only on behalf of themselves and copartners; and persons signing notes in the following forms have been held liable on them as makers, and not merely incidentally as members of the company to which they belonged:

"We jointly and severally promise to pay, etc., value received, for and on behalf of the Wesleyan Newspaper Association. Parker Story, James Ware, Directors." Healey v. Story, 3 Ex. 3, in which Story and Ware were sued jointly.

"We, the directors of the Royal Bank

said Lord Kenyon, that if this had been an action on the bills, the plaintiff might have recovered; there was a consideration for them; and being in writing, the Statute of Frauds would have been satisfied, though they were promises to pay the debt of another person.[1]

Of liabilities under guaranties given in the name of the firm.

SEC. 426. In Hope v. Cust,[2] Lord Mansfield said: "There is no doubt but that the act of every single partner in a transaction relating to the partnership binds all the others. If one give a letter of credit or guaranty in the name of all the partners, it binds all." On the other hand, Lord Ellenborough laid it down that it is not inci-

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of Australia, for ourselves and other shareholders of this company, jointly and severally promise to pay, etc., value received on account of the company. T. W. Sutherland, J. Connell, M. Boyd, A Duff, Directors." Penkivil v. Connell, 5 Ex. 381, in which Connell only was sued.

5. If a partner promises for himself and copartner, this amounts to a promise by the firm. Smith v. Bailey, 11 Mod. 401; Lane v. Williams, 2 Vern. 277 and 292; Smith v. Jarves, 2 Ld. Raym. 1484. Accordingly the firm has been held liable on notes in the following form: "Sixty days after sight I pay A or order £200, value received, for J. Matthew, T. Whitsmith, T. Smithson, J. Matthew;" Galway v. Matthew, 1 Camp. 403; and contrary to an older decision, Hall v. Smith, 1 B. & C. 407; E. C. L. R. 8, where the form was "I promise to pay —— for A B, C D, and E F, signed A B," and which was held to bind A B separately, the firm has been held liable on notes in the form following:

"*Leicester and Leicestershire Bank.*

"I promise to pay the bearer on demand £5, value received, for John Clarke, Richard Mitchell, Joseph Phillips, Thomas Smith, Richard Mitchell." Ex parte Buckley, 14 M. & W. 469, and 1 Ph. 562; and Ex parte Clarke, De Gex, 153, reversing Ex parte Christie, 3 M. D. & D. 736.

And companies have been held bound by notes in the following forms:

"We, two of the directors of the Ark Life Assurance Society, by and on behalf of the Society, do hereby promise to pay, etc., value received." (Signed by two directors, and sealed with the seal of the company.) Aggs v. Nicholson, 1 H. & N. 165.

"We, directors of the Royal Bank of Australia, for ourselves and other shareholders of the company, jointly and severally promise to pay, etc., for value received, on account of the company. J. W. Sutherland, Chairman; Adam Duff, John Mitchell, Directors; entered, Benjamin Wood, Secretary." Maclae v. Sutherland, 3 E. & B. 1; E. C. L. R. 77, held to be binding on the members of the company jointly.

"We jointly promise to pay, etc., for value received in stock, on account of the London and Birmingham Iron and Hardware Company, limited. James Melrose, G. N. Wood, John Harris, Directors; Edwin Guess, Secretary. Lindus v. Melrose, 2 H. & N. 293, and 3 id. 177, held to bind the company and not the directors signing.

The following instruments have also been held to be promissory notes binding on companies.

"*Sea, Fire, and Life Assurance Society.*

"To the Cashier—Credit A, or order, with the sum of, etc., on account of this corporation. A. Davis, W. Ogilvie, Directors; entered, F. F. A., Accountant." Allen v. The Sea, Fire, and Life Assurance Co., 9 C. B. 574.

UNION BANK POST-BILL.

"At sixty days after sight of this our first bill of exchange (second and third of same tenor and date not paid), we promise to pay, on account of the proprietors of the Union Bank of Calcutta, etc., value received. J. Rennie, W. P. Grant, Directors; H. W. Abbott, Secretary." Forbes v. Marshall, 11 Ex. 166. The above instrument had an acceptance written across it, and might, it seems, have been treated as a bill of exchange. The foregoing is copied from Lindley on Partnership, from pp. 273–284.

[1] Saville v. Robertson, 4 T. R. 720.

[2] 1 East, 48. Upon this subject, see Theobald on Guaranties, 29.

dental to the general power of a partner to bind his copartners by a guaranty.[1] In the case before Lord Ellenborough, the guaranty was signed by one of two partners, in respect of a matter in which it appears that the partnership had no concern. His Lordship therefore held that in order to support an action on such guaranty, it was necessary to give some evidence, beyond the relationship of partners subsisting between them, that the one who signed had authority to bind the other by such an instrument; though for this purpose it would be sufficient to prove a parol acknowledgment from the other partner subsequently to the giving of the guaranty, or to show a previous course of dealing, in which similar guaranties had been given in the partnership firm, with the privity of both partners.[2]

Guaranties must relate to partnership transactions.

SEC. 427. But in cases of this nature the question to be considered is, whether the guaranty can be deemed an *assurance made by one partner with reference to business transacted by both;*[3] for if it can, it will be binding on the firm, whether or not it was assented to by both. Therefore, where A employed B and C, his navy agents, to lay out money in the purchase of an annuity for him, of which, and of the fact of the money being laid out, both were cognizant, but B, unknown to C, guaranteed the punctual payment of the annuity — it was held that C was bound by the engagement of B, both partners being connected with the general transaction.[4] And the court observed that although the negotiation of annuities was out of the regular course of the partnership business, yet under the circumstances it was within the scope of B's authority.

Rule in Ex parte Gardom.

SEC. 428. The case of *Ex parte* Gardom[5] seems to have been decided on somewhat similar principles. Thomas Tapp applied to Gardom to sell him some cotton twist; Gardom desired a reference. Goodwin, of the house of Hargreave & Goodwin, told Gardom that their house would guarantee what twist Gardom might sell to Tapp up to the 1st January, 1808, *as Tapp was manufacturing goods for them;* accordingly, the following engagement was drawn up in writing: "We agree and engage to guarantee for what twist Thomas Tapp may purchase from you from the 28th ult. to 1st January, 1808.—Hargreave

[1] 8 Camp. 478.
[2] Duncan v. Lowndes, 3 Camp. 478. But see Payne v. Ives, 3 Dowl. & Ryl. 664.
[3] See the next section.
[4] Sandilands v. Marsh, 2 Barn. & Ald. 679.
[5] 15 Ves. 286; 2 Hov. Supp. 406.

& Goodwin." This paper was signed by Goodwin. The guaranty was afterward renewed in the same manner, and in similar terms. Sales took place in pursuance of both guaranties. Tapp afterward became a bankrupt, as also did Hargreave & Goodwin. Gardom received a dividend under the commission against Tapp, and petitioned to prove the residue of his demand against Tapp under the commission against Hargreave & Goodwin. The proof was rejected; and one ground alleged for the rejection was that the signature of Goodwin could not bind the partnership. At the hearing, the counsel for the assignee gave up this objection; and per Lord Eldon, "The objection that the partnership was not bound by the signature of one partner is properly given up."

Cannot give guaranty for third persons beyond scope of business.

SEC. 429. In a later case,[1] Lord Eldon, adverting to the subject of guaranty by one partner, observed that he quite agreed that a partner had no right to guarantee a separate transaction at the expense of the other partners, where they were not concerned; but he was at the same time bound by the doctrine of Lord Mansfield to say that a partner might give a guaranty for his partners in a matter relating to the partnership.

If the firm adopt the guaranty of one of the partners, they will be bound by such adoption, although the guaranty may have been given out of the regular line of their business;[2] and it will be for a jury to consider whether or not the firm have adopted the act of their copartner.[3] "If," said Lord Eldon, "they accede to the act of the partner giving the guaranty, it is not the mere circumstance of his having given it, but their having acceded to what he proposed, which constitutes the dealing between them and the parties secured. So, if partners are informed of such a measure having been taken by a person who is a partner, though perhaps not in that particular transaction, yet. inasmuch as it may not easily be known to those who deal with such partner, in what dealings the other partners are and in what they are not interested, and they do not think proper in answer to state whether they authorized such partner so to act or not, it is not too much to take it for granted that they accede to the guaranty which their partner has proposed."[4] But they may give in evidence a disclaimer of the guaranty.[5]

[1] Ex parte Nolte, 2 Glyn & Jam. 306.
[2] Crawford v. Sterling, 4 Esp. 207.
[3] Payne v. Ives, 3 Dowl. & Ryl. 664.
[4] Ex parte Nolte, *supra*.
[5] —— v. Layfield, 1 Salk. 291.

Of liabilities under acts and assurances in general, in the name of the firm.

SEC. 430. Generally, "the act and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners."[1] Hence the acknowledgment, promise or undertaking of one partner with reference to the contracts of the partnership, is the acknowledgment, promise or undertaking of all.[2] In Vicary's case,[3] which was an action of covenant against two, it was held that the affidavit of one of them might be given in evidence as the acknowledgment of both. So, in an action against two as the drawers of a bill, the acknowledgment by one that the bill was drawn by the partnership binds both.[4] Generally, also, an admission made by one of two partners relative to a partnership transaction, whether made before or *after* the dissolution of the partnership, is competent, though not conclusive evidence, to charge the other partner.[5] And where two houses are partners in consignments, the acknowledgment by one house of the receipt and sale of goods is binding on both houses.[6]

Promise by one partner is promise of all.

SEC. 431. It has been decided that the *promise* by one partner to pay a debt as a partnership debt, is a promise by the firm. G, a creditor of M'Neil & Co., was a debtor of Lacy & Wilson, who sued and arrested him. G afterward executed a deed of assignment to Lacy & Wilson, of all the money due to him from M'Neil & Co., and the action against him was discontinued. A written notice of the assignment was sent to Pizey, of the firm of M'Neil & Co., who made no objection to it, but said that "another person had given prior notice of 500*l.*, which he must pay first; but they would pay Lacy & Wilson, after the 500*l.*, as soon as they received the money." He also said, on a subsequent occasion, that "if the people of Chili (meaning the partners in M'Neil's house, resident at Chili) had not paid the money to G, he would pay it; and a notice to Chili would have made no difference." Between the respective times at which Pizey made these promises, the partnership of M'Neil & Co. was dissolved by the retirement of M'Neil. Eventually the money was not paid, whereupon Lacy & Wilson brought an action for money had and received against the partners of M'Neil's house, including M'Neil; and one question was, whether Pizey's promise to

[1] 2 Barn. & Ald. 679.
[2] Wood v. Braddick, 1 Taunt. 104.
[3] Bac. Abr Evidence, 623.
[4] Hodenpyl v. Vingerhoed, Chit. Bills, 381, n., 7th ed.; Gray v. Palmer, 1 Esp. 135.
[5] Wood v. Braddick, *supra*; Pritchard v. Draper, Russ. & Mylne, 199. See 10 Moore, 393.
[6] Cheap v. Cramond, 4 Barn. & Ald. 663.

pay was binding on M'Neil. The court held it to be clear that the promise to pay being made by one partner, for and in the name of the rest, coupled with the declaration, "that a notice to Chili would make no difference," was a perfectly good promise to bind the other partners.[1]

Payment by one is payment for all.

SEC. 432. Payment of principal or interest by one of several partners, on account of a joint debt, will operate as a new promise to pay by all the joint promisors, and be an answer to a plea of the Statute of Limitations.[2] And the 9 Geo. 4, c. 14, does not alter the decisions on this subject. By that statute (reciting the 21 Jac. 1, c. 16, and the Irish act of 10 Car. 1, sess. 2, c. 26, it is enacted, "That in actions of debt, or upon the case grounded upon any simple contract, no acknowledgment, or promise by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby;[3] and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them; Provided, always, that *nothing herein contained shall alter, take away, or lessen the effect of any payment of any principal or interest* made by any person whatsoever."

In case of joint and several notes.

SEC. 433. Under this statute, it is clear that the effect of part payment of principal, or payment of interest by one of several joint debtors, where the proof of payment does not rest on the mere admission of the party, is the same as heretofore;[4] and, therefore, the case of Whitcomb v. Whiting, and others of that class, unless impeached

[1] Lacy v. M'Neil, 4 Dowl. & Ryl. 7.

[2] Pittam v. Foster, 1 Barn. & Cres. 248; 2 Dowl. & Ryl. 363; D. Lord Tenterden, 8 Barn. & Cres. 38.

[3] In an action against A on the joint and several promissory note of himself and B, to take the case out of the Statute of Limitations, it is enough to give in evidence a letter written by A to B, within the six years, desiring him to settle the money. Halliday v. Ward, 3 Camp. 32.

[4] Chippendale v. Thurston, 1 Mood. & Malk. 411; Lloyd & Welsby, 78; Waters v. Tompkins, 2 C., M. & R. 723.

by other authorities, remain in full force, as before the statute. In Whitcomb v. Whiting, the plaintiff brought his several action against the defendant on a joint and several promissory note, executed by the defendant and three others. He proved payment by one of the others, of interest on the note, and part of the principal, within six years. It was contended that the plaintiff, by suing the defendant separately, had treated this note as if it had been signed by the defendant only, and therefore, that the acts of the other parties were clearly not evidence against him. But the Court of King's Bench held the evidence proper, and sufficient to take the case out of the statute, as against the defendant.[1]

Rule in Burleigh v. Stott.

SEC. 434. The case just cited has been the foundation of various modern decisions. Thus in Burleigh v. Stott,[2] A and B gave a joint and several promissory note, in which B was a mere surety; B died. To an action by the payee against the administrator of B, the latter pleaded the Statute of Limitations. It was held a sufficient answer to the plea that within six years of the issuing of the writ, and *during the life-time of B*, A made a payment on account of the note. Again, payment of interest by one of the makers of a joint and several promissory note, though made more than six years after it became due, has been held sufficient to take the case out of the statute, as against the other maker, if living.[3] On the other hand, it has been held at law that, after the death of one maker of a joint and several promissory note, payment of interest by the survivor will not take the case out of the statute as against the executors of the deceased,[4] and, further, that payment of interest by the executor of the deceased will not take it out of the statute as against the survivor.[5] The two cases last referred to proceed upon the legal principle, that by the death of one of several contractors the joint contract is severed. It is apprehended, however, that, in cases like these, courts of equity would relieve against the effect of the doctrine so held at law.[6]

Payment by assignee of drawer—effect of.

SEC. 435. The principles acted upon in the case of Whitcomb v. Whiting were carried still farther in that of Jackson v. Fairbank,[7] where

[1] Dougl. 651; and see Wyatt v. Hodgson, 8 Bing. 309.

[2] 8 Barn. & Cres. 36; 2 Man. & Ryl. 93; and see Perham v. Raynal, 2 Bing. 306; 9 Moore, 566.

[3] Manderston v. Robertson, 4 Man. & Ryl. 440; Channell v. Ditchburn, 5 M. & W. 494.

[4] Atkins v. Treadgold, 2 Barn. & Cres. 23; 3 Dowl. & Ryl. 200.

[5] Slater v. Lawson, 1 Barn. & Adolph. 397.

[6] See 1 Keen, 221.

[7] 2 H. Bl. 240.

it was held that the payment by the assignees of one of two drawers of a joint and several promissory note, of a dividend on account of the note, was an answer to a plea of the statute of limitations by the other drawer, in an action brought against him for the remainder of the money due on the note, such payment having been made within six years of bringing the action. But this decision has been considered to carry the doctrine to its utmost limits. In a more modern case, H. and I. carried on the two distinct trades of general merchants and insurance brokers, but both under the firm of H. & Co. W. was a partner in one-fourth of the insurance business only. O. & Co. being indebted to the insurance house, the latter drew a bill on O. & Co., which was accepted and indorsed by H. to the plaintiffs. Before the bill became due, O. & Co. became bankrupts. A commission of bankrupt likewise issued against H. and I., under which the joint estate of the mercantile house of H. & Co. was applied, and the plaintiffs proved a debt and received a dividend, beyond the amount of the bill, in respect of goods sold and delivered to the mercantile house, at the same time exhibiting the bill as their security. The plaintiffs having ascertained the partnership of W., brought an action againt him on the bill, to which he pleaded the statute of limitations, and the plea was held good, although the dividend under the bankruptcy of H. and I. had been paid within six years.[1] Again, A and B made a joint promissory note, ten years after the date of which B executed an assignment of his property in trust for his creditors, under which a dividend was paid to the holder of the note. It was held that the payment of the dividend under B's assignment, being after the statute of limitations had run, did not revive the debt as against A so as to enable the holder to prove on the note under the *fiat* against A.[2] It is extremely difficult, however, to reconcile this last-mentioned case with that of Channell v. Ditchburn.[3]

Distinction between admission of simple and joint debtor.

SEC. 436. It is to be borne in mind that the stat. 9 Geo. 4, c. 14, does not prohibit or qualify the ordinary mode of legal proof of payment, but only qualifies the effect of admission. In the case of a simple debtor, his mere admission will be sufficient to take the case out of the statute of limitations against him, provided the admission be in writing. In the case of joint debtors no mere admission,

[1] Brandram v. Wharton, 1 Barn. & Ald. 463.

[2] Ex parte Woodward, 3 Deac. 294; 3 Mont. & A. 615.

[3] 5 M. & W. 489.

whether oral or written, by one, will take the case out of the statute, as against the others. But, in both cases, positive proof of payment, independent of admission, will be sufficient.[1]

Admission by one, operative as to him.

SEC. 437. A promise in writing by one of several joint contractors to pay his proportion of the joint debt will take the case out of the statute as against the promisor to the extent of that proportion, and it is not necessary that the amount of the proportion should be specified in writing.[2]

Part payment by one partner—effect of.

SEC. 438. As part payment of a debt takes the case out of the statute, by operating as a fresh promise, it follows that if a debtor gives a bill in part satisfaction of his debt, the question, whether the debt is barred or not by the statute, will depend on the time when the bill was drawn or accepted, and not when it was paid. Hence, where A and B, joint owners of a ship, having contracted a debt for repairs in 1823, drew a bill in part satisfaction of that debt, which bill was not paid till 1827, and in 1830 the creditor brought his action for the sum remaining due for repairs, it was held that the part payment, which had been made by means of the bill, did not take the case out of the statute.[3]

Effect of the undertaking of one partner as to partnership transactions.

SEC. 439. Again, one partner will be liable in respect of the particular *undertakings* of his copartner, made with reference to business transacted by the firm. Thus, in an action on the case,[4] for money

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[1] Waters v. Tompkins, 2 C. M. & R. 723; 1 Tyr. & G. 137.

[2] Lechmere v. Fletcher, 1 C. & M. 623; Dickenson v. Hatfield, 2 M. & M. 141.

[3] Gowan v. Forster, 3 B. & Ad. 507.

[4] —— v. Layfield, 1 Salk. 201. See De Tastet v. Carrol, 1 Stark. 88.

Each partner has a complete control over the partnership effects, with the power of disposing of them for the purposes of the copartnership, whether they consist of ships or other property; and the sale will bind the whole copartnership as effectually as if each member acted. Quiner v. Marblehead Ins. Co., 10 Mass. 476; Lamb v. Durant, 12 id. 54; United States Bank v. Binney, 5 Mas. (U. S.) 176. Thus one partner may transfer or assign a chose in action, or a debt due to the partnership, or any other partnership effects, so far as the same can be transferred or assigned in law. Quiner v. Marblehead Ins. Co., 10 Mass. 476; Lamb v. Durant, 12 id. 54. So he has a right to bind the firm to any extent in contracts for the use of the partnership. Manuf. and Mech. Bank v. Gore, 15 Mass. 75; Boardman v. Gore, id. 331; Galloway v. Hughes, 1 Bailey (U. S.), 553; Winship v. Bank of United States, 5 Pet. (S. C.) 529; Storer v. Hinkley, Kirby (Conn.), 147. Where one of the members of the partnership for a particular business does an act on account of the firm, *prima facie* not within the scope of his authority, evidence is admissible to show that, in the exercise of good faith and reasonable discretion, he was warranted in so doing by the course pursued by the firm in the management of their business, and that so the other partners were responsible for his act. Wood-

had and received to the plaintiff's use, it appeared upon evidence that Layfield and the other defendants were bankers and partners, and that the plaintiff had given Layfield 20*s.*, for which he received a ticket in the double exchange lottery, and Layfield undertook to pay what benefit should happen thereupon; that the ticket came up a 40*l.* benefit, and for that money the action was brought; and it was objected for the defendants that the action was brought against Layfield and his partners, and it did not appear that any had undertaken to be trustees in the lottery but Layfield; and therefore, he only ought to be charged, and not his partners, to which Holt, C. J., answered that it appeared they were partners in their trade, and goldsmiths, and the adventurers put their money in upon the credit of several goldsmiths that had undertaken to pay the benefits; and it should be

ward v. Winship, 12 Pick. (Mass.) 430. The presumption is that contracts made by a partner are made on account of the partnership, and the firm will be bound thereby unless the parties with whom he contracts know the contrary. Le Roy, Bayard & Co. v. Johnson, 2 Pet. 198; Rochester v. Trotter, 1 A. K. Marsh. (Ky.) 54. If any one of the partners give his assent to the acts of their agent, such assent would be good evidence affecting the rest, unless, by the articles or constitution of the company, the whole concern and management should be intrusted to a committee or board of managers, in which case the assent must be proved to have been given by them, or some of them, pursuant to the authority delegated to them by the company. Odiorne v. Maxcy, 13 Mass. 178. If one of the firm has been in the habit of indorsing the name of the firm on bills of exchange, it is a fact from which the jury may legally infer that he had authority from the other partners so to do. The fact that such indorsement was prohibited by the articles of copartnership is no defense in a suit by a *bona fide* holder of the bill, without notice of such prohibition. Bank of Kentucky v. Brooking, 2 Litt. (Ky.) 41. Partners are all liable for goods furnished for the use of the firm, though the vendor supposed himself dealing with and giving credit to an individual partner, not knowing of the existence of the firm. Reynolds v. Cleveland, 4 Cow. (N. Y.) 282. Where one of several joint partners gives a receipt in his own name, having relation to the partnership business, it is obligatory on the partnership. Therefore, where it appeared that one partner received of the plaintiff certain promissory notes to collect, for which he gave a receipt in his own name, and the plaintiff, to evince the liability of the partners by showing that the transaction had relation to the partnership business, offered to prove that such notes were delivered to the partner while he was attending to other concerns of the partnership, to be collected and applied in satisfaction of a note due from the plaintiff to the partnership, and that that partner did accordingly collect one of such notes, and indorse the avails on the plaintiff's note to the partnership, it was held that such evidence was admissible. Brown v. Lawrence, 5 Conn. 397. The implied authority of one partner to bind his copartner by contract may be revoked by refusal of the latter to be thus bound, communicated to the party in whose favor the contract is to be made. Nor does it matter, in such case, that the partner revoking is a secret partner and that the existence of the partnership is unknown to the other party. But, whether one partner in any given case has revoked the implied authority of his copartner to bind him, is a question of fact; therefore, where the court directed the jury, in an action on a promissory note against A and B as partners, that if A was a dormant partner with B, and refused to give a joint note with him, the defendants were entitled to a verdict, it was held, that this was a misdirection, for these facts were not necessarily a revocation of the implied authority of B, and ought to have been submitted as evidence only. Leavitt v. Peck, 3 Conn. 124.

presumed that the act of Layfield was the act of the others and should bind them, unless they could show a disclaimer, and a refusal to be concerned in it; and accordingly, the plaintiff had a verdict for 40*l.*[1]

We have already seen that the undertakings of one partner may bind the firm, although out of the ordinary course of their business, if made with reference to matters transacted by the firm. If a proprietor of a coach enter into a special contract for the carriage of goods by that coach, the contract extends to any other coach of which he is the proprietor, and by which the goods are sent, and binds his copartners in such other coach. In Helsby v. Mears,[2] the plaintiff brought his action of *assumpsit* against the defendants, upon an undertaking to carry a box containing watch-cases from Chester to Liverpool, which undertaking was not fulfilled, the box having been lost. At the trial it appeared in evidence that the plaintiff was a watch-case maker at Liverpool, and the defendants proprietors of the mail-coach from Chester to Liverpool. On the 15th of September, 1824, the box in question was sent by the plaintiff from Liverpool to one Walker, the assay master at Chester, with gold and silver watch-cases, of the value of 185*l.*, to be assayed. On the 16th the box, with the same cases, was sent by Walker to the mail-coach office at Chester, which was kept by the defendant, Mrs. Tomlinson, directed to the plaintiffs at Liverpool. The box was lost. The defendants had put up a notice in the office that they would not be accountable for any parcel or package whatever above the value of 5*l.*, unless the same were entered and paid for accordingly, at the time of delivery of such parcel to them or their agents. Walker did not enter and pay for the box in question as being of more than 5*l.* value, but he proved that he was in the habit of receiving boxes of the same description from various places, which were conveyed by coaches of which the defendant, Mrs. Tomlinson, was a proprietor; and that three years before, Mrs. T. had agreed to convey these boxes for him at the ordinary rate of carriage, and that an annual account had been constantly settled between them on the basis of that agreement. This agreement had been entered into in consequence of a similar loss, not from the Chester and Liverpool mail, but from the Coventry and Liverpool mail, of which Mrs. T. was a proprietor, but not all the present defendants. The Court of King's Bench held that, notwithstanding the notice put up at the office, this contract with Walker was binding

[1] Pahlman v. Taylor, 75 Ill. 629; Pennell v. Phillips, 54 Ga. 29.

[2] 5 B. & C. 504; 8 D. & R. 289.

on all coach proprietors with whom Mrs. T. was a partner, in whatever coaches they might be concerned.

But of course the law will be otherwise, if the special contract entered into by one of several coach owners for the carriage of goods be a mere collusive contract between the parties in fraud of the other partners. Thus, where A, one of several coach owners, agreed, for a private and valuable consideration moving to him from B, to take B's parcels free of expense, upon the loss of a parcel above the value of 5*l.*, it was held that the agreement for free carriage under such circumstances did not oust the proprietors of the benefit of their 5*l.* notice, and, consequently, that B could not maintain an action against the firm for the loss.[1]

One partner may insure for the firm.

SEC. 440. One partner has an implied authority to *effect insurances* for the firm. In the case of Hooper v. Lusby,[2] which was an action by insurance brokers against the insured, who were merchants and partners, to recover the premiums and commission upon the effecting of several policies of insurance for the defendants, it was proved that the policies in question were effected in consequence of a letter written by one of the defendants in the name of the firm, ordering insurance to be done "on account of the company" on two ships, called the Commerce and the Christiana. Lord Ellenborough held clearly that the copartners were bound by this order, and he observed that, although one part-owner, even if he were ship's husband, had no implied authority to insure for the others, yet it was different in the case of partners. The plaintiffs accordingly had a verdict.

Cannot submit to arbitration.

SEC. 441. One partner cannot bind his copartner by a *submission to arbitration.*[3] There is no implied authority in partners, arising merely from the connection in that character, to bind each other by *loans* made to them individually, although the money be carried to the partnership account,[4] and *a fortiori*, there can be no such implied authority between partners to bind each other by *equitable mortgage.* But an authority to bind the firm by equitable mortgage may be

[1] Bignold v. Waterhouse, 1 M. & S. 255. The court thought that even if the contract had been *bona fide*, the proprietors should have had notice of the value of the parcel, for that, under an agreement for free carriage, it was not to be supposed that the proprietors dispensed with the notice *in toto*, but only with payment.

[2] 4 Camp. 66.

[3] See *post*, chap. 1, sect. 1.

[4] *Post*, chap. 2, sect. 2.

implied from the frame of the deed, the application of the money, and other attendant circumstances. In Ex parte Lloyd,[1] W., being the owner of certain freehold premises, entered into partnership with O., and the partners thenceforth occupied the premises as cotton spinners, and erected machinery thereon, for the purposes of their trade. The firm being afterward indebted to their bankers, O., in June, 1822, deposited with them the leases of certain leasehold premises, accompanied with a memorandum, which, after setting out a list of the deeds deposited, concluded with a statement that those papers were placed in the hands of Messrs. Jones, Loyd & Co., their bankers, as a security for what they might think fit to advance to O. & W. And, in August, 1822, W. deposited with the bankers a lease of a freehold piece of land, on which was situated a mill, and other buildings, together with a memorandum in these words: "These deeds are placed in the hands of Messrs. Loyd & Co., as security for what they may think proper to advance to O. & W. by W; the buildings alone are insured for upward of 2,000*l.*; machinery, etc., 2,000*l.* more." O. & W. afterward became bankrupts, and upon a petition of the bankers to be declared equitable mortgagees of the premises and machinery, the question was adverted to, whether there would be any difficulty in finding that the one partner had authority from the other to pledge the property in order to obtain an advance of money for partnership purposes. The judges were of opinion that, considering the terms of the memorandum, and that the money was borrowed by the partners, and applied to partnership purposes, such an authority in each partner might be presumed to exist, and that as to W., he might fairly be taken as mortgaging for himself his own freehold interest in the land and buildings, and, as agent for the firm, mortgaging the leasehold interest and the property of the firm in the machinery.

General rule as to powers of partner.

SEC. 442. The general rule of law, by which partners become liable under the contracts of their copartners, has given rise to a general rule in the course of legal proceedings, by which the act or admission of one partner, as likewise notice to one partner, is held to be binding on the firm. Thus, as will be more particularly noticed in another place, one partner may release a supposed right of action, even after proceedings to enforce it have been instituted by the firm. And not only may he release an action, but it seems that he has the power of

[1] 1 Mont. & Ayrt. 494.

suspending proceedings in it. Therefore, where three partners sued as plaintiffs, and two out of the three agreed with the defendant to accept common bail, and to stay proceedings for six weeks, it was held that the agreement was binding on the third partner.[1] In an action commenced against partners, one may enter an appearance for the rest.[2] In equity, service of a subpœna upon one partner may, upon notice, be made good service upon his copartner abroad.[3] But service upon one of two solicitors, partners, of an order to deliver a bill of costs, is not sufficient, although a copy of the order be likewise left at the house of business.[4]

Signature of one partner to simple contracts binds the firm.

SEC. 443. Generally, the signature of one partner in matters of simple contract relating to the partnership binds the firm; for every partner may be considered as an agent for the rest of the partnership.[5] Hence, it seems clear that notice by one partner in legal proceedings in general will bind the firm.[6] If one of several persons, jointly interested in a cargo, effect an insuranee for the benefit of all, he may give notice of abandonment for all.[7] If one partner for himself and partner sign a note for the weekly payment under the Lord's act, such note will be binding on the firm.[8] If one of several joint lessors, partners in trade, sign a notice to quit in the names of all, this will be valid for all,[9] though it will be otherwise if they are not partners in trade.[10] One joint tenant may, without the consent of his fellows, appoint a bailiff to distrain for rent due to all the joint tenants.[11]

Notice to one partner, effect of.

SEC. 444. Where several are concerned together in partnership, notice to one is equivalent to notice to all, provided the transaction is *bona fide*.[12] Hence, in an action on a joint promissory note, if the

[1] Harwood v. Edwards, Gow Part. 65, where see the case stated in the note.

[2] D. Dampier, arg. Harrison v. Jackson, 7 T. R. 207.

[3] Carrington v. Cantillon, Bunb. 107; Coles v. Guerney, 1 Madd. 187.

[4] Young v. Goodson, 2 Russ. 255.

[5] D. arg. Carrick v. Vicary, Doug. 653, n. But see, as to a power of attorney, Edmiston v. Wright, 1 Camp. 88.

[6] Mayhew v. Eames, 1 Car. & Payne, 550.

[7] Hunt v. Royal Ex. Ass. Co., 5 Mau. & Sel. 47.

[8] Meux v. Humphrey, 8 T. R. 25; Burton v. Isset, 5 Barn. & Ald. 267.

[9] Doe v. Hulme, 2 Man. & Ryl. 433.

[10] Goodtitle v. Woodward, 3 Barn. & Ald. 689.

[11] Robinson v. Hofman, 4 Bing. 562; 1 Moore & Payne, 474.

[12] 1 Mau. & Sel. 259; Alderson v. Pope, 1 Camp. 404 n.; Ex parte Waitham, 1 Mont. & A. 364. In Browne v. Turner, 15 Ala. 832, it was held that, after dissolution, a demand of payment made upon one of the partners, the others being absent, is sufficient; and in New York it has been held sufficient, although the partner to whom the demand is presented is a married woman. Erwin v. Downs, 15 N. Y. 576. In Maine it has been held that one partner, even

defendants suffer judgment by default, service of the rule *nisi* to compute principal and interest on one of the defendants, is service on all, for *quoad hoc*, they are partners.[1] If a bill be accepted by a firm, and dishonored by one of the partners, it is not necessary to give notice of dishonor to the other partners.[2] If one of several defendants resides forty miles from London, it is not necessary to give the ten days' notice of trial required by the statute.[3]

Power of one partner in bankruptcy proceedings.

SEC. 445. Partners are more notably bound by the acts of each other in proceedings under the bankrupt laws. Thus, to sustain a *fiat*, or commission of bankrupt, the practice is for one partner to make the affidavit of debt, and execute the bond to the Lord Chancellor on behalf of the firm.[4] One partner, likewise, on behalf of all, may prove a debt, vote in the choice of assignees, and sign the certificate.[5] One partner may likewise execute a power of attorney to some third person, authorizing him on behalf of the firm, to vote in the choice of assignees and sign the certificate,[6] and in some cases, even when such power is informal, the choice will not be set aside.[7] It is, however, to be remarked that in the petition for a fiat all the partners must join.[8] On the other hand, in petitions presented for hearing, the signature of one of the partners is to be deemed sufficient.[9] But the signature must not be in the partnership name,[10] but in the name of

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after dissolution, may receive the presentment and protest of a note. Darling v. Marsh, 22 Me. 186. As to notice of non-payment given to one partner, and held sufficient, see Baldwin v. Page, 24 Mo. 594; Coster v. Thomason, 19 Ala. 719; Slocomb v. Lizardi, 21 La. An. 359.

[1] Figgins v. Ward, 2 C. & M. 424; Carter v. Southall, 3 Mees. & W. 128.

[2] Porthouse v. Parker, 1 Camp. 82.

[3] Perry v. Jackson, 4 T. R. 516.

[4] Ex parte Hodgkinson, 19 Ves. 291; 2 Rose, 174; Ex parte Peele, Buck, 457. But one of two joint obligees cannot sue out a commission against the obligor. Brickland v. Newsome, 1 Camp. 474.

[5] Per Lord Eldon, 19 Ves. 293; Ex parte Mitchell, 14 id. 597; Ex parte Shaw, 1 Glyn & Jam. 129; Ex parte Bank, 2 id. 363; Ex parte Hall, 1 Rose, 2; Ex parte Bignold, 2 M. & A. 655. But one trustee cannot sign the certificate for himself and co-trustee. Ex parte Rigby, 2 Rose, 224.

[6] Ex parte Mitchell, 14 Ves. 597.

[7] Ex parte Shaw, 1 Glyn & Jam 129.

[8] Archb. B. L., Vol. 2, p. 5; Buckland v. Newsome, 1 Taunt. 477; Ex parte Peele, Buck. 457.

[9] Ord. Eld., 12 Aug. 1809, which requires that all petitions presented for hearing, except in cases of partnership or absence from the kingdom, shall be signed by the petitioners; see Ex parte Morgan, Buck. 109.

[10] Ex parte Hall, 1 Glyn & Jarm. 355, n; Marsh v. Keating, 1 Scott, 5; Locke v. Stearns, 1 Metc. (Mass.) 563. Thus, where one partner in a real estate firm fraudulently gave a deceitful appearance to the land for the purpose of increasing its apparent value, all the partners were held chargeable therefor. Chester v. Dickinson, 54 N. Y. 1. So a firm of attorneys was held liable for an unauthorized appearance in an action entered by one of the firm, Norton v. Cooper, 3 Sm. & G. 384; so for selling an article as of one class, when it is an article belonging to another, as for linseed meal when it was in fact a mixture of linseed meal and teelseed meal.

the petitioning partner, signing for himself and the other partners. It has been held, however, that a petition, signed "for self and partner" is sufficient.

Locke v. Stearns, 1 Metc. (Mass.) 563; so, where one member of a legal firm collected money and absconded with it. St. Aubyn v. Smart, L. R., 3 Ch. App. 647; McGill v. McGill, 2 Metc. (Ky.) 262; Willett v. Chambers, 2 Cowp. 814. Where one obtained money upon a note signed by him with the name of the supposed firm, and purporting to be indorsed by a third person payable at a future day, and before the maturity of the note it was discovered that the name of the supposed indorser had been forged, it was holden that the lender of the money was entitled to his action immediately as for money received to his use; that the action lay against both partners, although the other knew nothing of the forgery, the money having gone to the use of the copartnership. Manufacturers' Bank v. Gore and Grafton, 15 Mass. 75. Where a partner in a banking firm advised B, a female customer of the bank, to sell out some Dutch stock, telling her he could procure for her better security, and that he had one in view; he said the money was in fact wanted by his son who was in trade. B sold out the stock and paid the money into bank. She then gave A a check to draw out and invest. The other partners had no knowledge of these transactions by A. The latter drew out the money, loaned it to his own son, and took his note to B for the amount, and A guaranteed payment and absconded. It was held that this was an individual transaction and was not made by A as one of the partners, and although a great fraud was committed by A, his partners were not liable for his fraudulent representations. Bishop v. Countess of Jersey, 2 Drewry, 162. So, where one partner falsely recommended an insolvent person as worthy of credit, inducing the plaintiff to give such person credit, which were immediately attached by the firm, it was held that the firm was responsible for such partner's deceit. Pallen v. Gurney, 17 Mass. 182. So it has been held that a firm, of which the master of a vessel is a member, are responsible for frauds committed by him resulting in the forfeiture of the vessel and cargo. Hadfield v. Jamieson, 2 Munf. (Va.) 66. Where a debt is fraudulently contracted by one member of a firm, the others being ignorant thereof, all the members will be liable for the debt, but not for the fraud, unless they assented to or ratified it. Stewart v. Levy, 36 Cal. 169; Bond v. Gibson, 1 Camp. 195. *Contra*, however, and holding that one member of a firm may be arrested for a fraud committed by his copartner in the purchase of goods, in which he did not participate, see Townsend v. Bogart, 11 Abb. Pr. (N. Y.) 359; see, also, Griswold v. Havens, 25 N. Y. 597, in which it appeared that John J. Wright & Co. were engaged in receiving grain, and storing it for compensation. They gave out storage receipts representing that they had received on storage on account of Ford & Son, 1,835 bushels of mixed corn, 6,534 bushels of rye, 1,203 bushels of wheat, of the gross value of $6,000. Ford & Son assigned this receipt, and upon credit thereof received from the plaintiff $4,865. It appeared on the trial that John Wright, one of the defendants, signed the receipts in the firm name, and introduced one of the firm of Ford & Son to the plaintiff, and stated the grain was in good order and all right, whereon Ford assigned the receipts, and the plaintiff made the advances. It was claimed in defense that no such grain had ever been received in the store, and Wright was guilty of the fraud. It was held that the issuing of the receipts was a fraudulent act, and all the members of the firm were liable for the injury sustained. That the defendants were estopped from saying that no grain had in fact been received, contrary to the written receipts and statement of Wright.

CHAPTER XVIII.

OF LIABILITIES FOR THE FRAUD OF A COPARTNER.

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Firm liable for fraud of partner.

SEC. 446. One partner will be bound by the fraud of his copartner, in contracts relating to the partnership, made with innocent third

persons. This rule, however severe, is not more necessary to the security of the customer than it is to the credit and prosperity of the firm.[1] Hence, where one of two partners purchases articles, such as are used in the partnership business, which he fraudulently converts to his own use, the innocent partner, provided there has been no collusion between the buyer and seller, is liable for the price of the goods.[2] Hence, also, a partner may under particular circumstances become liable for the fraud of his copartner committed *before* the partnership began.[3] This was decided in a well-known case before Lord Mansfield. The plaintiff, Willet, brought an action for money had and received against the defendant Chambers, as the surviving partner of one Dadley, and obtained a verdict for 480*l.* It appeared that, prior to any partnership between the defendant and Dadley, who was an attorney and conveyancer at Coventry, the latter, in the year 1771, received of a Mr. Bindley the sum of 350*l.*, to be laid out on real security. Dadley accordingly furnished him with a mortgage from a Mr. Hughes to that amount, which, as it afterward appeared, Dadley had *forged.* At Midsummer, 1776, Dadley and Chambers entered into partnership, shortly after which Bindley wanted to call in his money. The pretended mortgagor was supposed at the same time to want a further sum of 150*l.*, which, added to the original mortgage money, made together the sum of 500*l.* The plaintiff, Willet, was ready to advance this sum, and, in consideration of his doing so, an assignment was made to him of the pretended mortgage before made to Bindley. Of the whole 500*l.*, Willet paid 180*l.* at Dadley's office to Chambers, Dadley not being at home. For this

[1] Ex parte Fife, 2 Mont. & A. 577.

[2] Bond v. Gibson, 1 Camp. 185.

[3] Willet v. Chambers, Cowp. 814. In St. Aubyn v. Smart, L. R., 3 Ch. App. 647, Smart & Buller, solicitors, under a power of attorney addressed to the firm, received moneys belonging to the plaintiff, by one of the firm, who signed the receipt in his own name. Buller, after receiving the money, absconded. It was held that the other partner was liable for fraud of Buller. See, also, to same effect, Atkinson v. Mackreth, 2 M. R. & V. C. Eq. 570. So, where an appearance is entered by solicitors in their partnership name without authority, each partner is liable for damages sustained by the party for whom the appearance was entered. Norton v. Cooper, 3 Sm. & G. 384. So where one partner of a firm of solicitors received money for investment, which was credited on the books of the firm, and he afterward used it for his own benefit, after the death of the partner so using the money it was held the other partner was liable for the amount. Eager v. Barnes, 31 Beav. 582. So, where two attorneys, as partners, receive a note for collection, and obtain a judgment for the creditor in the life-time of both partners, and after obtaining judgment one of the partners dies, and the surviving partner collects the judgment, but fails to pay it over, uses the money and dies insolvent, the administrator of the attorney who first died is liable for the amount of the debt collected. McGill v. McGill, 2 Metc. (Ky.) 262. See, also, Cook v. Bloodgood, 7 Ala. 685.

Chambers gave his separate receipt. Willet afterward paid the residue (except 20*l.*) to Dadley, for which Dadley gave *his* separate receipt. It was admitted that Chambers was in no respect privy to the forgery. Upon this evidence the Court of King's Bench held that the verdict should stand. And per Lord Mansfield, "The defendant suffers by the rascality of a man who had a very good character. I am very sorry for him, but upon this evidence I cannot say but that this is a partnership transaction, and that, in point of law, this engagement with Dadley makes Chambers answerable."[1]

The species of liability now referred to may occur not only in general trading partnerships, but in partnerships in particular transactions, for it has been held after some consideration, that joint owners of a patent for a particular process used in carrying on a trade are answerable, *in solido*, for the losses occasioned in relation to the patent, by the frauds of their coadventurers.[2]

The rule of liability in such cases was well illustrated in a recent case in New York.[3] In that case the complaint alleged that the defendants and another person who died during the pendency of the action, conspired to induce the plaintiffs to purchase, as oil-producing lands, certain lands in the county of Dutchess, and State of New York, being three farms in the town of Fishkill, known as the Bogardus, the Schofield and the Jones farm. That the defendants secretly poured petroleum upon said lands for the purpose of inducing the plaintiffs to believe that such oil was the spontaneous production of said lands, and falsely represented to the plaintiffs that the oil which they had so put on said lands was the natural product of the same. That the plaintiffs were thus induced to believe that such lands were oil-producing lands, and on the 24th of December, 1864, paid to the defendants the sum of $39,000 for certain contracts, for the purchase of said lands, which had been previously entered into by said defendants with the owners thereof. The evidence of fraud upon which the plaintiffs relied, and upon which the verdict mainly was found, consisted of the testimony of a person named Benjamin Higgs, who testified that he was employed by the defendants, Jones and Reed, to put petroleum upon these lands from time to time, frequently, in the fall of 1864, and the winter following, for the purpose of giving them the appearance of oil-producing lands. On the 28th day of November, 1864, the defendants entered into a written agreement,

[1] Willet v. Chambers, *ante*.
[2] Lovell v. Hicks, 2 You. & Col. 480.
[3] Chester v. Dickerson, 54 N. Y. 1.

signed by all of them, in which they agreed to purchase, lease and take refusal of lands on their joint account, in the town of Fishkill situate and lying along the Fishkill creek, specifying particularly the Bogardus farm, the Schofield farm, and the Jones farm, and also "such other parcels or farms along said creek as they may consider to be to their mutual advantage," and that they should sell, lease or work the lands thus taken; and they further agreed that all moneys expended and all loss sustained by reason of such purchases, leases or refusals, and the working thereof, should be borne equally amongst them, share and share alike, and that all the gains and profits thereof should be shared in the same way; and that all the leases and refusals thus made, and thereafter to be made, should be taken in the name of defendant Reed, for the equal benefit of all the parties. There was some evidence tending to show that this association or partnership was actually formed by parol, as early as September, 1864. Afterward, Bogardus executed a contract with Reed, giving him the refusal of his farm of forty-seven and one-half acres of land, at $100 per acre, until the 1st day of January then next; and prior thereto, in October, Schofield executed a contract with Reed, giving him the refusal of his farm of sixty acres, at $100 per acre, until the 15th day of March then next; and in December, 1864, Reed obtained an assignment of a contract for the Jones farm of 143 acres, at $150 per acre. About the 1st day of December, 1864, the defendant Reed opened negotiations with the plaintiffs to sell these lands to them, and represented to them that they were oil-producing lands, and took one of the plaintiffs upon the lands and showed him the indications of oil thereon, which had been produced by pouring petroleum thereon, representing and holding out to the plaintiff that the oil found there was the natural product of this land. On the 10th day of December Reed proposed to plaintiffs to sell them these three farms, and on the 12th of December the plaintiffs accepted the proposition, and subsequently paid to the defendants, which was divided equally between them, $39,000 for the refusals of the Bogardus and Schofield farms, and the contract for the Jones farm. On the 20th of December Reed assigned to the plaintiffs the refusals and contract, by a formal written assignment, and the plaintiffs thereafter paid for and took conveyances of the farms from the owners thereof. It appeared upon the trial that Jones was the defendant principally engaged in perpetrating the fraud, by causing the deceptive appearance of oil upon the lands. There was some evidence also tending to show that Reed participated, to some

extent, in this fraud. *But there was no evidence whatever that Dickerson had any thing whatever, personally, to do with the fraud, or that he knew that any fraud was practiced.*

At the close of plaintiff's evidence, and again at the close of all the evidence, a motion was made on behalf of defendant Dickerson, to dismiss the complaint as to him, on the ground that there was no evidence to connect him with the alleged fraud, and the motion was denied and Dickerson excepted. The court charged the jury that the defendants were partners under their written agreement dated November 28, 1864, and submitted to them to find whether they did not become such prior to that date, by oral agreement, and he charged that each defendant was liable for the fraud personally committed by him, and that from the time they became partners, all were liable for the fraud committed by either in and about the partnership business. The defendants requested the court to charge "that every one of the defendants must be acquitted by the jury, and have a verdict in his favor, unless the jury believe that he personally made, or procured to be made, the false representations charged in the complaint, and thereby induced the plaintiffs to make the contract with the defendants." The court refused so to charge, and the defendants excepted.

The defendant Dickerson requested the court to charge:

1. That the jury must find a verdict in his favor, there being no evidence whatever that he had any concern in or knowledge of any fraudulent acts or representations whatever.

2. That he is not responsible and cannot be made liable to the plaintiffs for any fraudulent acts or representations made or procured by the defendant Jones, or any other person, unless with the knowledge or procurement of either Reed, or himself, even if the jury should believe that such representations were made.

3. That the jury must find a verdict in favor of the defendant Dickerson, *unless they believe that he personally knew or consented* to some fraudulent act or representation to the plaintiffs which procured the sale. The court refused so to charge, and a verdict was rendered for the plaintiffs against all the defendants, which was sustained upon appeal.

When liability attaches.

SEC. 447. "In order that responsibility may attach to the firm," says Mr. Lindley,[1] "it is necessary—

1. That it shall have authorized it in the first instance; or,

[1] Lindley on Part. pp. 238–260. All of which is given in the following pages.

2. That it shall have made it his own by adoption; or,

3. That it shall have been committed by the agent in the course and as part of his employment.

That this last is sufficient is obvious from those cases in which masters have been held liable for the negligence of their servants;[1] litigants for irregularities committed by their attorneys in the course of the litigation to conduct which they are retained;[2] merchants for frauds committed by their factors and brokers whilst acting on their behalf;[3] and shopkeepers for the illegal acts of their shopmen whilst in the shop and attending to its business.[4]

Not liable for willful acts of a copartner.

SEC. 448. On the other hand a principal is not liable for the torts or frauds of his agent, except upon one or other of the three above-mentioned grounds. Thus, a principal is not liable for the willful acts of his agent, if not done in the course of his employment and as part of his business;[5] and this is true not only of assaults, batteries, libels, and the like, but also of frauds. The maxim *respondeat superior* does not render a principal liable for the frauds of his agent, unless they have been committed by the agent for the benefit of his principal, and in the course and as part of his own employment. Nothing can show this more strongly than the recent decisions in Grant v. Norway,[6] and Coleman v. Riches,[7] in the former of which it was held that the owner of a ship was not responsible for the conduct of the master in signing bills of lading for goods which had not been shipped; and in the latter of which it was held that a wharfinger was not responsible for the issue by his servant of fictitious warrants, purporting that goods were in store when in fact they were not.[8] In each of these cases the agent's real authority was to give receipts for goods received, and he had no business to give receipts for other goods; but on the other hand strangers could not know whether a receipt had been given for goods really come to hand or not; they had a right to assume that there had been no excess of authority; and the credit given to the receipt of the agent was due to the trust reposed in him by his principal. Reliance was placed upon the observation made by Holt, C. J., in Hern v. Nichols,[9] when he held a merchant responsible for

[1] Patten v. Rea, 2 C. B. 606.
[2] Collett v. Foster, 2 H. & N. 356.
[3] Hern v. Nichols, 1 Salk. 289.
[4] Grammar v. Nixon, 1 Str. 653; Amory v. Delamirie, id. 505.
[5] M'Manus v. Crickett, 1 East, 106; Croft v. Alison, 4 B. & Ald. 590; A. G. v. Siddon, 1 Cr. & J. 220.
[6] 10 C. B. 665.
[7] 16 id. 104.
[8] Compare these with A. G. v. Siddon, 1 Cr. & J. 220.
[9] Salk. 289.

the deceit of his factor, — "for, seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger;" but the Court of Common Pleas declined to apply this reasoning to the case in question.

As regards torts.

SEC. 449. It follows from the principles of agency, coupled with the doctrine that each partner is the agent of the firm, for the purpose of carrying on its business in the usual way, that an ordinary partnership is liable in damages for the negligence of any one of its members in conducting the business of the partnership. It has accordingly been held that a firm of coach proprietors is answerable for the negligent driving of a partnership coach by one of the firm, the coach being driven for the firm in the ordinary course of business.[1] So, a partnership is liable for the negligence of its servants acting in the course of their employment by the firm;[2] and if one partner, in conducting the business of the firm, is guilty of a breach of the revenue laws, all the partners are jointly and severally answerable for the consequent penalties, although they may not have authorized or been parties to the illegal conduct of their copartner.[3]

As a rule, however, the willful tort[4] of one partner is not imputable to the firm. For example, if one partner maliciously prosecutes a person for stealing partnership property, the firm is not answerable, unless all the members are, in fact, privy to the malicious prosecution.[5]

Upon precisely the same principles companies are liable for the negligence of their servants, and for torts committed by them in the course of their employment, and never has been admitted as a sufficient reason for non-liability on the part of the company, that it did not in fact authorize the very act complained of.[6] If the officer

[1] Moreton v. Hardern, 4 B. & C. 223.

[2] Stables v. Eley, 1 C. & P. 614. But the doctrine of this case is wholly untenable, as the defendants were not partners at all, but were held jointly liable because one of the defendants, who was *not* a defendant, permitted his name to remain on the cart. It is quite difficult to believe that the plaintiff permitted himself to be injured by the servant driving it, upon the faith of the credit of the defendant whose name was still retained upon the cart, but who had no interest whatever in the business, or any control or right of control over the servant.

[3] R. v. Stranyforth, Bunb. 97; A. G. v. Burges, id. 223; A. G. v. Weeks, id.; R. v. Manning, Comyn, 616; see A. G. v. Siddon, 1 Cr. & G. 220.

[4] In Green v. London General Om. Co., 6 Jur. (N. S.) 228, it was held that an incorporated company could be guilty of a wrongful intent, and was liable for torts willfully committe by its servants in obedience to orders given by its managers.

[5] Arbuckle v. Taylor, 3 Dowl. 160, and see Stevens v. The Midland Counties Rail. Co., 10 Ex. 352.

[6] See Yarborough v. The Bank of England, 16 East, 6; Maund v. The

of a joint-stock company, acting upon the faith of a forged power of attorney, wrongfully transfers the shares of one of its shareholders, the company is liable to make good the loss.[1]

As regards frauds. Firm liable for, when.

SEC. 450. An ordinary firm is liable for frauds committed by one of its members whilst acting for and in the business of the firm, and the innocent partners cannot divest themselves of responsibility on the ground that they never authorized the commission of the fraud. On the other hand, the firm is not liable for the other frauds of its members, unless it has in fact sanctioned such frauds, or the transactions of which they form part.

Liability of partnerships for misapplication of money by their members.

SEC. 451. 1. Where one partner, acting within the scope of his authority, as evidenced by the business of the firm, obtains money and misapplies it, the firm will be answerable for it.

In Willett v. Chambers,[2] before referred to, two persons carried on business as solicitors and conveyancers, in partnership. One of them received money from a client to invest on mortgage, and misapplied it. The other partner was held liable to repay it to the client. Lord Mansfield relied upon the fact that the bill for the fictitious mortgage was made out in the name of the firm, and was paid to the innocent partner. The transaction therefore was clearly a partnership transaction, and the defendant, although perfectly innocent of the fraud himself, was liable for the consequences.

In Brydges v. Branfill,[3] one of several solicitors connived at a fraud for obtaining money out of the court of chancery. The money was received by him under a power of attorney, and was handed over to the client. The other partners were entirely innocent, and were, in fact, ignorant of the transaction. It was nevertheless held that they were jointly and severally liable to make good the money to those to whom it really belonged.[4]

Monmouthshire Canal Co., 4 Man. & Gr. 452; Eastern Counties Rail. Co. v. Broom, 6 Ex. 314; Smith v. Birmingham Gas Co., 1 A. & E. 526; Scott v. The Mayor of Manchester, 1 H. & N. 59, and 2 id. 204.

[1] Ashby v. Blackwell, 2 Eden, 299, and 1 Amb. 503. Hildyard v. The South Sea Co., 2 P. W. 76, cannot be relied upon; see the case last cited, and Davis v. The Bank of England, 2 Bing. 393, E. C. L. R. 9; Bank of Ireland v. Evans's Charity Trustees, 5 Ho. Lo. Ca. 389; Orr v. Union Bank of Scotland, 1 M'Queen, 513. A bill will not lie in equity against the company for damages sustained by the wrongful transfer. Duncan v. Luntley, 2 Mc. & G. 30.

[2] Cowp. 814.

[3] 12 Sim. 369. See, too, Todd v. Studholme, 3 K. & J. 324.

[4] Although solicitors who are partners are responsible for the acts of each other, the court will not exercise its

Rule when firm receives money belonging to third persons.

SEC. 452. Where a firm in the course of its business receives money belonging to other people, and one of the partners misapplies that money whilst it is in the custody of the firm, the firm must make it good.

In Devaynes v. Noble, Clayton's case,[1] some exchequer bills, deposited by their owner with a firm of bankers, were sold by one of the partners without the owner's knowledge; the money produced by the sale was applied by the firm to its own use, and it was held to be clear that the money having been received by the partnership, the amount became a partnership debt whether all the individual partners were or were not privy to the sale.

In Devaynes v. Noble, Baring's case,[2] the firm was held liable for stock of its customers standing in the name of one of the partners of the firm, and wrongfully sold out by him. For the stock was standing in his name alone in accordance with the ordinary practice of the firm; the produce of the sale of the stock had been received by the firm, and had thus become a partnership debt; and the firm, in the accounts rendered by it to its customer, had falsely represented the stock as still standing in the name of the partner who had sold it, and had given credit for the dividends as if the stock had still been there.

In Ex parte Biddulph,[3] money at a banker's was drawn out and misapplied by one of the firm, and it was held that all the partners were liable to make it good.

In Sadler v. Lee,[4] the members of a banking firm were authorized jointly and severally to sell out stock standing in the name of a customer, and one of the partners exercised the power and sold out the stock, and the firm was credited with the proceeds of the sale. These were afterward misapplied by one of the partners, and it was held that the firm was answerable for the money.

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summary jurisdiction against a solicitor to whom personally no blame is attributable. See Re Lawrence, 2 Sm. & G. 367; Ex parte Gould, 2 Mon. & A. 48; Dixon v. Wilkinson, 5 Jur. (N. S.) 1063; and Re Ford, 8 Dowl. 684. At the same time, if a firm of solicitors are the solicitors on the record, each member is considered responsible for the acts of the other. See Norton v. Cooper, 3 Sm. & G. 375. But the rule is otherwise when funds belonging to third persons are received by one member of the firm, as trustee or otherwise, and used by him in firm transactions without the knowledge or assent of his copartners. Guillon v. Peterson, 9 Phil. (Penn.) 225.

[1] 1 Mer. 575.

[2] 1 Mer. 611; see, too, Warde's case, id. 624, and Vulliamy v. Noble, 3 Mer. 593.

[3] 3 De G. & Sm. 587.

[4] 6 Beav. 324.

Rule in Bromley v. Blair.

SEC. 453. Another well-known case illustrating the same principle is Blair v. Bromley.[1] There two persons were in partnership as solicitors. A client intrusted one of them with money to invest on mortgage, and was told by him that it had been invested, whereas, in truth, the partner who had received the money had misapplied it. For many years the client was regularly paid interest by the solicitor who attended to the matter, and the fraud was not discovered until he became bankrupt. The other partner knew nothing whatever of the fraud, but he was nevertheless held liable to make good the money It had been placed to the partnership account at the bankers of the firm; the representation that it had been duly invested was within the scope of the duty of the firm with reference to the transaction in question, and it was held that the innocent partner could not divest himself of his liability by showing that he had no control over the account at the bankers, and did not in fact attend to the monetary transactions of the firm.

Rule in Ribeyre v. Barclay.

SEC. 454. In De Ribeyre v. Barclay,[2] the defendants were in partnership as stockbrokers, and were in the habit of receiving moneys from the friends and connections of the firm, and of the individual partners for the purposes of investment. They also seem to have been in the habit of keeping for their customers the securities on which the investments were made. The plaintiff had some Portuguese bonds held by one of the partners for the plaintiff as a customer of the firm. The plaintiff married, and these bonds were assigned to trustees of whom that partner was one. The bonds remained in his custody as before, and were in fact deposited (and, as it seemed, with other securities belonging to other customers) with the bankers of the firm. The bonds were afterward converted by the same partner into other bonds, which were deposited as the first had been. He acted in this matter as a stockbroker, in conformity with the usual course of business of the firm, and advised the plaintiff from time to time in the name of the firm of what had been done. The bonds were afterward misapplied by him. It was held that they were originally clearly in the custody of the firm, and not in the custody of one only of its members, without reference to his character of partner. It was further held that the assignment

[1] 5 Ha. 542, and 2 Ph. 354.

[2] 23 Beav. 107; compare this case with Ex parte Eyre, 1 Ph. 22 ; Bishop v. The Countess of Jersey, 2 Drew. 143; Coomer v. Bromley, 5 De G. & Sm. 532.

of the bonds did not take them out of the custody of the firm, and that the firm was therefore liable for the loss consequent on their unauthorized removal. In the same case the firm was held liable for the loss of other bonds and securities bought by them for the plaintiff, and left in their custody in the usual way, and for money borrowed in the name of the firm, but from which the firm derived no benefit; and the fact that the plaintiff dealt only with one partner was held wholly immaterial, the business transacted being the ordinary and regular business of the firm, and appearing as such in its books and accounts. The principle of these cases is that the firm has in the ordinary course of its business obtained possession of the property of other people, and has then parted with it without their authority. Under such circumstances the firm is responsible; and the fact that the property has been improperly procured and placed in the custody of the firm by one of the partners does not lessen the liability of the firm, for whether the firm is or is not liable for the original fraud by which the property got into his hands, it is responsible for the subsequent misapplication thereof by one of its members. This was decided in the cases arising out of the notorious Fauntleroy forgeries.[1] Fauntleroy, who was a partner in the banking-house of Marsh & Co., forged powers of attorney for the sale of stock belonging to the customers of the bank. Marsh & Co. had an account with Martin Stone & Co., and the broker who sold out the stock under the forged powers of attorney remitted the proceeds of the sale to the credit of Marsh & Co. with Martin Stone & Co. Fauntleroy then drew out these moneys by a cheque signed by him in the name of his firm, and applied them to his own use. The firm of Marsh & Co. was, however, held liable for them, although none of the partners except Fauntleroy had any hand in his forgeries or frauds, or in fact knew any thing of what had taken place. The liability of the firm was based upon the ground that to sell stock for its customers and to receive the proceeds of the sale fell within the scope of its business; that the sale took place and the money was received in the usual way; that the fraud of Fauntleroy in the subsequent appropriation of the money afforded no answer after it had once been in the custody of the firm; and that if the other partners knew nothing of the receipt of the money, they might have

[1] Stone v. Marsh, 6 B. & C. 551, and Ry. & Moo. 364; Keating v. Marsh, 1 M. & A. 582; Marsh v. Keating; 1 Bing. N. C. 198, and 2 Cl. & Fin. 250; Ex parte Bolland, Mont. & McAr. 315, and 1 M. & A. 570; Hume v. Bolland, Ry. & Moo. 371, and 1 Cr. & M. 130. This last case is hardly consistent with Stone v. Marsh, Marsh v. Keating, or Ex parte Bolland.

known it and have ascertained the source from which it had been derived, if they had used ordinary diligence, and had not placed such implicit confidence in their copartner.[1]

Not liable for frauds in matters not connected with firm business.

SEC. 455. If a partner in the course of some transaction unconnected with the business of the firm obtains money and then misapplies it, the firm is not thereby liable to make good the loss.

In Harman v. Johnson,[2] one of several solicitors was intrusted with money for the purpose of investing it on mortgage when a good opportunity offered. He misapplied it, and it was held that his copartner was not liable, inasmuch as there was no evidence to show that it was part of the business either of the firm in question or of solicitors generally to act as scriveners, *i. e.*, as depositories of money waiting for investment. The court intimated that if it had been shown that the money was given to the defaulting solicitor for the purpose of being invested on some specified mortgage, his copartner would have been liable for its misapplication.

The case of Sims v. Brutton[3] must be referred to this head if its authority is to be upheld. There the defendants Brutton & Clipperton were in partnership as solicitors. Brutton received 500*l.* from a client to invest on a mortgage, and the money was duly invested. The mortgage deed remained with the defendants, and the money secured by it was ultimately repaid to Clipperton, who then gave up the deed to the mortgagor. Shortly after this Clipperton re-lent 300*l.*, part of the 500*l.*, and again received back the mortgage deed as a security, and ultimately this 300*l.* was repaid to him and the mortgage deed was again delivered up to the mortgagor. Clipperton had no authority to receive payment of the 500*l.* from the mortgagor, nor to re-lend the 300*l.*, nor to receive repayment of it, and he acted throughout the whole of these transactions without the knowledge of his copartner, or of the mortgagee, the client of the firm. The books of the firm, however, showed the receipt of the 500*l.* in the first instance, its loan and repayment, and also the loan and repayment of the 300*l.* The client was, moreover, credited from first to last with

[1] In Stone v. Marsh and Ex parte Bolland, Fauntleroy's partners did know that the stock was sold by their broker, but did not know that the powers of attorney were forged. In Marsh v. Keating, they do not seem to have known any thing either of the sale of the stock or of the receipt of the proceeds of the sale.

[2] 2 E. & B. 61, E. C. L. R. 75. Compare this with Willet v. Chambers, 1 Camp. 814.

[3] 5 Ex. 802.

the receipt of interest on the whole 500*l.*, and was debited with the same interest, which was in fact regularly paid to his agent. Clipperton misapplied the whole 500*l.*, and the court held that Brutton, his partner, was not liable to make it good. The defendants, it was said, discharged their duty by laying out the money as directed, and they had no authority to receive it back. Therefore, the repayment to Clipperton, though treated by him as a partnership transaction, was not so in point of law, and did not create any partnership responsibility. The entries in the books were only evidence of knowledge on the part of Brutton, and the case stated for the opinion of the court expressly found that he had no knowledge of the facts.

Upon this case it is to be observed that it is not stated in the report whether the 500*l.* when paid off ever came to the hands of the firm, or was placed to the credit of its account with its bankers. This, however, is material, for if it did, then the cases of Stone v. Marsh and Marsh v. Keating are strong authorities against the decision come to in Sims v. Brutton.[1]

Not liable for frauds of partner in his own business.

SEC. 456. A fraud committed by a partner whilst acting on his own separate account is not imputable to the firm, although had he not been connected with it he might not have been in a position to commit the fraud.

In Ex parte Eyre,[2] the customer of a firm of bankers had deposited with them a box containing securities belonging to himself, and he authorized one of the firm to take out some of the securities, replacing others, however, in their place. The partner so authorized, after obtaining the securities he was authorized to take and substituting others, clandestinely withdrew these last, and applied them to his own use. It was held that the firm was not liable for this act, and was not bound to make good the consequent loss. The act was a tortious act committed by one partner, not acting for the partnership or for any partnership object, but in his separate character and for his own individual and separate purposes.

In Bishop v. The Countess of Jersey,[3] one of a firm of bankers advised the plaintiff, a customer of the bank, to sell out some stock, telling her that there was an opportunity to place out 5,000*l.* on a good security at 5*l.* per cent to be given by his son. She accordingly authorized

[1] The statute of limitations afforded a good defense to the action in this case.

[2] 1 Ph. 227, affirming S. C., 2 M. D. & D. 66.

[3] Drew. 143.

the sale, and the money produced was placed to her credit at the bank. She then drew a check for 5,000*l.*, which he gave to the partner with whom she had been in communication. No security was ever given, the money was lost, the partner in question absconded. Interest, however, on the 5,000*l.* was for some time placed to the credit of the plaintiff in her account with the bank, but by whom it did not appear. The other partners knew nothing of what had taken place until after the fraud had been committed, and it was held that they were not answerable. The transactions had nothing to do with the business of the partnership, and if they had not taken place at the bank there would have been no pretense for saying that the one partner was acting otherwise than in a separate affair of his own. A more difficult case, but one turning mainly on the same principle, is to be met with in Coomer v. Bromley.[1] There the defendants, William and Joseph Bromley, were solicitors. The plaintiffs were their clients, and were trustees of some Navy 5*l.* per cent annuities, in which they were themselves beneficially interested for their lives. William Bromley was associated by the plaintiffs with them as trustee of these annuities. Upon their reduction from 5*l.* to 4*l.* per cent, the annuities were sold at the request of the plaintiffs, and it was arranged that the money arising from the sale should be invested on mortgage to be taken with the plaintiffs' consent in William Bromley's name alone. The annuities were sold; the money arising from the sale found its way to the credit of the firm at its bankers, but was not invested on mortgage as intended, and was apparently used as partnership money. William Bromley pretended that he had invested the money, and he paid interest accordingly. Ultimately, and with the plaintiff's knowledge, a mortgage, of which William Bromley was sole mortgagee, was appropriated as a security for the money in question. This mortgage was sufficient in point of value to cover the amount realized by the sale, and was for that amount less a few pounds which the plaintiffs divided between them. The security thus appropriated was afterward realized by William Bromley, and he misapplied the money, but it was not placed to the credit of the firm, nor did Joseph Bromley know any thing of its receipt or application. Under these circumstances it was held that Joseph was not liable to the plaintiffs for the loss; for the plaintiffs dealt with William Bromley as a trustee and not as a partner; they authorized him to take a mortgage in his own name alone; they acquiesced in the appropriation to their money of a

[1] 5 De G. & Sm. 532.

security which was of sufficient value, and Joseph's duty was then at an end. The plaintiffs could not hold him liable for the loss of the mortgage money arising subsequently from the fraud of the mortgagee.

These cases may be usefully compared with De Ribeyre v. Barclay,[1] the leading facts in which have been already stated.

Not liable for wrongful use of trust funds in hands of one partner.

SEC. 457. If a partner, being a trustee, improperly employs the money of his *cestui que trust* in the partnership business, or in payment of the partnership debts, this alone is not sufficient to entitle the *cestui que trust* to obtain repayment of his money from the firm.

In Ex parte Apsey,[2] one of the two assignees in bankruptcy was in partnership, and he applied part of the assets of the bankrupt in paying partnership debts. On the subsequent bankruptcy of the partnership it was held that the amount so applied was not provable against the joint estate.

In Ex parte Heaton,[3] a father and his sons were partners; the sons were trustees of a will, and instead of applying the trust moneys according to the trust, they appropriated them to partnership purposes; but on the bankruptcy of the partnership it was held that the amount of the moneys so appropriated was not provable against the joint estate, unless it could be shown that they were employed for the use of the partnership trade with the knowledge of the father, that they were trust funds, and an inquiry as to that was directed.[4]

It may at first sight be thought that these cases are opposed to Marsh v. Keating, and the other authorities before referred to, in which the firm was held liable for money which came to its hands. But in those cases the money came to the hands of the firm in the ordinary course of its business;[5] whilst in the cases now under consideration it is supposed to come otherwise. Liability must therefore attach to the firm, if at all, on wholly different principles, and the fact that the firm has had the benefit of the trust moneys is not sufficient to render it responsible for them. To be liable, the firm must be implicated in the breach of trust, and this it cannot be unless all

[1] 23 Beav. 107.
[2] 3 Bro. C. C. 265.
[3] Buck. 386.
[4] Ex parte Clowes, 2 Bro. C. C. 595, is not opposed to the cases in the text, for there the joint and separate estates were consolidated.
[5] This may be thought incorrect with respect to Marsh v. Keating, but it was the business of the firm there to sell, through their broker, stock belonging to their customers, and to receive and remit the proceeds; and the money for which the firm was held answerable did arise from the sale of the stock of a customer, though it was sold under a forged power of attorney.

the partners either knew whence the money came, or knew that it did not belong to the partner making use of it. Knowledge on the part of one partner will not affect the others, for the fact to be known has nothing to do with the business of the firm; and the case of Ex parte Heaton, already referred to, shows that in cases of this kind the liability as for a breach of trust does not extend to those who are ignorant of the matters before mentioned. But if knowledge of them can be imputed to the other partners, if they know, or ought to know, that trust moneys are being employed in the partnership business, they will be held bound to see that the trust to which the money is subject authorizes the use made of it, and will be answerable for a breach of trust in case of its misapplication or loss.[1] It is important to bear this in mind when one partner has died, for if the surviving partners deal with his property, knowing that it belongs to his estate, knowledge of the trusts on which the property is held will be imputed to them, and they may be thus involved in all the consequences of a breach of trust.[2] But this doctrine could hardly extend to the case of in-coming partners, who do nothing except leave matters as they found them when they entered the firm.[3]

If partners are implicated in a breach of trust, their liability is joint and several,[4] and a decree for costs will be made against them all, although they may not be all equally to blame.[5]

But although the firm is not liable to make good trust money applied to its use by one of its members in breach of the trust reposed in him, unless the firm can be implicated in the breach of trust, this doctrine will not preclude a *cestui que trust* from following his own money into the hands of the firm, and demanding it back, if he can show that the firm still has it, and the firm did not come by it by purchase for value without notice. The true owner of money traced to the possession of another has a right to have it restored, not because it is a debt, but because it is his money. His right is incidental to his ownership;

[1] See Ex parte Woodin, 3 M. D. & D. 399; Ex parte Poulson, De Gex, 79; Ex parte Watson, 2 V. & B. 414; Smith v. Jameson, 5 T. R. 601; Keble v. Thompson, 3 Bro. C. C. 112, and compare Ex parte Barnewall, 6 De G. Mc. & G. 801; Ex parte Burton, 3 M. D. & D. 364.

[2] See Travis v. Milne, 9 Ha. 140; Dickinson v. Lockyer, 4 Ves. 36; Wilson v. Moore, 1 M. & K. 127 and 337.

[3] See Twyford v. Trail, 7 Sim. 92.

[4] Devaynes v. Noble, Sleech's case, 1 Mer. 563; Baring's case, id. 614; Sadler v. Lee, 6 Beav. 324; Brydges v. Branfill, 12 Sim. 369; Blair v. Bromley, 2 Ph. 359; Wilson v. Moore, 1 M. & K. 127 and 337; Ex parte Poulson, De Gex, 79. Compare Ex parte Burton, 3 M. D. & D. 364. It, however, by no means follows that on the bankruptcy of the firm there can be a proof against the joint as well as against the separate estate; see Ex parte Barnewall, 6 De G. Mc. & G. 801. This will be discussed in the chapter on bankruptcy.

[5] Lawrence v. Bowle, 2 Ph. 140.

and whether the money is traced to the hands of a single individual, or to the hands of a firm, is wholly immaterial.[1]

Liability of partnerships for the false representations of their members.

SEC. 458. The firm is liable for the false and fraudulent representations of any of its members relative to matters falling within the scope of the partnership business. This cannot be better illustrated than by the case of Rapp v. Latham.[2] There the defendants (Parry and Latham) were in partnership as wine and spirit merchants, and the plaintiff employed them to purchase wine for him on commission, and to sell the same as opportunity might offer. Parry was the active partner, and he alone attended to the business of the firm. He from time to time represented that he had effected purchases and sales on the plaintiff's account, and he remitted to the plaintiff balances alleged to be due to him on the pretended sales. The plaintiff had advanced 126,000*l.* to be laid out in the purchase of wines, and he had received, on account of pretended re-sales and profits arising therefrom, 130,000*l.* There was, however, a considerable sum advanced by the plaintiff still unaccounted for, but which the defendant Parry alleged had been invested in the purchase of wine at so much a pipe; and to recover this sum the action was brought against Parry and his copartner. No purchase or sale had ever been made by Parry, and the whole of his representations to the plaintiff were false and fraudulent. It was contended by Latham that he was not affected by the fraud of his copartner, inasmuch as the fictitious purchases and sales were not in the ordinary course of trade, and were not, therefore, partnership transactions. But it was held that he was bound by the acts and representations of his partner Parry, and could not be allowed

[1] See as to tracing money, Lewin on Trusts, 753, etc., 3d ed.; Scott v. Surman, Willes, 400; Taylor v. Plumer, 3 M. & S. 562; Small v. Atwood, Young, 507; Pannell v. Hurley, 2 Coll. 241; Pennell v. Deffell, 4 De G. Mc. & G. 372. Where G, S, and W, the three New York members of a firm, contrary to the articles of copartnership, and without the knowledge of P, the Philadelphia member, went into stock speculations with the trust funds of an estate of which S was an executor, and involved the estate in a large loss, it was held that a legatee thereof could not recover against P for the loss. Guillon v. Peterson, 9 Phil. (Penn.) 225. See, also, Quincey v. Young, 5 Daly (N.Y.C.P.), 327.

[2] 2 B. & Ald. 795. See, also, Chester v. Dickerson, 54 N.Y. 1; also gist of case given, *ante*, pp. 720–722. An action lies by copartners in trade against two or more partners for falsely and fraudulently recommending an insolvent person as worthy of credit, whereby the plaintiffs were induced to trust him with goods which the defendants immediately attached, in consequence of which the plaintiffs lost their goods. Patten v. Gurney, 17 Mass. 182. So where, by the fraud of the master or one of the partners in an adventure, the vessel and cargo do an act which forfeits the same in a foreign port, all the partners are liable for the fraud of one. But the fraudulent partner may be liable for his misconduct to his other partners. Hadfield v. Jamieson, 2 Munf. (Va.) 66.

to say that those transactions were fictitious which Parry had represented to be real. The plaintiff was adjudged entitled to retain the 130,000*l.* remitted to him, and to recover back the advances for the supposed purchases in respect of which there had been no remittance

Again, where one of several partners in a patent induced the plaintiff, by false and fraudulent representations, to pay 3,000*l.* for part of the profits to be obtained by its working, all the partners were held liable to repay the money, although there was no evidence of fraud on the part of more than one.[1]

The case of Blair v. Bromley,[2] already alluded to, is another instance in point, and was in fact decided by the Lord Chancellor expressly upon the ground that persons who, having a duty to perform, represent to those who are interested in the performance of it that it has been performed, make themselves responsible for all the consequences of non-performance, and as one partner may bind another as to any matter within the limits of their joint business, so he may by an act which, though not constituting a contract by itself, is in equity considered as having all the consequences of one.[3]

What amounts to a representation binding on the firm is not always easy to decide. In Hume v. Bolland,[4] stock standing in the name of trustees was sold out under a power of attorney forged by Fauntleroy, one of the partners in the banking firm of Marsh & Co. After the sale the trustees were regularly credited in the books of the bank with dividends on the stock, as if it still stood in their names. The entries in the books were not communicated to the trustees, but they drew checks which there were no funds to meet, except what might have been received for dividends, and those checks were paid by the bankers. On the bankruptcy of the bank there was a considerable balance standing to the credit of the trustees in the bank books, but the Court of Exchequer certified that the bankrupts were not indebted to the trustees in any sum of money. No reasons for this judgment are, however, given, and the case can scarcely be considered as an authority at the present time.[5]

Copartners not liable when act is in excess of real or apparent power.

SEC. 459. If a partner acting apparently beyond the limits of his authority untruly represents that he is acting with his copartners' con-

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[1] Lovell v. Hicks, 2 Y. & C. Ex. 46 and 481.

[2] 5 Ha. 542, and 2 Ph. 354.

[3] See, too, Devaynes v. Noble, Baring's case, 1 Mer. 611; De Ribeyre v. Barclay, 23 Beav. 107.

[4] 1 Cr. & M. 130.

[5] 2 Cox, 312.

sent, they are not bound by this representation, nor are they liable for what may be done on the faith of it. Therefore in Ex parte Agace,[1] where one partner gave partnership bills in payment of his own separate debt, and on being asked whether his copartner was acquainted with the transaction, untruly replied that he was, and that he consented to it, it was held that the bills were not provable against the joint estate of the firm, they not being in the hands of a *bona fide* holder for value, without notice of the circumstances under which they had been given.

In this case the partner who gave the bills did that which was clearly not within the scope of his authority, and the person who took them knew it. The latter was, it is true, misled by the false answer to his question, but that answer was not referable to a matter within the scope of the partnership business, and the other partner did nothing to lead to the supposition either that he was a consenting party or that he had authorized his copartner to say that he was.

A question of more difficulty arises when a partner alleges that the business of the firm is more extensive than it really is, or that it is different from what it is. But even in this case the firm would probably be held not liable for such a misrepresentation. *Ex hypothesi* the representation is not referable to any thing falling within the scope of the partnership business; and it would probably be contended in vain that each partner was impliedly authorized by his copartners to answer questions as to what business they really carried on in partnership. If the person seeking to make the firm liable knew any thing of the firm and of its business as ordinarily carried on, then Ex parte Agace is an authority to show that he could not succeed. If he knew nothing of the firm, he would be in the position of a person dealing with an agent whose authority is wholly unknown. Now an agent whose authority is wholly unknown cannot bind his principal by misrepresenting the authority conferred;[2] and it is difficult, therefore, to see upon what principle a partner could, in the case now supposed, bind the firm by misrepresenting his authority, or by misrepresenting the nature of the business of the firm which, as to strangers, determines that authority. A member of a banking firm could hardly bind it by underwriting a policy in the name of the firm, and by untruly representing that he and his partners were insurers as well as bankers.

Liability of companies for the fraud of their directors.

SEC. 460. It is now proposed to examine the general question—

[1] See Story on Agency, § 134, etc. The case supposes that *all* that is known about the agent's authority is what he himself says.

under what circumstances is a fraud perpetrated by the directors of a company imputable to the company?

Directors of a company have no implied authority from the company to make false representations on its behalf; and, generally speaking, frauds committed by directors are quite as much frauds on the companies they represent as on other persons; but consistently with the established principles of agency, it does not follow that, as between an innocent company on the one hand, and an innocent individual defrauded by its directors on the other, the company is not responsible for the fraud committed on him by those directors. It has been held in a recent case by the House of Lords that the general interests of society demand that the representations by the directors of a company should bind the company, although the shareholders may be ignorant of the representations and of their falsehood.[1]

In the National Exchange Company of Glasgow v. Drew,[2] the defendants had been induced, by the false statements contained in the reports of the directors to the shareholders of a company, and by the false representations of its manager, to borrow money of the company, and to buy shares in it with the money so borrowed, in order to keep the price of shares up in the market. The company sued for a return of the money lent, and the defendants relied upon fraud as an answer to the suit. The fraud was clearly proved, and it was held imputable to the company, and a sufficient ground of defense. The following passage from the judgment of the Lord Chancellor shows how the argument, that the fraud committed was not the fraud of the company, was met. "The company, as an abstract thing, can represent or do nothing. It can only act by its managers. When, therefore, the directors, in the discharge of their duty, fraudulently (for I assume this to be so), for the purpose of misleading others as to the state of the concerns of the company, represent the company to be in a different state from that in which they know it to be, and the persons to whom the representation is addressed act upon it in the belief that it is true, I cannot think that society can go on without treating that as a misrepresentation by the company. Otherwise companies of this sort would be in this extraordinary predicament—that they might employ, nay,

[1] The National Exchange Co. of Glasgow v. Drew, 2 M'Queen, 103. See, too, Ranger v. The Great Western Railway Co., 5 Ho. Lo. Ca. 72.

[2] 2 M'Queen, 103. The judgments in this case were reviewed by Lord Chelmsford in Nicol's case, 5 Jur. (N.S.) 207, and were not altogether approved by him. See, however, the judgment of Lord Justice Turner in the same case.

must employ, agents to carry on their concerns, and that those agents might make representations, be they ever so false and ever so fraudulent, and yet that the company might and must benefit by those misrepresentations, without being at all liable to be told that is your fraud. It was plausibly argued that these reports were not made *by* the company but *to* the company. In form that is so. No doubt they are reports made to the company. But I assume for the present, that they were made to the company under such circumstances that what they so report is known and intended to be known, not only to the shareholders, but to all persons who may be minded to become shareholders, just the same as if they were published to the world. I repeat that I think the exigencies of society demand that the reports so made and so circulated should be deemed to be the reports of the company." Lord St. Leonards expressed a similar view upon this question. He said, "If representations are made by a company fraudulently, for the purpose of enhancing the value of their stock, and they induce a third person to purchase stock, those representations so made by them for that purpose do bind the company. I consider representations by the directors of a company as representations by the company, although they may be representations made to the company, it is their own representation. What is the first act which takes place at any such meeting as that at which the report was read? The first act which takes place at every such meeting in Scotland and England is, that if there is not a rejection, there is an adoption of the report, then I say the report is the act of the company, and not simply of the directors. It does not stand as the simple statement of the directors. It becomes the act of the company by the adoption of the report, and sending it forth to the world as a true representation of their affairs, and if that representation is made use of in dealing with third persons for the benefit of the company, it subjects them to the loss which may accrue to the party who deals, trusting to those misrepresentations."

Upon the principles above laid down, and upon the authority of the case last cited, it was held in Brockwell's case,[1] that false and fraudulent reports issued by the directors of the Royal British Bank, for the express purpose of inducing the public to take shares in it, were to be regarded as the reports of the company, and that consequently a person who had taken shares on the faith of such reports was not a contributory. So, in Bell's case,[2] it was held that a circular

[1] 4 Drew. 205. [2] 22 Beav. 35.

issued by the secretary of a company, by the order of its directors, containing a false and fraudulent statement of its state, with a view to induce the public to take shares, was imputable to the company, and that a person who had taken shares upon the faith of such representations was not a contributory. A similar decision was made in Ireland in Ginger's case,[1] where it was held that circulars issued by the managing director of the Tipperary bank for the purpose of inducing persons to take shares in it, and containing false and fraudulent statements, were to be regarded as circulars of the bank, so that persons taking shares upon the faith of them were not contributories. In all of these cases the false and fraudulent statements were made by directors for the express purpose of inducing the public to take shares; they had no other object, the directors were acting for the company, and within the scope of their authority in endeavoring to get its shares taken up, and the statements in question were made for the benefit of the company, and in connection with and as part of its legitimate business, which the directors were the persons to manage.[2] It seems therefore impossible upon principle to dispute the propriety of these decisions. So long as it is law that a principal *may* be bound by the unauthorized act of his agent, so long it will be impossible to deny that companies *may* be affected by the false and fraudulent representations of their directors, although they have no authority to promulgate falsehoods. The falsehood may be an excess of authority, but it does not therefore follow that it is imputable only to those who utter it.[3]

At the same time it has been said by great authority that directors cannot be the agents of a body of shareholders to commit a fraud, and in several cases observations are to be met with which to a certain extent warrant the opinion, which unfortunately is gaining ground, that frauds committed by directors are not imputable to the companies they represent.[4] But if the cases alluded to are closely examined, they will scarcely be found to establish any such dangerous doctrine as this. In some of them a distinction seems to be drawn between false reports made by directors to the shareholders, and adopted by them and then laid before the public, and false statements made by

[1] 5 Ir. Ch. Rep. 174.

[2] See, too, Ayre's case, 25 Beav. 513, noticed hereafter when treating of contributories.

[3] See per Lord Campbell in Burnes v. Pennell, 2 Ho. Lo. Ca. 497, and in the Deposit and General Life Ass. Co. v. Ayescough, 6 E. & B. 761, and per Lord Justice Turner, in Nicol's case, 5 Jur. (N. S.) 205.

[4] See Dodgson's case, 3 De G. & Sm. 85, where, however, it does not appear what fraud had been committed; Bernard's case, 5 De G. & Sm. 283; Nicol's case, 5 Jur. (N. S.) 205, per Lord Chelmsford; Ayre's case, 25 Beav. 520 and 523.

the directors alone to persons making inquiries of them with reference to the affairs of the company. But if such statements as these last cannot bind the company, it is difficult to see on what principle untrue reports adopted by shareholders can be regarded as emanating from those shareholders who do not expressly adopt them. If the directors are not the agents of the body of shareholders, for the purpose of stating what is false, surely some of the shareholders are not the agents of the rest for the same purpose. To say that a falsehood emanating from the directors is not imputable to the company, but that a falsehood emanating from a meeting of the shareholders is imputable to the company, cannot be right. Bell's case,[1] Ginger's case,[2] Brockwell's case,[3] Ayre's case,[4] coupled with the case of Gerhard v. Bates,[5] Pulsford v. Richards,[6] and The National Exchange Company of Glasgow v. Drew,[7] show conclusively that circulars and reports put forth by the directors of a company as inducements to the public to take shares may be considered as representations made by the company to such individuals as take shares from the company on the faith of such circulars and reports.

Effect of circulars, reports, etc., issued by company.

SEC. 461. It does not, however, follow that circulars and reports issued by a company are to be regarded as representations by the company to any one who sees them and is induced, even by an officer of the company, to act upon them. They will not amount to representations by the company unless issued for the purpose for which they are afterward used; nor unless used by some person whose business it is to carry out that purpose; nor unless used by him when acting on behalf of the company. This is well illustrated by Burnes v. Pennell,[8] which is sometimes, but erroneously, supposed to have decided that false reports made by the directors to their shareholders and afterward laid before the public, are not to be regarded as representations by the company. In this case a company was paying dividends when it was not warranted in doing so; its directors had issued and published false reports as to the flourishing state of its affairs; some time after these reports had been published, and when in fact they were old, they were shown by the law agent of the company to a person who was desirous of taking shares in it and who ultimately did take

[1] 22 Beav. 35.
[2] 5 Ir. Ch. Rep. 174.
[3] 4 Drew. 205.
[4] 25 Beav. 513.
[5] 2 Ell. & Bl. 476.
[6] 17 Beav. 87.
[7] 2 M'Queen, 103.
[8] 2 Ho. Lo. Ca. 497. See, too, Nicol's case, 5 Jur. (N.S.) 205; Bigge's case, id. 7; Worth's case, 4 Drew. 529.

shares in it on the faith of the representations made to him by such law agent, backed by the reports in question. It was held that these circumstances afforded no answer to an action for calls. It was no part of the business of the law agent to induce people to take shares in the company; no part of his business to make any representations as to the affairs of the company. The case is an authority for the proposition that representations made by an unauthorized person, although an officer of the company, do not bind the company, and that reports of the company used by him to substantiate his statements are not to be regarded as representations made by the company to the person to whom he shows them. But the case is no authority for the proposition that reports of directors are not reports of the company upon whose affairs it is a part of their business to report.

When may be used against the company

SEC. 462. Whether any person who sees them is entitled to make use of them against the company is quite a different matter. He is only entitled to do so in one of two cases, viz., 1, if the reports are published for the purpose of being acted upon by the public, and he as one of the public deals with the company upon the faith of them; or 2, if, being used for the purposes for which they were published, they are so used by the agents of the company when acting within the limits of their real or apparent authority, and on behalf of the company.

Bearing this in mind, and bearing in mind also that where a company intrusts the management of its concerns to several directors jointly, no one of them alone can be regarded as the agent of the company, most of the cases supposed to conflict with those alluded to above will be found to be consistent with them. This will be seen hereafter when the liability of persons to be contributories is examined. It may, however, be observed here, 1, that Richmond's and Painter's case,[1] Parbury's case,[2] Sheffield's case,[3] Daniell v. Royal British Bank,[4] Henderson v. Royal British Bank,[5] and Powis v. Harding,[6] are not authorities on the question whether a company is or is not answerable for the fraud of its officers, all these cases having been decided on other grounds; 2, that Nicol's case,[7] Bigge's case,[8] Holt's case,[9] Gibson's case,[10] Wollaston's case,[11] Worth's case,[12] and Liverpool

[1] 4 K. & J. 305.
[2] 3 De G. & S. 43.
[3] 1 Johns. 451.
[4] 1 H. & N. 681.
[5] 7 E. & B. 356.
[6] 1 C. B. (N. S.) 533.
[7] 5 Jur. (N. S.) 205.
[8] Id. 7.
[9] 22 Beav. 48.
[10] 2 De G. & J. 275.
[11] 5 Jur. (N. S.) 617.
[12] 4 Drew. 529.

Borough Bank,[1] are all distinguishable from those cases with which they at first sight may be thought to be conflicting; 3, that Dodgson's case,[2] is so reported as to render it of very little weight upon the question of fraud; and 4, that Bernard's case[3] may perhaps be explained upon the ground that there it was not established that the fraud relied upon had induced the taking of the shares sought to be repudiated. None of these cases (unless perhaps the last) will be found opposed to what is here contended for, viz., that the question whether a false and fraudulent statement can be regarded as the statement of a company, must be answered in the affirmative, if the statement in question is made by an agent of the company, if it relates to a matter as to which he is its agent, and if it is made in the course and as part of the business which he is appointed to transact for the company.[4]

Liability of directors for fraud by issuing false circulars, etc.

SEC. 463. Whatever doubt there may be as to the liability of a company for the frauds of its officers, there is fortunately none as to the personal liability of directors for frauds perpetrated by themselves. Directors who circulate false prospectuses and reports, with a view to induce people to take shares, are answerable in damages to those who take shares on the faith of such reports;[5] and an action for misrepresentation is sustainable, although there may have been no immediate communication between the plaintiff and the defendant.[6]

Negotiable securities, fraudulently issued, valid as to bona fide holders.

SEC. 464. As the doctrine now under consideration is established and enforced for the benefit of trade, in no case can it be more properly insisted on than where fraud has been effected by means of negotiable securities. For it would be repugnant to the nature of such securities, which are in themselves the tokens and evidences of credit, if a *bona fide* holder of them were bound to inquire into the causes of their origin. It may therefore be laid down generally that a partnership security, negotiated through the fraud of one of the partners, is nevertheless binding on the firm, in the hands of an indorsee for valuable

[1] 4 Jur. (N. S.) 1068.

[2] 3 De G. & S. 85.

[3] 5 De G. & S. 283, decided (so far as it turned on fraud) on the authority of Dodgson's case.

[4] See Meux's Executor's case, 4 De G. & S. 331, and 2 De G. M. & G. 522; Ex parte Ginger, 5 Ir. Ch. Rep. 174.

[5] Gerhard v. Bates, 2 E. & B. 476, E. C. L. R. 75; Burnes v. Pennell, 2 Ho. Lo. Ca. 497, and see Denton v. Great Northern Rail Co., 5 E. & B. 860, E. C. L. R. 85.

[6] See Clarke v. Dickson, 1 Ell. Bl. & Ell. 148; Bedford v. Bagshaw, 4 H. & N. 538.

consideration without notice of the fraud,[1] and that no subsequently acquired knowledge by the indorsee, of the misconduct of the partner in giving such security, can disaffirm the act. In the words of Lord Kenyon, if such a bill goes into the world, and gets into the hands of a *bona fide* holder, who takes it on the credit of the partnership name, and is ignorant of the circumstances, though in fact the bill was discounted for one partner's own use, in such case the partnership is liable."[2]

Rule in Lacy v. Woolcott.

SEC. 465. The case of Lacy v. Woolcott may be mentioned in connection with this subject. There, A and B being partners, A, after having committed an act of bankruptcy, accepted in the name of the firm a bill, the only consideration for which was an unstamped *post obit* bond, in which the obligor was a prisoner in the King's Bench prison. The acceptance and consideration were private transactions of A, unknown to B, and unconnected with the partnership business. The bill having afterward come into the hands of an indorsee for a valuable and *bona fide* consideration, and A being a bankrupt, the court of King's Bench held clearly that B was liable for the whole amount.

Rule in Sanderson v. Brooksbank.

SEC. 466. The principles which run through this class of cases were acted upon in a case in which the circumstances were more special. Two persons were joint agents of the Royal Veteran Battalion, but were not otherwise connected in business, and were in the habit of accepting bills by means of a clerk whose name was J. Gould, in this form: — "For agents of the R. V. B. — J. G." The letters S. A., meaning "separate account," were added after the letters J. G. It was nevertheless ruled that it was no answer to a joint action against the two by the indorsee of such a bill to show that it was accepted for the private advantage of one without the knowledge of the other, although it appeared that the indorsee might, if he had inquired of the clerk who accepted it, have ascertained that such was the fact.[4]

[1] But an indorsee of a partnership note will be called upon to prove that he gave valuable consideration for it, if there be a fair suspicion that he had notice of the original negotiation of it being in fraud of the copartnership. And in no case will a *forged* indorsement confer a title, even upon a *bona fide* holder. Esdaile v. La Nauze, 1 You. & Col. 401.

[2] 2 Esp. 523. But see the case of Williams v. Thomas, note c, *infra*.

[3] 2 Dowl. & Ryl. 458.

[4] Sanderson v. Brooksbank, 4 Car. & Payne, 286. In this case, that of Williams v. Thomas, 6 Esp. 18, was cited. There it was decided that if three persons undertake to accept bills for a particular concern, and the drawer draws bills on account of one of them only,

Instances in which firm is bound by fraudulent acceptances by one partner.

SEC. 467. Upon the same general principles, where one of three partners, unknown to and in fraud of his copartners, undertook to provide for a bill of exchange drawn by the three upon and accepted by a fourth person, it was held that the firm were bound by this fraud, and that they could not maintain an action on this bill against the acceptor.[1] So, where one of several partners in a banking-house drew a bill in his own name upon a third party, who accepted it upon condition that the drawer should provide for the same when due, it was held that the firm were bound by this act of their partner, and that, as he having failed to perform the condition could not have sued the acceptor, so neither could they.[2] Where two houses had a common partner, and a bill was indorsed by one house to the other house, as a security for demands of the latter against the former, and the former received satisfaction of the bill in fraud of the latter, it was held that the latter was bound by such fraud and could not sue the acceptor.[3]

Rule in Rapp v. Latham, relating to fraudulent contracts by one partner.

SEC. 468. The general principle regarding the frauds of individual partners was carried to its utmost limits in a modern case,[4] in which one partner was compelled to fulfill the contract of his copartner, which was incomplete by reason of such copartner's fraud, although the person contracted with had profited by such part of the contract as had been performed. Latham and Parry, the defendants, were in partnership as wine merchants. The business was under the sole management of Parry. The plaintiff employed the defendants to purchase wine for him on commission, and to resell the same as opportunity might offer. On one occasion Parry wrote to the plaintiff, that he had an opportunity of purchasing sixty-one pipes of port, at 65*l.* per pipe, and he desired the plaintiff to remit the money to pay the price of such wines, and the duties thereon: the plaintiff did remit the money, and Parry falsely represented that he made the purchase, and afterward, in the name of the firm, transmitted an account to the plaintiff, stating that thirty of these sixty-one pipes were sold at the price of 84*l.* per pipe, and paid the proceeds of such pretended sale

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and not for the particular concern, and he accepts in the name of the three, such bill cannot be recovered on by a *bona fide* holder who received it from the drawer, against the other two. *Sed. qu.* and see the case.

[1] Richmond v. Heapy, 1 Stark. 202; Johnson v. Peck, 3 id. 66.

[2] Sparrow v. Chisman, 9 Barn. & Cres. 241; 4 Man. & Ry. 206.

[3] Jacaud v. French, 12 East, 317.

[4] Rapp v. Latham, 2 Barn. & Ald. 795.

to the plaintiff. The other transactions were similar to this, and continued for about a year, during which time Parry represented that eleven different purchases of wine had been made. Each transaction formed the subject of a separate account. The plaintiff conceived that Parry was in fact laying out his money in *bona fide* purchases of wines, and that he actually resold part of such wines as he represented. The defendants having become bankrupts, it was found that these transactions were wholly fictitious, and that Parry had recourse to them as expedients to raise money. The defendant, Latham, knew that the plaintiff had employed Parry to buy and sell wines on commission, but he had no knowledge that the transactions were fictitious. Upon the whole account the plaintiff had received more money on account of the supposed resales than he had advanced; but he contended, that he had a right to take each transaction separately, and to charge the defendants jointly with the amount of the money advanced to them for the purchase of every pipe of wine not accounted for. Upon consideration of the case, the Court of King's Bench were of opinion that the plaintiff had such right; that the defendant Latham was bound by the acts and representations of his partner Parry, and could not be allowed to say that those transactions were fictitious, which Parry represented to be real; that the consequence of this was that the plaintiff was entitled to retain, without account, all the money that had been paid to him upon those fictitious transactions, as he would have been if the transactions had been real; and was entitled to recover back the sums advanced for the other supposed purchases, as money advanced by him upon a consideration not performed, and as therefore had and received by the defendants to his use.

Firm giving facilities for commission of frauds must abide the consequences.

SEC. 469. Where a partner possesses facilities to commit fraud, either by reason of the nature of his business or of the trust reposed in him by his companions, the firm ought, *a fortiori*, to be responsible for his acts. Accordingly it has been held that if one of several partners convert to his own use the moneys of customers lodged in their hands as bankers, even though such moneys were placed there by means of a secret felony committed by the fraudulent partner in a distinct character — the firm will nevertheless be liable, if they, without using due care, act upon the fraud, although they may not have been privy to the conduct of such partner.

In Stone v. Marsh,[1] the plaintiffs, together with Fauntleroy, were proprietors of stock as trustees under the will of Sir T. B. Plaistow, and the defendants, together with Fauntleroy, were bankers. Fauntleroy executed a letter of attorney empowering his copartners, the bankers, to sell the stock, and for that purpose forged the signature of the plaintiffs. The stock was sold and transferred in the books of the Bank of England, to the credit of the buyers, the other partners, Stracey & Graham, executing the instruments of transfer. The produce of the stock was paid into the bank of the defendant's agents, Martin, Stone & Co., to the credit of the defendants, according to the usual practice on the sale of stock being effected for the defendants. Fauntleroy was permitted by the partners to conduct the greater part of the business of the house without their interference, and drew upon the account at Martin, Stone & Co.'s in the partnership firm (as he thought fit), without the knowledge and in fraud of his partners, more than the amount of the produce so paid in. The defendants and Fauntleroy became bankrupts. Fauntleroy was afterward tried and convicted of forging a similar instrument, and executed. A petition was then presented[2] in the bankruptcy, by the plaintiffs, praying permission to prove the amount of stock sold against the joint estate of the bankrupts. Upon the hearing of this petition, the Lord Chancellor directed an issue, to try whether the defendants and Fauntleroy were, at the date and issuing forth, etc., indebted to the plaintiffs and Fauntleroy in any and what sum of money, and the Court of King's Bench held that the money received by the banking-house constituted a debt due from them to the trustees. Lord Tenderden—"It appears by the case that the defendants' house, by means of sales of the annuities made under the orders of the house, and transfers signed, part by one of the defendants and part by another, received the price and proceeds of the annuities; that the money was paid by the broker who effected the sales into the defendant's house, by a payment to their agents in the city; that it was so paid generally, and was never appropriated by the house to any particular account; not to the account of H. Fauntleroy, nor to the account of the trustees, who had not, in fact, any account with the house, nor to the account of the executors of the person of whose estate these annuities had formed a part, and who

[1] Ryan & Moody, 364; 6 Barn. & Cres. 551; 8 Dowl. & Ryl. 71. See S. P. Keating v. Marsh, 1 Mont. & A. 582; confirmed on appeal. 2 Cl. & Finn. 250.

[2] Mont. & Mac. 317.

had an account with the house; and, therefore, being so paid in and not placed in any particular account, cannot have been drawn out, but must be taken to have remained in the hands of the house at the time of the bankruptcy. Upon this state of facts it cannot be doubted that it was the duty of the house to place the money to the credit of the trustees, and retain it for their use and subject to their order; and that no ignorance on the part of any of them, even supposing all but one to have been ignorant of the facts (which, however, cannot have been), nor any neglect on the part of the house, arising from a misplaced confidence reposed by them in one of themselves, or otherwise, to which the plaintiffs were no parties, can deprive the plaintiffs of their right to their money." The plaintiffs were accordingly permitted to prove.

Upon the trial of the issue directed in this case, three objections were taken on the part of the defendants, the bankers: First, that no debt could be founded on and arise out of a felony; that the party whose name had been forged could not adopt and recognize the forgery so as to found a civil right upon it, it being against the policy of the criminal law to allow the party affected by felony in any way to sanction or turn it to his advantage. Secondly, that, in point of fact, the plaintiffs had not been injured, and had not lost their property, inasmuch as the transfer under a forged power worked no alteration of property; and that they, therefore, still remained owners of the stock, and could call upon The Bank of England to answer for both the principal and dividends, and Davis v. The Bank of England was cited.[1] Thirdly, that even if the defendants were fixed by the payment of the money to Martin & Co. on their account, still that they were discharged by the repayment of it to Fauntleroy, one of the parties whose property it was, and into whose hands and use it appeared by the evidence to have come.

Upon the first of these objections it was held, both by the Court of King's Bench and Lord Lyndhurst, C.,[2] that the felony committed by Fauntleroy made no distinction between this and ordinary cases of fraud, and that the house could not set up this felony as an answer to the plaintiff's claim. For that, although it was a rule of law that a man shall not be allowed to make a felony the foundation of civil action, yet that rule depended on a principle of public policy, and where the public policy ceased to exist, the rule should cease also.

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[1] 2 Bing. 392. [2] On a petition for a new trial, see Mont. & Mac. 397.

That no such policy was applicable to the principal case, the offender having suffered the extreme penalty of the law for a similar offense. Further, that the argument that the plaintiffs were seeking to ratify the felonious act of Fauntleroy, and were making that the ground of their demand, was fallacious. That the ground of their demand was the actual receipt of the money produced by the sale and transfer of their annuities. That neither the sale nor the transfer, nor the receipt of the money was felonious, but that the felony was antecedent to all these and was complete by the forgery. In answer to the second objection, it was held, both by the Court of King's Bench and Lord Lyndhurst, C.,[1] that whether the plaintiffs had or had not their remedy against the bank, they had clearly their remedy against the defendants; and that, generally speaking, where an injured party has different remedies against different persons, he may elect which he will pursue. The third objection was answered by Lord Tenterden at the trial. "The defendants say," observed his Lordship to the jury, "that Fauntleroy was one of the persons entitled, and that he has drawn the money out, and therefore they are not answerable. Now, if two persons give a power of attorney to bankers to sell out their joint stock, the bankers ought to place the proceeds to their *joint account*, and both ought to draw. If it is meant that the money should be paid to one, an authority ought to be given to that effect to the bankers; that in my experience has been the ordinary practice. If you are of opinion that this is the usual mode of dealing, then, as against the other two trustees, it is no defense that the payment has been made to one only of several who are jointly entitled to receive it."[2]

In another case, arising out of the same bankruptcy, it was held that where bankers have been employed to receive dividends in the funds, and have in their own books credited their employers with the dividends as received, and have allowed them to draw without having any other funds in their hands, the bankers are bound by the entries so acted on, although not communicated to the parties interested; and, therefore, that they cannot set up as a defense that the entries have been fraudulently made by one of the partners, the money never having been received by the house.[3]

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[1] His Lordship seems to have changed his opinion in Hume v. Bolland, 2 Tyr. 575; 1 Crom. & Mees. 130; which is at variance with the decisions previously referred to. But the case of Hume v. Bolland must be considered as overruled by the later decision of Marsh v. Keating, unless it can be distinguished on the ground that in the former case the entries made in the books of Marsh & Co. were not communicated to the customer.

[2] Ryan & Moody, 370.

[3] Hume v. Bolland, Ryan & Moody, 371; but see S. C., 2 Tyr. 575.

Firm cannot obtain title through fraud of one partner, although not privy thereto.

SEC. 470. As the firm are generally bound by losses arising from the fraud of any of the copartners, so, *a fortiori*, a firm cannot acquire property in goods obtained by the fraud of one of the partners, to which the rest are not privy. In the case of Kilby v. Wilson,[1] the plaintiffs, who were brokers, purchased a quantity of cottons of one Ryder, by order and for the use of T. & Co. T. gave them a check for the amount, drawn by his partner, Payne, who was ignorant of the transaction. The plaintiffs delivered to T. the East India Company's warrants for the cottons, and T. deposited these warrants with the defendant, as a security to cover his acceptances for two bills given to T. & Co. The day after receiving the warrants T. absconded, and the check in question, with many others given under similar circumstances, was dishonored. T. & Co. became bankrupts. The plaintiffs then brought an action of trover against the defendant for the cottons; and for the defense it was urged that the sale to T. & Co., if valid, vested the property in the assignees; and if it was invalid through fraud, the property remained in Ryder. Lord Tenterden left it to the jury to say whether or no T. obtained the warrants with a preconceived design to raise money upon them and then abscond, without ever paying the plaintiffs. If they were of that opinion, their verdict must be for the plaintiffs. In that case, the partnership ought not to prevent the plaintiffs from recovering, for although the partner was himself deceived, and had no participation in the fraud, still, no property could be vested in the partnership by such a transaction. If they thought that T. conceived the design of defrauding the plaintiffs after he had obtained possession of the warrants, then their verdict must be for the defendants.

Firm liable for connivance at fraud in certain cases.

SEC. 471. A firm is liable not only for actual fraud, but sometimes even for connivance at fraud on the part of any of its members in matters in which the firm is concerned. Thus, it has been laid down by Lord Tenterden that if one partner of a firm colludes with one of another firm in a transaction connected with the partnership, the partners of the person so colluding are liable for damages to the injured firm, by reason of their partner's misconduct. In the case[2]

[1] Ryan & Moody, 179; and see Snaith v. Burridge, 4 Taunt. 684; Easterbrook v. Messermith, 18 Wis. 546; Bell v. Ellis, 33 Cal. 627; Harper v. Smith, 9 Ga. 449.

[2] Longman v. Pole, Danson & Lloyd, 126; 1 Mood. & Malk. 223.

where this opinion was expressed, it appeared that the plaintiffs, Longman & Co., banked with the defendants, Pole & Co. On a certain day, Hurst, one of the partners of Longman, sent cash to the defendants in order to take up three bills accepted by him in the name of the firm, and coming due the next day. The bills were taken up, and by Hurst's order not entered in the plaintiff's books. It was proved that about the same period Downes, a partner in the bank, told one of the clerks that a bill of Longman's would come in on such a day, which he was to pay and give to him, Downes; and that he was to debit Hurst with it in the note book, in which private transactions were entered, so that it might not go into the ledger. Downes soon afterward gave a similar direction respecting another bill. The bills were accordingly entered in the note book, to the debit of Hurst individually, and the cash payments were entered in the same book to his credit; and consequently, no trace of these proceedings appeared either in the pass-book of the bankers, or in the check book of the plaintiffs. Hurst afterward retired from the firm of the plaintiffs, receiving the full amount of his capital, and became insolvent and bankrupt. The plaintiffs were subsequently compelled to pay his acceptances in the name of the firm, to a very large amount. The plaintiffs having brought their action for damages sustained by them from the supposed collusion between Hurst and Downes, Lord Tenterden held that the action was clearly maintainable on the principles above stated, but the jury, thinking that there was not sufficient evidence to fix Downes with collusion, found a verdict for the defendants. In some cases, however, the firm of the colluding partner may have a good defense at law, on the ground that the plaintiffs' defrauded firm are, from technical reasons, incapable of suing in a court of law. In this case, the parties defrauded must apply to a court of equity.

Acts of one partner to be binding on firm, must have been done as a partner.

SEC. 472. In all cases, however, where the firm is bound by the fraud of one partner, the acts of the fraudulent partner must have been committed in his capacity of partner.[1] Where fraud is committed by a partner *en autre droit*, and the copartners have no notice of the transaction, it seems clear that the firm will not be liable, although it may have derived benefit from such fraud. A and his two sons were partners. The sons were trustees named in a will

[1] Jacques v. Marquand, 6 Cow. 497.

for the sale of real estates. They sold the estates, and instead of applying the moneys to the purposes of the trust, appropriated them to partnership purposes. A commission of bankrupt issued against A and his two sons. Upon a petition by the *cestui que trusts* to prove against the joint estate, there being no separate estate, Sir John Leach directed an inquiry whether the moneys were employed for the use of the partnership trade, with the knowledge of the father that they were trust funds, observing that if that were the case, the *cestui que trusts* might proceed either against the sons as actual trustees, or against the firm as implied trustees, but he considered that notice of the trust was necessary in order to make the whole firm implied trustees.[1] In this case, to be sure, the whole firm had become bankrupts, but the assignees stood in no better situation than A himself would have done. But of course where some of the members of a firm apply the moneys which they hold in trust to partnership purposes, with the knowledge of the firm, the firm are responsible for the transaction, and hold the moneys as debtors to the *cestui que trust*.[2] In cases of this nature, the *cestui que trust* has a right to have the subject of the breach of trust restored to him in the manner most beneficial to himself, and consequently to consider it either as a debt from the time the breach of trust took place, or to be made good *in specie*. In Clayton's case,[3] exchequer bills were deposited with bankers without any authority to the firm to sell them, except, as it was understood, that when the exchequer bills were paid off, the bankers were to buy with the produce, or take in exchange other exchequer bills to be held by them in the same manner. Contrary to this agreement, the bankers sold the exchequer bills without the knowledge of the creditor, for a considerable sum, which they applied to their own use. Sir William Grant, on the ground that the creditor elected to take the money due to him as a debt, directed interest at 5*l. per cent* to be computed upon the amount produced by the sale, from the period at which the money came into the hands of the partnership.[4]

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[1] Ex parte Heaton, Buck, 386; Ex parte Apsy, 2 Bro. 265. However, if the partners of an executor permit him to place his account as executor in the general books, whether they are aware of the specific contents of those entries or not, it seems that they may be compelled to grant the *cestui que trust* a free inspection of the books. Freeman v. Fairlie, 3 Mer. 44.

[2] Ex parte Watson, 2 Ves. & B. 414; Smith v. Jameson, 5 T. R. 601.

[3] 1 Mer. 572.

[4] If a trustee lend trust money to a firm in which he is engaged, or to any other firm for the sake of making a profit, he may be made to account for and pay all the profits. Heathcote v. Hulme, 1 Jac. & W. 122; Docker v. Somes, 2 Myl. & K. 655; Palmer v.

Of liabilities for torts committed by a copartner.

SEC. 473. A learned writer observes that, though partners are in general bound by the *contracts*, they are not answerable for the *wrongs* of each other. If they all join in one trespass or tort, of course they may all be sued and compelled to make compensation for the injury they have committed; but this action arises from their personal misconduct, and not from the relation of partnership which subsists between them. With regard to matters quite unconnected with the partnership trade or business, there can be no question; and in general, acts or omissions in the course of the partnership trade or business, in violation of law, will only implicate those who are guilty of them. If one of two bankers in partnership should commit usury in discounting bills; if one of two attorneys in partnership should practice without a certificate; if one of two surgeons in partnership should wantonly ill-treat a patient, the innocent copartners certainly could not be liable to an action for penalties or damages. However, the rule admits of exceptions. Partners, like individuals, are responsible for the negligence of their servants, upon the maxim of *qui facit per alium facit per se*, and if one of the partners acts he is considered in this instance as the servant of the rest. In these cases the tort is looked upon as the joint and several tort of all the partners, so that they may either be proceeded against in a body, or one may be sued alone for the whole of the damage done.[1] The doctrine contained in the preceding paragraph is warranted by several cases, to some of which it may be proper to advert.

When action may be against all.

SEC. 474. Where the tort is joint the action may be brought against all the partners. In Moreton v. Hardern,[2] an action on the case was brought against three defendants, proprietors of a stage coach. The declaration stated that the defendants so carelessly managed their coach and horses, that the coach ran against the plaintiff and broke

Mitchell, 2 id. 672, n. In a case before Lord Thurlow, where the assignees of a bankrupt had kept the bankrupt's fund in their hands for eight years without dividing, and one of them admitted that he had lent his share to a partnership in which he was engaged, jointly with his own money, and without making any distinct charge of interest, he was decreed to pay such interest as should appear to have been made, and where none, 4*l.* per cent. Hankey v. Garrett, 1 Ves. 236. However, the court has, in some cases, given interest on profits, but the general rule is that, where a trust property is employed in a trade without authority, the *cestuis que trust* shall elect to take either the profits for the whole period, or interest for the whole period. Docker v. Somes, *supra*.

[1] Wats. Partn. 235.

[2] 4 Barn. & Cres. 223; 6 Dowl. & Ryl. 275.

his leg. It appeared in evidence that one of the defendants was driving at the time when the accident happened, and the jury found that it happened through his *negligent* driving. It was held that the plaintiff might maintain *case* against all the proprietors, although he might perhaps have been entitled to bring trespass against the one that drove the coach.

Upon the same principle, it has been laid down, that partners may be sued in an action of trover, although there was no joint conversion in point of fact. That a joint conversion may be raised in point of law, by the assent of the partner to the acts of his copartner.[1] So, it has been held that a bookseller or newspaper proprietor is answerable for the acts of his agent or copartner, not only civilly but criminally.[2]

The same principles apply to breaches of the revenue laws, which are in the nature of tort. Thus, in The Attorney-General v. Stannyforth,[3] Nicholas Skinner, for himself and company, had imported a quantity of wine, and by a wrong entry in the custom-house books the Crown was defrauded in its duties 535*l*. The discovery being made some years after, this information was brought, which prayed that the defendants might make good the deficiency, and the court decreed accordingly that, though the importation and entry were only by Skinner, yet all the partners who were so at the time of the importation were liable in the whole to the crown.

Action may be against one or all.

SEC. 475. Although the tort be joint, the action may be brought against any one of the partners. Thus, where A and B were in partnership as attorneys, and their joint names were inserted in their papers, in causes in their office, but by agreement A was to have the profits of all the business which arose from his own connections, it was ruled that an action for penalties for practicing without a certificate might be maintained against B, although the suit in respect of which the action for the penalties was brought was conducted by A for his own benefit only, B deriving from it no advantage whatever.[4]

Again, as to breaches of the laws of the customs. In the Attorney-General v. Burges,[5] upon an information by way of *devenerunt*, for the treble value, on the statute 8 Anne, for goods that

[1] Nicoll v. Glennie, 1 M. & S. 588.
[2] Rex v. Almon, 5 Burr. 2686; Rex v. Pearce, 1 Peake, 75; Rex v. Topham, 4 T. R. 126.
[3] Bunb. 97.
[4] Edmonson v. Davis, 4 Esp. 14.
[5] Bunb. 223; and see the Attorney-General v. Weeks, id.

came to the hands of the defendant, knowing they had not paid the duties, it was determined by Lord Chief Baron Pengelly that if one of several partners is concerned in smuggling, on account of the copartnership trade, the Crown may come against any one of the partners for the whole penalty, it being in the nature of a *tort*, and not of a contract; just as, in cases of *tort*, a subject might come upon any one concerned in the *tort*.

Rule in King v. Manning.

SEC. 476. So, in The King v. Manning,[1] upon an information by way of *devenerunt*, to recover treble the value of one hundred weight of tea come to the hands of the defendant, it was held that the information was maintainable against the defendant separately, though another was concerned jointly with him in the smuggling; and that, inasmuch as the whole of the goods were left in his custody while the other went out to look for a purchaser, he was liable for treble the value of the whole. But in this case it is laid down by Lord Chief Baron Comyns that if the partners had divided the goods after their purchase, the defendant could be liable only to the treble value of his share, and no more, for no more came to his hand or possession; for, though joint tenants are seized or possessed *per my et per tout* (that is, so far possessed of the whole that none can say till partition made that this or that part is not in his possession), yet they in right and reality are possessed of no more than the proper share or purparty. As, therefore, they give or dispose of no more, so neither can they forfeit any more.

When only one is liable.

SEC. 477. And clearly, those partners alone are liable in respect of a *tort* who are privy to the *tort*. Thus, if two persons join stock together and buy goods on their joint account, and one alone is consenant that the goods are run and uncustomed, he alone is liable.[2]

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[1] Com. Rep. 616.

[2] Id.

CHAPTER XIX.

OF EXEMPTIONS FROM LIABILITY.

SEC. 478. Where contract is by deed.
SEC. 479. No implied power to bind by deed.
SEC. 480. Bond made by one partner, binding on firm when.
SEC. 481. American doctrine.
SEC. 482. Rule does not extend to releases.
SEC. 483. Releases by deed.
SEC. 484. Warrant of attorney.
SEC. 485. Submission to arbitration.
SEC. 486. The partner executing is bound.

Where the contract is by deed.

SEC. 478. The law, from the necessity of encouraging commerce, recognizes the universal custom of merchants which allows one partner to bind his copartner by bills of exchange. But there is no need to extend that custom to instruments which are not negotiable, and which are attended with such solemnities that they who rely on them as securities must know under what circumstances, and on whose credit, they are executed.

One partner, therefore, has no implied authority to bind his copartner by deed. In the case of Harrison v. Jackson,[1] an action of

[1] 7 T. R. 207. Generally, one partner cannot bind his copartner by a sealed instrument, as by a deed. Gram v. Seton, 1 Hall (N. Y. S. C.), 262; Green v. Beals, 2 Cai. 254; Gates v. Graham, 12 Wend. (N. Y.) 53; Skinner v. Dayton, 19 Johns. (N. Y.) 513; Little v. Hazard, 5 Harr. (Del.) 291; Fitchburgh v. Boyer, 5 Watts (Penn.) 159; Fleming v. Dunbar, 2 Hill (S. C.), 532; Napier v. Catrou, 2 Humph. (Tenn.), 584; Massey v. Pike, 20 Ark. 92. But this rule does not apply, where the deed would be equally operative if it was not sealed or acknowledged. Purviance v. Sutherland, 2 Ohio St. 478; Tapley v. Butterfield, 1 Metc. (Ky.) 515. The reason alleged, why one partner cannot bind his copartner by deed, is, that the act is one requiring special authority. That is, that it is not embraced under the general powers of a partner. Donaldson v. Kendall, 2 Ga. Dec. 227. An instrument under seal, including a deed, executed by one partner, is valid if executed in pursuance of prior special authority or if it is subsequently verbally ratified by the firm. Grady v. Robinson, 28 Ala. 289; Herbert v. Hanrick, 16 id. 581; Drumwright v. Philpot, 16 Ga. 424; Haynes v. Seachrest, 13 Iowa, 455; Ely v. Hair, 16 B. Monr. (Ky.) 230; Pike v. Bacon, 20 Me. 280; Cady v. Sheperd, 11 Pick. (Mass.) 400; Clement v. Brush, 3 Johns. (N. Y.) Cas. 180; Swan v. Stedman, 4 Metc. (Mass.) 548; Fox v. Norton, 9 Mich. 207; Gwinn v. Rooker, 24 Mo. 290; Smith v. Kerr, 3 N. Y. 144; Gram v. Seaton, 1 Hall (N. Y.) 262; Bond v. Aitkin, 6 Watts & S. (Penn.) 165; Johns v. Rattin, 30 Penn. St. 84; Lowery v. Drew, 18

covenant was brought upon an agreement of three parts, stated in the declaration to have been made between the defendants Jackson, Sykes, and Rushworth, merchants and partners, of the first part; W. and J. Harrison of the second part, and the plaintiff, of the third part; of one part of which said agreement, as being sealed with the seal of the said W. Sykes, for himself and the other two defendants, the plaintiff made a *profert* in court. The defendants pleaded *non est factum*. At the trial it appeared that the defendants were partners. The agreement stated in the declaration was produced, and the subscribing witness proved that it was executed in his presence by the defendant Sykes, in the following form: "For Jackson, Self, and Rushworth.—W. Sykes;" but neither Jackson nor Rushworth was present at the execution. The question reserved for the opinion of the Court of King's Bench was, whether such execution of the agreement by the defendant Sykes was binding on the other defendants, Jackson and Rushworth. The court held that it was not. Lord Kenyon—"The law of merchants is part of the law of the land; and in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted but that one partner might bind the

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Tex. 786; Wilson v. Hunter, 14 Wis. 683. And such ratification or assent of the other partner or partners may be implied from circumstances. Person v. Carter, 3 Murph. (N. C.) 321; Layton v. Hastings 2 Harr. (Del.) 147; Doe v. Tupper, 12 Miss. 261; Morse v. Bellows, 7 N. H. 549; Lucas v. Sanders, 1 McMull. (S. C.) 311; Lee v. Onstott, 1 Ark. 206; Montgomery v. Boon, 2 B. Monr. (Ky.) 244; M'Cart v. Lewis, id. 267; Cummings v. Carsily, 5 id. 47; Bentrin v. Zierlien, 4 Mo. 417; Turbeville v. Ryan, 1 Humph. (Tenn.) 113.

Where a partner executes a bond in the name of the firm, and upon being informed that it did not bind the partners, with the consent of the obligor removes the seal, and redelivers it, with the intent to bind the company, it is effectual as their promissory note. Horton v. Child, 4 Dev. (N. C.) L. 460.

A deed executed by one partner is good and binding upon his copartner if executed in his presence, and by his consent. United States v. Astley, 3 Wash. 508; Fleming v. Dunbar, 2 Hill (S.C.), 532; Modisett v. Lindley, 2 Blackf. (Ind.) 119; Posey v. Bullitt, 1 id. 99; Fitchburgh v. Boyer, 5 Watts (Penn.), 159; Mackay v. Bloodgood, 9 Johns. (N. Y.) 285; Little v. Hazard, 5 Harr. (Del.) 291. An action brought by a partnership upon a sealed instrument, executed by one of the partners in the partnership name, is an adoption of the instrument, and the defendant cannot object that it is not the deed of the partnership. Dodge v. M'Kay, 4 Ala. 346. An obligation, signed with the partnership name, but in the body of which it is recited that it was the act of one of the partners, and given as a security for his individual debt, is not, on its face, a partnership act. Scott v. Dansby, 12 Ala. 714.

One partner cannot execute a bond under seal, in the partnership name, so as to bind the other partner unless he subsequently ratifies the act. Gerard v. Basse, 1 Dall. (Penn.) 119; Hart v. Withers, 2 N. J. L. 285; Button v. Hampson, Wright (Ohio), 93; McDonald v. Eggleston, 26 Vt. 154; Pierson v. Hooker, 3 Johns. (N. Y.) 68.

But such a bond is obligatory upon the partner executing it. Williams v. Hodgson, 2 H. & J. (Md.) 474; Jones v. Neals, 2 P. & H. (Va.) 339; Jackson v. Stanford, 19 Ga. 14. And upon the others if they expressly or impliedly assented thereto. Pettes v. Bloomer, 21 How. Pr. (N. Y.) 317; Price v. Alexander, 2 Greene (Iowa), 427; Day v. Lafferty, 4 Ark. 450; Henderson v. Barber, 6 Blackf. (Ind.) 26.

rest. But the power of binding each other by deed is now for the first time insisted on, except in the *Nisi Prius* case cited,[1] the facts of which are not sufficiently disclosed to enable me to judge of its propriety. This would be a most alarming doctrine to hold out to the mercantile world. If one partner could bind the others by such a deed as the present, it would extend to the case of mortgages, and would enable a partner to give to a favorite creditor a real lien on the estates of the other partners."

Neither does a general partnership agreement, though under seal, authorize the partners to execute deeds for each other, unless a particular power be given for that purpose.[2] Generally, therefore, if a deed be expressed to be executed by A "for himself and partner," it must be shown that A had authority by deed from his partner to execute. The partner's subsequent acknowledgment of A's authority will not be sufficient.[3] But a partner may bind his copartner by deed, if he have a special power under seal for that purpose.[4]

No implied authority to bind by deed.

SEC. 479. However, although one partner has no implied authority generally to bind his copartner by deed, yet if one partner execute a deed on behalf of the firm, in the presence and with the consent of his copartners, that will bind the firm; in such case the sealing and delivery by one is deemed to be the act of all. In the case of Ball v. Dunsterville,[5] an action was brought on a bill of sale; the declaration stated the bill of sale to have been made by the defendants, and sealed with the seal of one of them for and on behalf of himself and the other, and by the authority of the other, etc. It was proved at the trial that one of the defendants, in the presence of the other and by his authority, executed the instrument for them both, they being partners in this transaction; but there was but one seal, and it did

[1] Mears v. Serocold, cited by Dampier, *arguendo*, thus: "In Mears v. Serocold, the defendant pleaded *non est factum* to an action brought on a joint and several bond; at the trial it appeared that Jackson was in partnership with Serocold when the bond was given, and that the consideration of the bond was a partnership debt due from Jackson and Serocold to the plaintiff, and that Jackson first executed the bond for Serocold, and then for himself. Lord Mansfield ruled, that for a partnership debt one partner had authority to execute a bond for another, and thereupon directed a verdict for the plaintiff."

[2] Per Lord Kenyon, Harrison v. Jackson, *supra*.

[3] Steiglitz v. Egginton, Holt (N. P. C.), 141; Brutton v. Burton, 1 Chit. 707. A surviving partner cannot alone convey real estate of the firm by deed. Galbraith v. Gedge, 16 B. Monr. (Ky.) 631.

[4] Ibid. And see Horsely v. Rush, 7 T. R. 209, cited; Appleton v. Binks, 5 East, 148; Berkely v. Hardy, 8 Dowl. & Ryl. 102. See, also, Gerard v. Basse, 1 Dall. (Penn.) 119; Hart v. Withers, 2 N. J. L. 285; McDonald v. Eggleston, 26 Vt. 154; Pierson v. Hooker, 3 Johns. (N. Y.) 68.

[5] 4 T. R. 313.

not appear that he had put the seal twice upon the wax. It was objected on the part of the defendants, that the instrument was not properly executed, for that they (not being a corporation) could not have a common seal; that the execution by one could not operate as an execution by both, even though they both consented; and that the authority given by one to the other to execute a deed, should itself have been conferred by deed. But the Court of King's Bench were clearly of opinion that there was no ground for the objection; that no particular mode of delivery was necessary, for that it was sufficient if the party executing a deed treated it as his own. And they relied principally on this deed having been executed by one defendant for himself and the other in the presence of that other.[1]

Bond made by one partner binding on firm, when.

SEC. 480. In the same manner, it has been held in a court of equity that a bond is binding on the firm, though not executed by all the partners, if executed in the name of the firm and in the presence of all the partners. In the case of Burn v. Burn,[2] a bond commenced thus: "Know all men by these presents, that we, Mayne & Co., of etc., are held and firmly bound," etc. The condition ran thus: "The condition of this bond is such, that if the above-bounden Mayne & Co., their heirs, executors, or administrators, shall and do well and truly pay," etc.; and the instrument concluded thus: "Mayne & Co. Signed, sealed, delivered, etc., in the presence of A. B." The bond was executed by Thomas Mayne only, because his name stood first in the firm, but he executed it with the privity of the two other partners, who were both present at the execution. It was held to be valid and binding on the other members of the firm.

In a recent case where a deed giving time to the debtor of a banking firm was executed by one of the partners of the bank, at the banking-house, in the following manner: "For Self and partners, S. G. Smith," but there was no evidence of any express assent to or dissent from this mode of signature by the other partners, the Court of Exchequer declined to give any opinion as to whether the deed was binding on the other partners in the banking-house.[3]

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[1] If one of the officers of the Forest put one seal to the rolls by assent of all the verderers and other officers, it is as good as if every one had put his several seal; as in case divers men enter into an obligation, and they all consent, and set but one seal to it, it is a good obligation of them all. Lord Lovelace's case, Sir W. Jones, 268, cited *arguendo* in the principal case. See Sheph. Touch. 55; Fitzh. tit. Feoffment, pl. 105; Com. Dig. Fait, (A. 2). See, also, United States v. Astley, 3 Wash. (U.S. C.C.) 508; Fleming v. Dunbar, 2 Hill (S. C.), 532; Modiselt v. Lindley, 2 Blackf. (Ind.) 119; Fitchburn v. Boyer, 5 Watts (Penn.) 159; McKay v. Bloodgood, 9 Johns. (N.Y.) 285.

[2] 3 Ves. 573; 1 Hov. Supp. 410. See Orr v. Chase, 1 Mer. 720.

[3] Smith v. Winter, 4 M. & W. 454.

American cases where the deed was held good.

SEC. 481. A sealed instrument signed with the partnership name, though by one partner, under a former verbal authority, or subsequently ratified by them, is binding upon the firm.[1] And where an action was brought by a partnership upon a sealed instrument executed by one of the partners in the partnership name, it was held to be an adoption of the instrument by the partnership, and that the defendants could not object that it was their deed.[2] And although one partner cannot bind another by deed or bond by virtue of the partnership relation merely, yet a declaration alleging that partners "made their certain writing obligatory signed by their firm name, and sealed with their seal," was held good on demurrer, as the deed, if it was the deed of but one, must be shown by plea on the part of the partner who did not execute it.[3] The rule that a partner has no power to bind the firm by deed does not extend so far, that an agreement is no evidence at all against the firm.[4] And that an agreement in writing that would be good without seal, is not vitiated by the seal.[5] But a contrary doctrine seems to be held in Pennsylvania. In Schmertz v. Shreeve,[6] it was held that an action could not be maintained against a firm on an instrument under seal executed by one partner, even where the seal was not essential to the validity of the instrument.

The court, by Sharswood, J., say, "It was a contract to deliver merchandise at a future time for a certain price to be paid by the defendants, and the suit to recover damages for the failure of the defendants to fulfill that engagement. It was therefore an executory contract, imposing a new original liability on the firm. It is certainly true that a seal was not essential to its validity. But that is not the test. It rather is, did it change its nature? This is unquestionable. A seal imports a consideration, and a contract under seal requires no consideration to support it. Moreover, there is no limitation prescribed by law to an action on a specialty or covenant under seal.[7]

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[1] Grady v. Robinson, 28 Ala. 289; Herbert v. Haurick, 16 id. 581; Drunwright v. Philpot, 16 Ga. 424; Haynes v. Secrest, 13 Iowa, 455; Ely v. Hair, 16 B. Monr. (Ky.) 230; Pike v. Beacon, 20 Me. 280; Cady v. Sheperd, 11 Pick. 400; Swan v. Steadman, 4 Metc. (Mass.) 548; Fox v. Norton, 9 Mich. 207; Guinn v. Rooker, 24 Mo. 290; Smith v. Kerr, 3 N. Y. 144; Bond v. Aitkin, 6 W. & S. 165; Johns v. Battin, 30 Penn. St. 84; Lowry v. Drew, 18 Tex. 786; Wilson v. Hunter, 14 Wis. 683; Dillon v. Brown, 11 Gray (Mass.), 179; Butterfield v. Hemsley, 12 Gray (Mass.), 226: Sherely v. Fearne, 33 Miss. 653; Russell v. Annable, 104 Mass. 72.

[2] Dodge v. McKay, 4 Ala. 346.

[3] Massey v. Pike, 20 Ark. 92.

[4] Purviance v. Sutherland, 2 Ohio, 478.

[5] Id. See, also, 7 id. 175; Sale v. Deshaur, 3 Leigh (Va.), 548; Kyle v. Roberts, 6 id. 495.

[6] 62 Penn. St. 457; 1 Am. Rep. 439.

[7] See, also, Fitchhorne v. Boyer, 5, Watts (Penn.), 159; Bond v. Aitkin, 6 W. & S. (Penn.) 165; Johns v. Battin, 30 Penn. St. 84.

But the common-law virtues of the private seal seem to be waning, and its former qualities are growing constantly less. In many States a mere scroll has been substituted, and in others they have been abolished, and if an instrument is under seal it is of no higher character than an unsealed one.[1] Under a statute of Missouri, requiring mortgages of personal property to be acknowledged as conveyances of land are required to be, it was held that a mortgage by a partnership might be signed and acknowledged by one of the partners with the firm name, although his name does not appear in the firm name.[2] And in Virginia it was held that where a partner, in the absence of his copartner, executed a bill of sale under a seal, of all the partnership effects, the sale being *bona fide* and for the full value of the property, and made to pay a pressing debt of the absent partner, was binding upon him and passed the whole title of the firm in the property.[3] And an instrument signed by the partnership name and sealed with a single seal is binding upon all the partners who were present and assented thereto.[4] But when one partner conveys the joint interest and the deed is signed in the name of the firm by one member, and acknowledged by him as his act and deed, it was held necessary for the party receiving the conveyance to show that the partner executing the conveyance had authority so to do, otherwise it will only convey the individual interest of the partner.[5]

The rule does not extend to releases.

SEC. 482. The general rule of law that one partner cannot bind his copartner by deed, although applicable, with the exceptions which have been mentioned to every deed in the nature of a grant, yet appears not to extend to releases. It has been said by a learned judge that "a release of a demand executed by one of five partners would bind all, for if a person owe money to five several partners, he is not bound to pay them altogether, but may pay the debt to any one of them whose receipt or discharge operates as the receipt or discharge of the whole firm."[6] Perhaps this observation refers rather to discharges of minor payments in the ordinary course of trade, than to releases of important debts, or to general releases of all debts due

[1] Williams v. Haynes, 27 Iowa, 251; 1 Am. Rep. 268.

[2] Keck v. Fisher, 58 Mo. 532; see, also, Patch v. Wheatland, 8 Allen (Mass.), 102; Tapley v. Butterfield, 1 Metc. (Mass.) 515.

[3] Corkner v. Stuart, 6 Gratt. (Va.) 197.

[4] Day v. Lafferty, 4 Ark. 450; Lee v. Oristoll, 1 id. 206; Henderson v. Barbee, 2 Blackf. (Ind.) 26; Price v. Alexander, 6 Gr. (Iowa) 427; Pettes v. Bloomer, 21 How. (N. Y.) 317.

[5] Walton v. Tusten, 49 Miss. 569.

[6] D. Best, C. J., 10 Moore, 393.

from a debtor to the firm, because, the convenience arising to the customer by his being permitted to pay his debt effectually to one of several partners, seems hardly a sufficient foundation for any general rule of law regarding deeds of release executed by one partner in the name of the copartnership.

But however this may be, it seems to be the prevailing opinion, though the point has not been expressly decided, that in all cases a release by one of several partners to a debtor of the firm binds the firm. In Rolle's Abridgment it is laid down that, "if there are divers obligees, and one release, it bars all.[1] And in Perry v. Jackson,[2] Lord Kenyon says: "A partner may release as well as create a debt." It has also been laid down that if copartners are creditors, and come in under a composition deed which is in the nature of a release, and usually contains a clause of release, it binds all if executed by one, and may be pleaded in bar of an action brought for the previous debt, either in conjunction with him who executed it, or by the others as surviving partners after his death.[3] It has likewise been stated generally that one partner may release partnership debts.[4] And Lord Eldon, speaking of the case of Harrison v. Jackson, says: "The question depended in a great measure on the nature of the deed. I take it that that was a deed by which one partner signing, sealing, and delivering for himself and his partners, undertook to make a grant; the effect of such a deed is very different from the effect of a release.[5]

In the case before his Lordship, the bill was filed by a surety in a bond against the partners,[6] stating that they having agreed to execute a release to the principal, in consideration of an assignment of his effects, one alone executed the release, signing and sealing it for himself and his copartners. The bill then alleged that the release being executed by one partner only, the plaintiff could not defend himself at law and prayed that it might be declared a good discharge in equity against the surety, that the defendants might be restrained from proceeding on the bond at law, and that the bond might be delivered up to the plaintiff to be canceled. The defendants put in a general demurrer, insisting that the release, though executed by one partner only, might be pleaded at law to an action brought by both, and therefore that the plaintiff, having by his own statement a defense at law,

[1] 1 Roll. Abr. 410, d.

[2] 4 T. R. 519. See Ellison v. Dezell.

[3] Wats. Partn. 225.

[4] Mont. Partn. 24, citing the dictum in Tooker's case, 2 Rep. 68, and D. arg. Wood, Swan v. Steele, 7 East, 211.

[5] Hawkshaw v. Parkins, 2 Swanst. 544.

[6] The principal in the bond was out of the jurisdiction.

had no remedy in equity. Lord Eldon seemed to be clearly of opinion that such a release might be pleaded at law. But he held that whether the plaintiff had or had not a defense at law was in this case immaterial; for that here, the defendants having agreed to execute a release, and an assignment having been made in performance of that agreement, that would sustain the agreement in equity, if not in a court of law. Besides, the bill prayed relief, which could not be obtained at law, the delivery of the bonds to be canceled. On these latter grounds, therefore, he overruled the demurrer.[1]

Whatever be the force and effect of a release by one partner of partnership debts in general, it seems clear that one of two partners may release a cause of action brought by the two.[2] This will be again mentioned at a future page.

Releases by deed.

SEC. 483. The English doctrine on the subject of releases by deed has been followed in this country, although there would seem to be no distinction founded upon principle between this and deeds for other purposes.[3] So a partner may by an instrument under seal authorize a third person to discharge a debt due the firm.[4]

Warrant of attorney.

SEC. 484. A *warrant of attorney* under seal, executed by a person for himself and partner in the absence of the latter, but with his consent, is a sufficient authority for signing judgment against both.[5] However, the reason for this decision seems to have been, that a warrant of attorney to confess judgment need not be under seal.

Submission to arbitration.

SEC. 485. One partner cannot bind his copartners by *submission to arbitration*, whether the instrument be under seal or otherwise. In Stead v. Salt,[6] three out of five joint contractors signed a submission

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[1] Hawkshaw v. Parkins, 2 Swanst. 539.

[2] Per Dallas, J., 4 Moore, 194.

[3] Halsey v. Whitney, 4 Mass. 206; Bruen v. Marquand, 17 Johns. (N. Y.) 58; Smith v. Stone, 4 Gill & J. (Md.) 310; Pierson v. Hooker, 3 Johns. (N.Y.) 68; Beach v. Olendorf, 1 Hilt. (N. Y.) 41; McBride v. Hagan, 1 Wend. (N. Y.) 326; Morse v. Bellows, 7 N. H. 549: Crutwell v. De Rossett, 5 Jones' (N. C.) L. 263; United States v. Astley, 3 Wash. (U. S. C. C.) 508.

[4] Wells v. Evans, 20 Wend. (N. Y.) 251; 22 id. 324.

[5] Brutton v. Burton, 1 Chit. 707; see Kinnersley v. Mussen, 5 Taunt. 264.

[6] 10 Moore, 395; 3 Bing. 101.

In Parkes v. Smith, 15 Ad. & El. 297, it was held that a submission made by *all* the partners was good, as to all matters within the terms of the submission, acted upon by the arbitrators. Kimball v. Walker, 30 Ill. 482; Tomlinson v. Hammond, 8 Iowa, 42; Dater v. Wittington, 1 Hill (N. Y.), 319; Riley v. Rupet, 34 Mo. 524; Haynes v. Forskall, 13 Me.

to arbitration, not under seal, in respect of the price of some work which had been done for them in the course of their joint undertaking, and the Court of Common Pleas held that this instrument was not binding on the two who did not sign, although the subject-matter referred to arose out of the business in which they were jointly engaged.

And the case of Stead v. Salt has been acted upon in a recent case, where the parties concerned were general partners.[1] There the plaintiff brought his action of *assumpsit* upon an award, which had been made for the purpose of settling certain differences which had arisen between himself and his partners, Pares and Heygate. It appeared that the submission was by parol on the part of Pares, but there was no evidence of any express assent to the reference either by the plaintiff or Heygate, and on the ground that the submission of Heygate was not proved, the plaintiff was nonsuited. Upon an application to the Court of Exchequer to set aside the nonsuit, and for a new trial, the court refused the application, Lord Abinger observing that there was sufficient authority for saying that one partner cannot bind another by a submission to arbitration. "I do not mean to say," added his Lordship, "that such assent must be given in any particular form of words, or that it requires to be under the hand of the copartner. All that there should be is some evidence of an actual authority conferred. Such a power does not arise out of the relation of partnership, and is not therefore to be inferred from such relation."

115; Coleman v. Coleman, 12 Rich. (S. C.) L. 183; Gibson v. Moore, 6 N. H. 549. And, when in order to secure the rights of the firm under a contract, it is necessary that a submission should be made — as to secure a loss under an insurance policy — one partner may agree to submit, when the others are away, and the submission is valid, unless they afterward dissent. Brink v. New Amsterdam Fire Ins. Co., 5 Robt. (N. Y. S C.) 104. Generally, however, such submission made by one partner is void. Harrington v. Higham, 13 Barb. (N. Y.) 661; Martin v. Thrasher, 40 Vt. 465; Stead v. Salt, 10 Moore, 389; McBride v. Hogan, 1 Wend. (N. Y.) 337; Wood v. Shepperd, 2 P. & H. 457; Adams v. Bankart, 5 Tryw. 425; Armstrong v. Robinson, 5 G. & J. (Md.) 422; Abbott v. Dexter, 6 Cush. (Mass.) 108; Jones v. Bailey, 5 Cal. 345; Karthaus v. Ferrer, 1 Pet. (U. S.) 228; Morrow v. Riley, 15 Ala. 710. See, holding that one partner may submit to arbitration Southard v. Steele, 3 T. B. Monr. (Ky.) 438; Halleck v. Marsh, 25 Ill. 50. An award, although otherwise valid, may be set aside for fraud even after judgment thereon. Chambers v. Crook, 42 Ala. 173.

[1] Adams v. Bankhart, 1 C. M. & R. 681. See Boyd v. Emerson, 2 Ad. & Ell. 184. See, also, Carthaus v. Ferrers, 1 Pet. 222; Jones v. Bailey, 5 Cal. 345; Wood v. Sheperd, 2 Pratt & H. (Va.) 442; Buchox v. Grandjoin, 1 Mich. 367; Martin v. Thrasher, 40 Vt. 460; but see Buchanan v. Curry, where the partners received the fruits of the award; see, also, contrary doctrine where the agreement was not under seal. Hallack v. March, 25 Ill. 48; Taylor v. Corgel, 20 Miss. 243.

The partner executing is bound.

SEC. 486. In all that precedes, the question has been, whether the partner *not* executing the instrument is bound. But, where a partner executes a deed for himself and his copartner, it has frequently been decided that he himself is bound, though his copartner is not. In the case of Elliott v. Davis,[1] one Davis, intending to execute a joint and several bond for himself and his copartner Marsh, executed one in this form: "Know all men by these presents, that I, T. Davis, and G. Marsh," and signed it "Davis and Marsh." He also sealed and delivered it as his deed. Marsh was ignorant of the transaction. It was held that, as he had no authority to bind Marsh, the bond became his several bond, and not the joint and several bond of himself and Marsh.

Again, where G had, in behalf of himself and partner, entered into a submission to an award, it was held that G was bound by the submission, though his copartner was not, and that he was liable in an action for non-performance of the award.[2]

Where an award of partnership matters in general is offered in evidence against a partner, it must be proved that the deed of submission was executed by all the partners, for the submission of the others is the consideration to each partner to submit to the arbitration. A and others, partners, entered into a deed of covenant that the copartnership accounts, and all matters in difference between the parties, or any two of them, should be referred to arbitrators. The arbitrators made their award, by which they found a balance due to A on the partnership account, and a balance due to A from H, another of the partners. H became bankrupt, and A was his petitioning creditor and assignee. In an action of trover by A, the assignee, against the other partners, the plaintiff's counsel put in the deed of covenant, but was only able to prove the execution of it by A and H, although it appeared on the face of it to have been executed by all the partners. The question then was, whether the award which was founded on the deed of covenant could be received in evidence; and the court held that it could not. Lord Ellenborough said that if this covenant were to bind H, he might lose the benefit of the submission of all the others, which might have been his inducement to submit the matters in difference between him and A. And he added that the principle

[1] 2 Bos. & Pull. 338.

[2] Strangford v. Green, 2 Mod. 228.

was strong, and wanted no authority to support it, that there should be the accession of all the parties to the common agreement of all, which was the consideration to each for entering into the agreement.[1]

[1] Antram v. Chase, 15 East, 209. That the execution by deed, if void as to the partnership, binds those executing it, see Jackson v. Stanford, 19 Ga. 14; Doe v. Tupper, 12 Miss. 261; Layton v. Hastings, 2 Harr. (Del.) 147; Potter v. McCoy, 26 Penn. St. 458; Hoskinson v. Elliott, 62 id. 393; Armstrong v. Robinson, 5 Gill & J. (Md.) 412.

CHAPTER XX.

WHERE THE CONTRACT IS SEVERAL IN LAW.

SEC. 487. Where contract is executed in the name of the partners only.
SEC. 488. Advancing money and taking security of partner.
SEC. 489. Grounds on which liability rests.
SEC. 490. Principle on which firm is charged.
SEC. 491 When loan to one partner becomes debt against the firm.
SEC. 492. Rule in Ex parte Raleigh explained.
SEC. 493. Creditor must have acted with due caution.
SEC. 494. Where the contract in fact is made with the firm.
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SEC. 499. Contracts as affected by the custom of trade.

Where executed in the name of the partner only.

SEC. 487. It is possible for third persons to enter into contracts with an individual partner, under an impression that such contracts are made with the firm; the law, on the contrary, adjudging them to have been made with the individual partner only. Instances of this kind are few, but they may occur under certain circumstances. Thus: 1. If a person advance money to the firm, and take the separate bill of one partner, he cannot sue the firm on that security, although he may possibly succeed in an action against the firm for money advanced. On the bill the contract is several, and the individual partner alone can be sued upon it. 2. A person may contract with an individual partner in a matter unconnected with the partnership business, in which case, though he may have intended otherwise, his contract will only be several, and the firm will not be liable.[1] 3. A person may, upon receiving a consideration, assent to such private arrangements of the firm as shall deprive him of the benefit of his joint contract. 4. Cases may arise where, by the custom of a particular trade, a contract

[1] D. Bayley, B., 1 Cromp. & Jerv. 509 —"A party is not liable as a partner, except he give to his partner express or implied authority to pledge his credit in the transaction out of which the claim arises."

made with one partner is not binding on the firm. Other situations and circumstances, attended with the same legal result, will probably occur to the mind of the learned reader. The various matters which we have above adverted to will deserve our consideration in the present section.

Advancing money and taking security of a partner.

SEC. 488. If a person advance money even for the purposes of a firm, but take the separate security of one partner, the partnership not being carried on in that partner's individual name, the contract as evidenced by such security is several, and a several action only can be brought upon it. In the case of Siffkin v. Walker,[1] an action was brought on the following promissory note:—"Two months after date, I promise to pay J. Siffkin or order £300 for value received.—T. Walker." The declaration stated that the defendants made their certain promissory note, which was signed by Walker for himself and Rowlestone, whereby they promised to pay, etc. The counsel for the plaintiff, in opening the case, undertook to show that the defendants were jointly indebted to the plaintiff on a charter-party of affreightment to the amount of £300, and that the note declared upon was given by Walker in satisfaction of this debt. Lord Ellenborough—"I think your remedy was either jointly against both defendants on the charter-party, or separately against Walker on the promissory note. How can I say that a note made and signed by one in his own name, is the note of him and another person neither mentioned nor referred to? The import and legal effect of a written instrument must be gathered from the terms in which it is expressed, and I must treat this note as a separate security for a joint debt."

The principles of the foregoing decision were acknowledged and confirmed in the case of Emly v. Lye.[2] There it appeared that George Lye and E. L. Lye, being carriers and partners, employed Horne as their book-keeper, and Horne was in the habit of receiving bills from his employers, some drawn in the name of the firm, some by G. Lye only, and others by E. L. Lye. Horne carried these bills to Burrough, who was not acquainted with the defendants, but had received strong recommendations of them, and they were discounted by Burrough at various times, he making no distinction between the bills, but conceiving that they were all drawn on the partnership account. The proceeds of the bills were remitted

[1] 2 Camp. 308. [2] 15 East, 7.

and paid by Horne to the partnership account, and the discount thereof allowed to him in his account with the partnership. Burrough having become bankrupt his assignees brought their action against both partners on the separate bills of E. L. Lye, and obtained a verdict for the amount. The defendants then obtained a rule nisi to set aside the verdict and enter a nonsuit; and it appears from the report of the case that the counsel for the plaintiffs, in arguing against the rule, relied only on the money counts, giving up the counts on the bill, on the authority of the case of Siffkin v. Walker. And per Lord Ellenborough, "The first counts of this declaration have been properly enough abandoned, for unquestionably on a bill of exchange drawn by one only, it cannot be allowed to supply by intendment the names of others in order to charge them. If the plaintiffs, therefore, would rest their claim upon the bills, they must confine " to E. L. Lye."

Grounds on which liability rests.

SEC. 489. Upon these two cases it is to be observed that in the former the plaintiff had the joint security of the charter-party, on which he might have sued the firm, but in the latter case, the plaintiffs had no joint security, and having failed on the money counts, they were without any remedy against the partners jointly. The grounds on which they so failed are well worthy of attention. It appears that Burrough had strong recommendations of the defendants, and conceived that the bills were all drawn on the partnership account. This, however, was held not to raise any contract, by way of loan, between him and the partnership, the judges treating the transaction as a mere matter of discount. Lord Ellenborough—"It is contended that as the proceeds went to the use of the partnership, the partners are therefore liable upon the other counts. I am at a loss to discover what difference that circumstance can make, if it were originally a mere matter of discount, and I do not find any evidence to show that it was any thing else. It was supposed, indeed, by Burrough (the bankrupt), that the money would be applied to the partnership use; and to such use it was in fact applied; but nothing passed from the defendants to induce him to believe that it was a partnership concern, and to lend his money on that account. It does not appear that any contract of that sort took place, nor any thing more than the mere discount of the bills; and it would be highly dangerous to follow the proceeds into the hands of every party to whose use they may be applied. In the absence, therefore, of any express contract between

the parties, it appears to me that we must treat the transaction as a mere discount of the bills." Grose, J.: "It is contended that this was money lent to the partnership, but it was only mere matter of discount, and not money advanced on the general security of the partnership, although it was applied to their use. At the time when the discount took place, the partnership had made no contract with the discounter, who, therefore, must be taken to have purchased the bills of one of the partners only. If the partners were not liable at the time when the discount was made, the subsequent application of the money cannot make them liable." And Le Blanc, J.: "Where another security is not required, the party who discounts a bill of exchange stands in the situation of a purchaser of the bill, and therefore cannot recover against the person with whom he discounts it, and whose name is not on the bill, the money advanced by way of discount."

Perhaps this decision might have been given in words of broader application. In Ex parte Hunter,[1] where A lent B a sum of money for the purpose of being applied to a partnership in which he was engaged, and had taken B's separate bond for the amount; upon the application of A to prove as a joint creditor against the firm, Lord Hardwicke said: "It has been contended, on the part of the petition, that the money in question was jointly lent to the partners, but that is expressly contradicted by their own affidavits, for they admit the sum to be lent to B, with the intention that he should apply the same for the benefit of the partnership. The consequence of this is that here are plainly two contracts, one as between A and B, the other as between B and his partner." His Lordship accordingly held that A could not come in upon the estate of B and his partner *pari passu* with the joint creditors, although he was otherwise entitled to relief.

Principle on which firm is charged.

SEC. 490. The principle, therefore, of these cases is, that in order to charge a partnership as debtor, there must be satisfactory evidence that the contract which is the foundation of the charge was joint in point of law. In the case of goods supplied to a partnership, a joint

[1] 1 Atk. 223; 1 Co. B. L. chap. 13. It appears by the latter report that the loan arose from acquiescence on the part of A in a wrongful act of B, who had previously, and *with the knowledge of his partner*, raised money on some securities of A, which he held in trust, and applied the produce to the uses of the partnership. If the fact as to the knowledge of the copartner be true, which is expressly denied in Atkyns, this case is not to be reconciled with that of Smith v. Jameson, 5 T. R. 601.

contract may in part be inferred from the general nature of the transaction, but, in the case of money lent, the evidence of a joint contract must be more specific, for, as Lord Eldon observed, "It is not enough to prove that money borrowed by an individual goes into the partnership estate to make the partners liable."

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[1] Ex parte Emly, 1 Rose, 61. D. Leach, *arguendo*, "If goods be delivered to an individual member of a partnership, although he does not disclose that it is for the partnership, and although the creditors imagined it to be merely for that individual, they may prove as against all the partners." D. Lord Eldon, "The law in regard to goods is as stated by Mr. Leach, but it is a different question where goods are sold to A B and C D, and it is part of the contract that A B shall give bills of exchange, whether those bills are not a payment? I except the case of antecedent debts." The same doctrine is maintained in this country. Thus, where a partnership was sued upon a note signed by one partner only in his individual name, which was not the style of the firm, it was held that the burden of proof was on the plaintiff to show that the note was in fact a partnership transaction, and that the partnership would not be liable by showing, merely, that the money was borrowed for the use of the firm, and was used by them, with knowledge of these facts, if it also appears that the money was advanced on the personal credit of the partner executing it, or if it was given to be negotiated as the individual note of the maker. Farmers' Bank v. Bayliss, 41 Mo. 275. A note signed by partners in their individual names, and not the partnership name, for money used in the partnership business, is a partnership note. Kendrick v. Tarbell, 27 Vt. 512. See, also, Gay v. Johnson, 45 N. H. 587. "It is," says Mr. Lindley, vol. 1, p. 291, "an erroneous but popular notion that if a firm obtains the benefit of a contract, made with one of its partners, it must needs be bound by that contract. Now, although the circumstance that the firm obtains the benefit of contract entered into by one of its members tends to show that he entered into the contract as the agent of the firm, per Rolfe, B., in Beckham v. Drake, 9 M. & W. 99, 100, such circumstance is no more than evidence that this was the case, and the question upon which the liability or non-liability of the firm depends is not —has the firm obtained the benefit of the contract? but, did the firm, by one of its partners, enter into the contract? Per Rolfe, B., *ubi supra*. See, too, Kingsbridge Flour Mill Co. v. The Plymouth Grinding Co., 2 Ex. 718; Ernest v. Nicholls, 6 Ho. Lo. Ca. 423. Similarly, the fact that one partner only has obtained the benefit of a contract does not show conclusively that the firm is not bound. Ex parte Bonbonus, 8 Ves. 544. A leading case on this head is Emly v. Lye, 15 East, 7. There a partner drew bills in his own name, and sent them to an agent of the firm in order that he might get them discounted. They were discounted, and the money obtained was remitted by the agent, and was paid to the account of the firm. It was held that the firm was neither liable for the amount of the bills or the bills themselves, nor for their proceeds on the common counts. There was no loan to the partnership, no contract with it, and no liability attached to the firm by the fact that the partner who alone was liable had applied the money after he got it for the benefit of his copartners, as well as for the benefit of himself. Again, in Bevan v. Lewis, 1 Sim. 376, one partner borrowed money, and executed warrants of attorney to confess judgment. The money which was obtained was applied by him for the benefit of the partnership, and was obtained in part with the knowledge of his copartner, in order that it might be so applied. But it was held that the partnership was not liable for the money, the loan having been clearly made to the one partner against whom alone judgment was to be entered, and not to the firm through him. So, in ordinary cases, when one partner borrows money without the authority of his copartners, the contract of loan is with him and not with the firm, and the nature of that contract is not altered by his application of the money. The lender of the money has, therefore, no right to repayment by the firm, although the money may have been applied for its benefit. See Smith v. Craven, 1 Cr. & J. 500; Hawtayne v. Bourne, 8 M. & W. 595; Burmester v. Norris, 6 Ex. 796; Ricketts v. Bennett, 4 C. B. 686, E. C. L.

When loan to one partner becomes debt against firm.

SEC. 491. On these principles it has been decided in equity,[1] that if a partner borrow a sum of money on his own security only, it does not become a partnership debt, although applied to partnership purposes, even with the knowledge of the other partner. In the case alluded to, Bevan and Lewis were partners. Lewis borrowed two

R. 56; The Worcester Corn Exchange Co., 3 De G. Mc. & G. 180; Fisher v. Tayler, 2 Ha. 218. In all these cases the firm got the benefit of the money borrowed, and yet was held not liable to repay it. Compare with them Ex parte Chippendale, 4 De G. Mc. & G. 19. The same rule applies to goods, services, and works supplied to or done for one partner, either on his own account, or if for the firm, at the request of one of its members acting beyond the limits of his apparent as well as of his real authority. The firm does not, in any case of this sort, enter into any contract, express or implied, with the person dealing with the partner in question, and does not incur any obligation toward that person by reason of the circumstance that it gets the benefit of what he has done. Kingsbridge Flour Mill Co. v. Plymouth Grinding Co., 2 Ex. 718; Lloyd v. Freshfield, 2 C. & P. 325; Galway v. Matthews, 10 East, 264; Kilgour v. Finlyson, 1 H. Bl. 155; Ex parte Wheatley, Cooke's Bank Law 538; Ball v. Lanesborough, 5 Bro. P. C. 480; Ex parte Peel, 6 Ves. 603; Ex parte Hartop, 12 id. 352. The principles of these decisions govern those cases in which one partner in breach of trust, but without the knowledge or consent of his copartners, applies trust money, over which he has control as a trustee, to the purposes of the firm. *The fact that the firm has been benefited by the money does not render it liable to the owners of the money.* Ex parte Apsey, 3 Bro. C. C. 265; Ex parte Heaton, Buck 386. But perhaps the cases that go farthest in this direction, are those in which it has been held that corporations are not liable for goods supplied to them, or work done for them unless some contract with the corporation under its common seal has been entered into. For cases showing that a corporation or company is not liable for contracts entered into by its promoters, although it has had the benefits therefrom, see Hutchison v. Surrey Gas Co., 11 C. B. 689; Payne v. New South Wales Coal Co., 10 Ex. 283. The authorities referred to may therefore be taken to establish that a partnership or company does not become liable upon a contract when entered into by reason of its having been benefited by it, and from the fact that it was so benefited, it is not to be deemed to have ratified the contract or to have incurred any obligation *quasi ex contractu*, similar to that which it would have incurred if the contract had been binding upon it at its inception. Homershaw v. Wolverhampton, etc., Company, 6 Exch. 142." And a note given by individual partners does not necessarily constitute a partnership debt. Turner v. Jaycox, 40 N. Y. 470. And where a debt due by a firm was settled by paying the creditor one-half of his demand in cash, and giving him a note for the balance executed by one of the partners individually, it was held that the debt of the firm was discharged, and that on an accounting between the partners the maker of the note should be credited with its amount as so much money paid by him for the firm. Gondolfo v. Appleton, 40 N. Y. 533. See, also, Maxwell v. Day, 45 Ind. 509; Evans v. Hawley, 35 Iowa, 83. But Mr. Parsons states the rule with a qualification. He says: "The firm would not be held if the creditor of the firm had accepted the individual security of the partner instead of the debt of the firm; provided the new individual indebtedness be of a higher nature than the firm debt, or payable sooner, or attended with some other advantage, which might be regarded as a consideration." Pars. on Part. 106. And he observes: "If there is no new consideration for the new promise, as all the partners were equally liable in *solido* for the firm debt, a new promise by any one of them to pay it, should, by itself alone, be no consideration for releasing the rest." Pars. on Part. 110. And one who has purchased of one of a firm property subject to partnership debts,

[1] Bevan v. Lewis, 1 Sim. 376; see Loyd v. Freshfield, 2 Carr. & Payne, 325; Smith v. Craven, 1 Cromp. & Jerv. 500.

several sums of 500*l.*, the first of Siely, and the second of Siely and Cubitt. For each of these sums he gave his separate promissory note, and his separate warrant of attorney. Judgments having been entered upon these warrants of attorney, and writs of *fi. fa.* having been sued out upon them, the sheriff took the partnership property in execution, sold part, and was proceeding to sell the other part for the benefit of Siely & Cubitt. Bevan then filed his bill against Lewis, Siely, Cubitt, and the sheriff, insisting that the stock and effects of the partnership ought to be sold, the proceeds applied in payment of the partnership debts, and the surplus divided between the plaintiff and Lewis; that Siely and Cubitt were not entitled, under the execution, to seize the stock and effects, nor had they any interest therein, except in Lewis's share of the surplus, and praying for the usual part-

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and agreed in writing to assume and pay such debts as a part of the purchase price, thereby recognizes the equitable lien of the partnership creditors; and it is not necessary that such creditors should put their claims into judgments before filing a bill to compel such payment. Olson v. Morrison, 29 Mich. 395. On this question, whether a partnership is liable in case of contract with one of the partners, Mr. Parsons observes: "He who gives credit to one partner alone cannot call on the rest. This is true, however, the credit is given, as if the creditor sold him goods; or sold to another goods on his guaranty; or received him as surety in any way; or loaned him money." Pars. on Part. 103. See, also, Lafton v. Chinn. 6 B. Mon. (Ky.) 305; Pinckney v. Keyler, 4 E. D. S. (N. Y. C. P.) 469; Mifflin v. Smith, 17 S. & R. (Penn.) 169; Clay v. Cottrill, 18 Penn. 408; Siegel v. Chidsey, 28 id. 279; Miller v. Morrell, 6 Hill (N.Y.), 114; Whitaker v. Brown, 16 Wend. (N.Y.) 505. And he further observes: "If there is no evidence to show to whom the credit was given, the fact that the money borrowed by a partner comes to the use of the firm, raises a presumption that the loan was made by him as a partner, and, if not rebutted, will make the firm liable for repayment." Pars. on Part. 104. The conclusion to which he comes does not seem consistent with the principles of law relating to the subject, nor is it sustained by the authorities cited by him. It would appear more consistent to presume that the transaction contemplated the liability only of the partner making the contract or executing the instrument, and only hold the firm liable where the circumstances would, under general principles applicable to the case, warrant it. And these circumstances ought to be shown by the party making the claim. It may occur that the funds or property of a partner placed in the capital or common stock of a firm, and for which the partner has given his individual obligation, is a matter of which the copartners has no knowledge whatever. And the obligation to do so may rest upon the partner so furnishing it, and the mere using of such money or property in the partnership ought not to furnish a presumption of the obligation of the partnership to pay the obligation assumed merely by a partner. On this question, see Emly v. Lye, 15 East, 7; Skiffkin v. Walker, 2 Camp. 308; Winship v. Bank of U. S., 5 Pet. 567; Danton v. Rodie, 3 Camp. 493; Graeff v. Hitchman, 5 Watts (Penn.), 454; Bond v. Aitkin, 6 W. & S. (Penn.) 165; Foster v. Hall, 4 Humph. (Tenn.) 346; Union Bank v. Eaton, 5 id. 499; Green v. Tanner, 8 Metc. (Mass.) 411; Ostrom v. Jacobs, 9 id. 454; Thorn v. Smith, 21 Wend. (N. Y.) 365; Beebe v. Rogers, 3 G. Greene, 319; Donnelly v. Ryan, 41 Penn. St. 306; Folk v. Wilson, 21 Md. 538; Watts' Adm. v. Fife, 37 Penn. St. 394; Beckham v. Knight, 4 Bing. N. C. 243; Robinson v. Rudkins, Exch., 38 Eng. L. & E. 372; Beakham v. Drake, 9 M. & W. 79; Reynolds v. Cleaveland, 4 Cow. 282; Webster v. Stearns, 44 N. H. 498.

Where goods are bought by a partner for the firm of which he is a member, the goods become the property of the firm, though the fact of the partnership

nership accounts, that the stock and effects might be sold and the produce applied in payment of the debts of the partnership; that the plaintiff's share of the surplus might be paid to him; for an injunction to restrain the execution; and for the appointment of a receiver, etc. By the answers of Siely & Cubitt it appeared that Bevan was aware of both these loans, that, as to the first, he knew that part of it had been devoted to partnership purposes, and that, as to the second, it was applied for by Lewis at the request of Bevan, paid by Bevan's direction to the bankers of the partnership to the joint credit of the partners, and afterward applied by them in payment of the partnership debts. Sir Anthony Hart, however, held that there was a clear equity for the plaintiff. "The judgments," he said, "that have been entered up upon the securities for the sums in question, must take their character from the securities on which they have been so entered up, and as those securities were executed by one only of the partners, they constitute the creditors joint proprietors only with the other partners. The accounts of the partnership estate and debts must therefore be taken in the manner prayed by the bill, and the defendants will be entitled to be paid their debts out of Lewis's share of any surplus that remains after all the demands on the partnership are satisfied." [1]

Rule in Ex parte Raleigh explained.

SEC. 492. A case decided in the Court of Bankruptcy, at first sight appears irreconcilable with the preceding authorities, but, upon a careful investigation of it, there seems no reason to say that it is not in accord-

is not disclosed at the time. Scott v. McKinney, 98 Mass. 344. So where one of two partners, acting as the financial agent of the firm, purchases land to promote the partnership business; on which they afterward expend money and make valuable improvements, the purchase will be deemed that of the firm, and inure to its benefit. Lacy v. Hall, 37 Penn. St. 360. But where one partner purchased a horse with his own private funds, under an agreement to allow his copartner to elect to take him at the cost price, and for several days the horse was used in the partnership business until the latter, in the exercise of his election, sold him, such sale was held not to be a partnership transaction. Hatch v. Foster, 27 Vt. 515. And where two persons by virtue of an agreement became partners as to third persons, without any firm name, and one of the partners who transacted the business gave a note signed with his own individual name for goods purchased, and the payee was ignorant of the relations of the partners, it was held that the dormant partner was not liable on the note. Palmer v. Elliott, 1 Cliff. (U.S.) 63. And in a case where a note was drawn and signed by a member of a firm in favor of the firm, and he indorsed the name of the firm thereon, it was held, in the absence of proof to the contrary, that there was a legal presumption that a partner using the firm name does so for a joint indebtedness in the regular course of partnership business. Manning v. Hays, 6 Md. 5. So a partnership may be held liable for the rent of premises leased to and in the name of one member only, on proof that they were hired for and used by the firm. Penn v. Kearny, 21 La. An. 21.

[1] Ex parte Raleigh, 3 Mont. & A. 670; 3 Deac. 160.

ance with the principles already laid down. In that case one partner borrowed money for partnership purposes, upon security of certain shares of a banking-house which belonged to the partnership, but which stood in the name of his copartner. The copartner being resident in America, the borrowing partner gave his separate undertaking to procure the assignment of the shares, and, in consideration of this undertaking, the buyers of the shares gave their acceptance for the amount to a bill drawn upon them by the borrowing partner in the name of the firm. The drawers of the bill having become bankrupt, the question was whether the buyers could prove the amount of the bill against the separate estate of the partner who gave the separate undertaking, and the Court of Review held that they could not, being, as it should seem, of opinion that the contract was made with the firm, and not with the individual partner. Now, supposing the buyers to have had notice of the fact of these shares being the property of the partnership, and to have insisted on having the separate undertaking of the borrowing partner merely as a collateral security in consequence of the absence of his copartner, there is nothing in this case which militates against the foregoing authorities; and it seems clear, upon the whole, that such were the circumstances of the case, or, at all events, that the court in its judgment proceeded on this hypothesis.[1]

Creditor must have acted with due caution.

SEC. 493. In the cases which have just been examined, a separate security was uniformly taken by the creditor, a circumstance which, *per se*, would be evidence of a *separate* contract. But even where no separate security has been taken, and where the creditor, through the *fraud* of his debtor, has acted on the belief that the contract is joint —the money advanced being carried to the funds of the debtor's partnership—still, if the creditor be proved to have acted with want of ordinary caution, the contract will be held to be several, and the firm of the debtor is not answerable for the debt. In the case of Lloyd v. Freshfield,[2] A, who was in partnership as a solicitor, borrowed money

[1] The reports of this case, as of some others in the Court of Review, vary from each other in very essential points. In the report of Montague and Ayrton, an affidavit is set out from which it should appear that the buyers were not informed, and had no reason to believe, that the shares were the joint property of the firm. On the other hand, according to Deacon's report, the Chief Judge said: "It appears from the affidavits that the shares were in fact the joint property of the firm of Rostern brothers, though standing in the name of James Rostern at the bank; *that this fact was explained to the Duncans at the time of the contract of sale*, and that they then said they would have the personal responsibility of L. Rostern."

[2] 2 Carr. & Payne, 325; and see Parkin v. Carruthers, 3 Esp. 248. In this country it has been held that where there is a general partnership,

of the plaintiffs, who were bankers, alleging that he was instructed to raise a sum for a client of his firm. The plaintiffs lent the money without consulting A's copartners or the client, and A paid the money into the funds of his copartnership in satisfaction of certain other moneys which he had previously drawn out without the knowledge of his copartners. It appeared in evidence that A's firm never had an account with the plaintiff's banking-house, although A himself had. The plaintiffs having brought their action for money lent against the firm of A, the jury, under all the circumstances, found a verdict for the defendants, and the Court of King's Bench refused to set aside the verdict. Abbott, C. J.: "Taking the evidence together, it appeared to me at the trial that the advance was to B alone, and not to his firm. As to any rule that if one partner borrow money on his separate credit, he, by applying it to partnership purposes, thereby makes the house liable, I wish it to be distinctly understood that I do not subscribe to that doctrine." Bailey, J.: "There is no ground to disturb the verdict. In point of law, one of several partners may pledge the partnership name for money *bona fide* lent, the lender supposing that one partner has the authority of the house to borrow, and that he is borrowing for the purposes of the house. But if there be gross negligence, and the transaction be out of the ordinary course of business, the lenders cannot recover against the other partners if the money be misapplied. The plaintiffs lend to A alone; the sum is very large; and there is no document, not even a letter from the client, stating that he wants any money; and no deed passes. It was a negligent act at least in the plaintiffs to lend the money, and they, therefore, cannot call on an innocent party for its repayment.

Where the contract in fact is made with the firm.

SEC. 494. But where the contract of the creditor is in fact made with the firm, and not with the individual partner only, there, by force of the contract, the creditor has a clear legal remedy against the firm, although, as a collateral security for his debt, he may have taken the separate bond or bill of one partner, under which he could only sue that partner separately. In Ex parte Brown,[1] two partners

and money is borrowed by one of the firm *in the name* of the firm, all the partners are liable, although the money, when obtained, be appropriated by the partner borrowing it to his own use. Church v. Sparrow, 5 Wend. (N. Y.) 223. But it is apprehended that in England so general a decision would not be made. See, also, New York Fire Ins. Co. v. Bennett, 5 Conn. 574; Onondaga Bk. v. Du Puy, 17 Wend. (N.Y.) 47; Winship v. U.S. Bk., 5 Pet. (U.S.) 529; 5 Mass. 179.

[1] 1 Atk. 225, cited. See Ex parte Bonbonus, 8 Ves. 542. See, also, U. S. v. Astly, 3 Wash. (U. S. C. C.) 508, where Washington, J., observed:

"The reason upon which the doctrine is founded is obvious. The bond is

agreed to borrow a sum of money for the use of the partnership, but one of them only gave a bond for securing the payment, and the other was a witness to it. This money was afterward entered into the cash book of the partnership. A joint commission was afterward taken out against them, and the obligee was denied by the commissioners to be admitted a creditor, but Lord King was of opinion that he ought to be admitted, and directed accordingly.

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clearly obligatory upon the partner who executed it, and is, therefore, an extinguishment of the simple contract debt as to him. A joint action therefore to recover on the original debt could not be supported against both partners. Neither could the action be maintained against the partner who did not execute the bond because he has a right to insist that his partner should be joined with him in the action, of which right the creditor and the other partner cannot, without his consent, deprive him. It is precisely like the case of a release, which, if given to one joint debtor, discharges both. A bond, given for a simple contract debt, operates as a release of that debt, and creates another of superior dignity, which can be enforced only against the person who executed the bond." See, also, opinion of Washington, J., in United States v. Astley, 3 Wash. (U. S. C. C.) 512; Ward v. Motter, 2 Rob. (Va.) 536; Anderson v. Levan, 1 W. & S. (Penn.) 334; and as to the effect of taking the note of one partner, see Davis v. Desauque, 5 Whart. (Penn.) 530; Mason v. Wickersham, 4 W. & S. (Penn.) 100. In Virginia it has been held that in equity the taking of a note or bond of one partner for a partnership debt would not extinguish the claim against the firm. Sale v. Dishman, 3 Leigh, 548; Gault v. Callaud, 7 id. 594; Weaver v. Tapscote, 9 id. 424; Ward v. Motter, 2 Rob. 552. But the doctrine recognized in other States is that if the obligation taken is of a higher character or quality than the original, then the new one becomes a substitute, even although it be the obligation executed by an individual partner for the debt of a firm. Id. See, also, United States v. Astley, *supra;* Tour v. Goodrich, 2 Johns. Cas. (N. Y.) 180; Moule v. Hollins, 11 Gill & J. (Md.) 11; Bell v. Banks, 3 Man. & G. 258; McNaughton v. Partridge, 11 Ohio, 223; United States v. Lyman, 1 Mason (U. S.), 505. In the latter case Judge Story observes: "The doctrine that in general a higher security taken from the debtor himself extinguishes the original contract proceeds upon a presumption of law that it is taken in satisfaction of the original debt; for if it appear otherwise upon the face of the security, it will not operate as an extinguishment. * * * It is therefore after all a mere question of interest, and the law, in the absence of all other evidence of interest, construes the higher security of the debtor himself as an extinguishment, because it gives a higher remedy. I admit, also, that a higher security by a third person, if taken at the time of making the original contract, or afterward, in satisfaction of the debt, operates as an extinguishment. But there is this difference between the case of a higher security of the debtor himself and a third person, that in the latter case the law does not presume the security taken in satisfaction, unless it is averred and proved to be the agreement of the parties so to consider it. Whether the receiving of higher security from one partner for the partnership debt be an extinguishment, unless expressly taken in satisfaction of such debt, may, perhaps, admit of some doubt, notwithstanding the language of some highly respectable authorities." And in Bond v. Pitkins, 6 W. & S. (Penn.), the court say: "Where the bond of one of the partners is taken for an antecedent partnership debt, it may be considered either as payment or extinguishment of such debt, or only a collateral security, according to the nature of the transaction and the circumstances attending it. Wallace v. Fairman, 4 Watts (Penn.), 378. But when there is no antecedent debt, but the bond of one partner is taken at the time the money is loaned to the partnership, and as a consideration for loaning the money, it can hardly be treated as a collateral security. It must be considered as all one transaction, and the bond as the only security contemplated; unless perhaps there were strong and positive evidence to show an express agreement to the contrary by all parties." See, also, Williams v. Hodgson,

Rule in Denton v. Rodie.

SEC. 495. The case of Denton v. Rodie [1] must be referred to the same principles. There, the house of Clough, Wilkes & Clough was established at Liverpool, but J. B. Clough, one of the partners, was resident at New York with a view to form connections and to procure consignments for the house at Liverpool. For the purpose of raising money, he was in the habit of drawing bills in his own name upon the house at Liverpool. These bills he sold at New York for cash or promissory notes at short dates, according to the current rate of exchange. The money thus raised he applied in the purchase of homeward investments for the house at Liverpool. That house regularly accepted and paid the bills so drawn, till they stopped payment. At the time they stopped payment, the house of Denton & Co. were holders of several of these bills in consequence of having advanced money upon them to J. B. Clough, according to the rate of exchange. One of these bills had been accepted, but not paid; the others were unaccepted, not having been presented. The question was, whether Denton & Co. could prove these bills on the joint estate of the three bankrupts, or only upon the separate estate of the drawer, and an issue having been directed to try this question, a verdict was found for the plaintiffs, Denton & Co., under the direction of Lord Ellenborough. "I think," said his Lordship, "this case is distinguishable from Emly v. Lye. Here, I conceive the partner in America had authority from the two others to raise money for the use of the firm, and money was accordingly raised from the plaintiffs upon these bills in pursuance of such authority. The transaction is a loan rather than a discount. J. B. Clough was sent out to America to manage the business of the house there, and to procure homeward investments. The shipments from this country did not form an adequate fund for that purpose. He says himself, that he had a *carte blanche* as to the means he should

2 Har. & J. 474; McNaughton v. Partridge, 11 Ohio, 223. And where the creditor takes the individual note of a partner for partnership debt, this exonerates the other members from liability. Harris v. Lindsay, 4 Wash. (U. S. C. C.) 98; Pope v. Nance, 1 Stew. (Ala.) 354. See, also, Patterson v. Camden, 25 Mo. 13; also, Millerd v. Thorn, 15 Abb. (N. Y.) Pr. N. S. 371. And where a creditor pursues his claim against an individual partner to judgment, this has been held to discharge the firm from liability for the same debt. Trafton v. United States, 3 Story (U. S.), 648; United States v. Cushman, 2 Sumner (U. S.), 437; Pearce v. Kearney, 5 Hill (N. Y.), 82; Suydam v. Barber, 6 Duer (N. Y. S. C.), 34; McMaster v. Vern, 3 id. 249; Peters v. Sanford, 1 Den. (N. Y.) 224; King v. Hoar, 13 M. & W. 494; Bell v. Banks, 3 Man. & G. 267; Spear v. Gillett, 1 Dev. (N. C.) Eq. 466.

[1] 3 Camp. 493; Ex parte Bolitho, Buck, 109; South Carolina Bank v. Case, 8 Barn. & Cres. 427.

adopt. He accordingly raises money, for which he gives as a security bills of exchange drawn in his own name upon the house. They know and recognize this mode of dealing. They regularly accept and pay the bills so drawn, till the time of their failure. Therefore, although I cannot say they are jointly liable upon the unaccepted bills, I think they are jointly indebted to the same amount, as for money lent, or money had and received."

The transactions in the preceding case seem to have been of the same nature, and conducted nearly by the same parties as those in The South Carolina Bank case, which has been already cited. It should seem, therefore, on the authority of the latter decision, that the plaintiffs, Denton & Co., might have recovered against the defendants, as drawers of the bills, supposing the name of J. B. Clough to have been in fact the name of the firm for the purposes of the business in America.

Contract with a partner.

SEC. 496. Again, if a person contract with an individual partner in a matter unconnected with the partnership business, the firm will not be bound. In Ex parte Agace,[1] Prothero and Spraggon were partners. Scollick, the brother-in-law of Prothero, was indebted to one Owen by bond. Scollick applied to Prothero to lend him 100*l.*, which he did. It was then agreed between Prothero, Scollick, and Owen, that the latter should assign Scollick's bond to Prothero & Spraggon, and that in lieu thereof Owen should take five acceptances of Prothero & Spraggon, as a security for Scollick's debt to him. This was done, but while Prothero was putting the names of himself and Spraggon to the five bills, Owen asked him whether Spraggon was acquainted with the transaction, and Prothro assured him that it was done with Spraggon's consent. In fact, Spraggon was a total stranger to the transaction at the time, and was not acquainted with it until some time afterward, when he immediately expressed his disapprobation of it in the strongest terms, and insisted upon an immediate dissolution of the partnership between himself and Prothero. Owen afterward indorsed the bills to Agace, *who had notice of the circumstances under which the bills were given.* Upon the bankruptcy of Spraggon & Prothero, the question was, whether Agace could prove the amount of the bills as the joint debt of Spraggon and Prothero, which question depended on another, namely, whether

[1] 2 Cox, 312. See Williams v. Thomas, 6 Esp. 18; Anon., Ca. Ch. 88.

Owen himself could have so proved. The court were of opinion that he could not, for that the debt due from Scollick to Owen had nothing to do with the partnership of Prothero and Spraggon, and at the time the bills were given, Owen himself asked Prothero the question, whether Spraggon knew of it, and he took Prothero's word for this, that this was a transaction with an individual partner, in a matter not relating to the partnership, and that therefore the partnership could not be bound by it without their subsequent concurrence, and that, where a man takes a security from one partner in the name of the partnership, in a transaction not in the usual course of dealing, he takes such a security at his peril.

May bind firm as to matters arising out of its usual transactions.

SEC. 497. But, although it is not in the power of a partner to bind the firm, in matters *wholly* unconnected with the partnership, yet he may do so in matters out of their usual course of business, if those matters arise out of, and are connected with the regular transactions of the firm. Thus, the business of navy agents is, to receive the money due from the navy board to their customers, and likewise to receive their dividends in the public funds, and it is no part of the ordinary business of navy agents to deal in annuities; yet, where one of two partners, navy agents, purchased for a customer an annuity, and gave a guaranty in the name of the firm for the punctual payment of such annuity, it was held that this guaranty was binding on the other partner, although the letter in which it was contained was not entered in the partnership letter-books, and it did not appear that such other partner had personally any knowledge of the guaranty. Abbott, C. J.: "The question is, whether this defendant shall be held to be bound by the guaranty given without his knowledge by his partner Creed, and if the verdict of the jury finding him to be so bound be not sustainable, it will be very dangerous hereafter to deal with a partnership, for the business in each department of a firm is generally transacted by one partner only. It has, undoubtedly, been held that, in a matter wholly unconnected with the partnership, one partner cannot bind the others. But the true construction of the rule is this, that the act and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners."[1]

In this case, however, the court took notice that from the state of the partnership accounts, not only the sale of the customers' stock,

[1] Sandilands v. Marsh, 2 Barn. & Ald. 673.

but the fact that the proceeds had been laid out in the purchase of an annuity, either was actually known, or ought to have been known by the other partner.

But the principles of the foregoing case are not to be extended to the act and assurance of one partner in the shape of a *submission to arbitration*. In the case of Stead v. Salt, which has been already referred to,[1] that of Sandilands v. Marsh was cited in argument, but was not noticed by the court, Best, C. J., merely observing that joint contractors could only be made jointly responsible for transactions arising in the way of their business or employment, and that one could not bind the others by a submission to arbitration made without their knowledge, assent, or authority.

Agreement to take part of the firm as contractors.

SEC. 498. Again, a person upon receiving a consideration may assent to such private arrangements of the firm as shall deprive him of the benefit of his joint contract. If, for instance, in consideration of a pecuniary advantage to himself, he agrees to rely upon the credit of a part of the firm instead of the whole, he must be taken to have deserted his contract with the whole, and betaken himself to a contract with the part only.

This position is strongly illustrated by the celebrated case of Bolton v. Puller,[2] in which there was a major firm including a minor, and upon the failure of both houses the assignees of the minor firm were allowed to retain, as against a creditor of the major firm, bills of exchange which had been indorsed by him to the major firm, and remitted by the major firm to the minor. The facts were shortly these: Forbes & Gregory, traders in London, were also partners in the house of Caldwell & Co., bankers in Liverpool. Bolton banked with Caldwell & Co., but he was permitted to have his bills payable at the house in London. Bolton's account was with the house in Liverpool only, that house keeping the account with the house in London, the payments on Bolton's bills, when made, being carried by the house in London to their account with the house in Liverpool, and by the house at Liverpool to their account with Bolton. In February, 1793, Bolton accepted bills payable at the house in London to a larger amount than usual, namely to the value of £19,702; *he then proposed to the house at Liverpool that they should procure these bills to be paid as they*

[1] 1 B. & P. 539.

[2] 1 Bos. & Pull. 539.

fell due by the house in London; and that, to enable the house at Liverpool to provide for such payments, he should deliver to them certain other bills of exchange with his indorsement thereon. To this proposal the house at Liverpool agreed. In pursuance of this agreement, Bolton indorsed to the house at Liverpool several bills of exchange, amounting in the whole to the sum of 11,583*l.* 2*s.* 9*d.*: among these was a bill for £4,000, and another for 398*l.* 18*s.* 3*d.* These two bills they remitted generally, with many others, to Forbes & Gregory, to whom they were considerably indebted. Both houses became bankrupt. The acceptances were payable before the indorsed bills; and Bolton was obliged to pay all his own acceptances. The assignees of Forbes & Gregory having refused to deliver up these bills, Bolton brought trover for them, but failed in his suit. Eyre, C. J.—"In some respects, an individual partner, or a particular partnership, consisting of two or more of those persons, who are partners in some arger partnership, may be considered as third persons in transactions in which the general partnership may happen to be engaged with their correspondents. On the other hand, it will be difficult, if not impossible, for individual partners, or for particular partnerships composed of individual partners, to shake off privity in all the transactions of the general partnership, or to avoid all the consequences of privity.[1] Each partner is a party, as well as privy, to the transactions of the general partnership, though the general partnership is not a party to the separate transactions of the individual partners. It must be admitted, therefore, that Forbes and Gregory were parties to the agreement which Caldwell and Smith entered into with Bolton. The true nature, however, of the transaction is simply this: Bolton paid into his banker's hands bills on his general account, to be converted into cash, in order to increase his credit with his bankers. These bills, at least the bills in question, were remitted to the house in London on the general account of the banking-houses. We cannot think that this was a misapplication, or that the confidence of Mr. Bolton was abused. It may be asked, assuming that Mr. Bolton considered both houses to be in full credit, was it not the very thing he meant? Was not this the probable mode by which the banking-house would be enabled to provide for the payment of Mr. Bolton's acceptances at the house of Forbes & Gregory? Then, what effect can the privity and participation of Forbes & Gregory in the agreement between Bolton and the banking-house have on this transaction, which,

[1] See Lord Eldon's observations in Ex parte Pease, 19 Ves. 45.

as between the two houses, undoubtedly changed the property in these bills? If, up to the moment of the bankruptcy, nothing affected the right of Forbes & Gregory to hold these bills on their separate account, the right must vest in the assignees of Forbes & Gregory, with nothing to affect it; the assignees of Forbes & Gregory are bound to admit that Forbes & Gregory knew that Mr. Bolton's object, and that the object of the partnership at Liverpool, was, that by means of those bills the acceptances were to be provided for. But how were these bills to operate as means? They were to be dealt with as the banking-house thought fit to deal with them — to be negotiated if they thought fit, to be discounted at Liverpool if they pleased, or remitted to whom they pleased, and were necessarily to be converted into money, in order to be means effectual to the purpose even of the parties who deposited them. If, then, Forbes & Gregory were parties capable of acquiring a property in these bills, as capable as any third party, and did acquire it without reproach, and in truth in pursuance of that agreement upon which they were delivered to the banking-house, why are not Forbes & Gregory to be considered as third persons, with whom these bills have been negotiated?"

In the preceding case, the creditor himself proposed to be bound by the arrangement regarding the two houses; there was likewise a due consideration for rendering the contract several. But a mere acquiescence in the terms proposed by a firm cannot be binding on a creditor; because this is a mere *nudum pactum*, and, *a fortiori*, it will not bind him where he reserves to himself the present securities which he holds against the firm. Hence, also, an agreement previous to a dissolution of partnership, that one partner shall undertake the payment of all debts, is not binding on third persons, though privy to it, unless they are also parties to it, and even in the latter case it seems doubtful whether such an agreement would amount to a release or covenant not to sue.[1]

The question whether or not a creditor has assented to be bound by the private arrangements of the firm most commonly arises in cases where, upon the retirement of one or more partners, the others undertake to receive the credits and pay the debts of the firm. These cases will be noticed in a subsequent chapter.

We have already had occasion to observe that where, *previous* to entering into a contract with one of several partners, the creditor has had notice of the want of power in such individual partner to bind

[1] Lodge v. Dicas, 5 Barn. & Ald. 611.

the firm, the creditor will be bound by this arrangement, and cannot sue the partnership on such contract.

Contracts as affected by the custom of trade.

SEC. 499. It has been observed that by the custom of a particular trade the firm may be exempt from liability on account of contracts entered into by its individual members. Instances, however, of this kind are of rare occurrence, for although it has been held that partnerships of a peculiar nature are not liable on account of bills drawn by their respective members, yet perhaps there is no ordinary trade, except that of coach proprietors, in which the firm shall not be liable in respect of goods supplied or repairs done by the order of one partner for the use of the concern. It happens, however, that in the particular trade we have mentioned certain contracts made by one partner for the benefit of the proprietors at large have nevertheless been held to be binding upon him only with whom they were made. Thus, if several persons horse, with horses, their several property, the several stages of a coach in the general profits of which they are partners, they are not all jointly liable for goods furnished to one partner for the use of the horses drawing the coach along his part of the road. In Barton v. Hanson,[1] an action was brought to recover the price of some hay and corn furnished by the plaintiff to the defendants, who were co-proprietors with others of a stage-coach, running from Hastings to London, but who horsed the coach only in the Lamberhurst quarter, and the jury found a verdict for the plaintiff. The Court of Common Pleas, however, ordered the verdict to be set aside and granted a new trial, and upon its being suggested that the entire partnership had the benefit of the goods supplied, and upon every adjustment of the partnership account paid for them as part of their general outgoings, the court observed that the utmost that could be said in favor of the plaintiff was, that he let the horses to the whole concern for this stage, but if his argument was founded on the ultimate mode of making up the accounts between the partners, he could at that time proceed no further, for that fact did not appear.

But, if a coachmaker let coaches for the use of the proprietors of a stage-coach, this is a contract with the whole firm, although the actual agreement be made with one only, whose particular business it is to hire the coaches. In the case of Arthur v. Dale,[2] it appeared

[1] 2 Taunt. 49; 2 Camp. 97.

[2] M. T. 1828. It appears to be the custom amongst stage-coach proprietors for the town proprietors to make a monthly account of the hire of carriages, or mileage, which account is discharged

that Dale, Thomas and Burford were proprietors of a stage-coach running from London to Stroudwater. Dale was the London proprietor, and it was his business to hire the coaches for the journey, for which there was a separate account between him and the other proprietors. The distance from London to Stroudwater is one hundred and seven miles. Thomas horsed the coach for the space of fifteen miles only, and he was coachman between London and Abingdon. Dale contracted with the plaintiff Arthur, who was a coachmaker, for the hire of the coaches, and in the course of these transactions, Arthur took his *separate* bills for the amount. Dale afterward becoming bankrupt, the plaintiff proved and received a dividend under the commission in respect of the bills. It was proved that before the bankruptcy the plaintiff had, in various conversations with Thomas, asserted that he had not been paid the amount of his bills for mileage. Some time after the bankruptcy of Dale the plaintiff brought his action against all the partners to recover the residue of the money due to him. Dale having pleaded his bankruptcy, and Burford having let judgment go by default, the Court of Common Pleas held that Thomas was liable for the whole amount unpaid, Best, C. J., observing that, as there was no proof that the plaintiff had taken the bills in question as a satisfaction of all claims against the defendants, nor any evidence of collusion between the plaintiff and Dale, the contract being one of partnership, the defendant Thomas was clearly liable for the moneys sought to be recovered.

It has been decided, however, that if several persons are partners in a coach concern, but one, by agreement, provides the coaches at a certain rate per mile, he alone is responsible for repairs done to the coach by a person cognizant of this arrangement, although the names of all the partners appear on the vehicle.[1]

periodically by the other proprietors. It was urged at the trial of this action, that the custom was well known to all coach-makers; and that, therefore, the plaintiff, on not being paid regularly by the defendant Dale, ought to have given notice of this circumstance to the other defendant.

[1] Hiard v. Bigg, Man. N. P. Ind. 220; Gow Partn. 150. On this subject, see Dwight v. Brewster, 1 Pick. (Mass.) 50; Cobb v. Abbott, 14 id. 289; Dow v. Sayward 12 N. H. 276; Bostwick v. Champion, 11 Wend. (N. Y.) 571; Wetmore v. Baker, 9 Johns. (N. Y.) 307.

CHAPTER XXI.

WHERE THE CONTRACT IS SEVERAL IN FACT.

SEC. 500. Separate creditors of partners.
SEC. 501. What constitutes fraud in.
SEC. 502. Bill invalid in hand of payee may be valid in hands of *bona fide* holder.
SEC. 503. Other securities, rule as to
SEC. 504. Where separate creditor acts *bona fide.*
SEC. 505. Where money is advanced on obligation of the firm.
SEC. 506. What is evidence of collusion.
SEC. 507. Rule in Barber v. Backhouse.
SEC. 508. Adoption of a several debt by the firm.

Separate creditors of the partners.

SEC. 500. It is evident, from the very nature of a separate creditor's contract, that, *prima facie,* he can have no claim against the firm. But such creditor frequently obtains from his debtor the bills, notes, or effects of the partnership as a security for his separate debt. A question then arises—Did he obtain these securities fraudulently or *bona fide?* If he obtained them fraudulently, he is remitted to his several contract, and cannot recover against the firm. If, on the other hand, he obtained them *bona fide,* a new contract arises, under which he can sue the firm. It therefore becomes necessary to determine what, in these cases, constitutes fraud, and what a *bona fide* transaction.

What constitutes fraud in.

SEC. 501. First, then, what constitutes fraud in a separate creditor holding partnership securities, so as to remit him to his several contract, and bar him of any remedy against the firm?

Where there is clear evidence of collusion between the partner and his separate creditor, independently of the transfer to the latter of partnership securities, it is hardly necessary to say that the firm are not liable to the separate creditor in respect of his contract. In the case of Arden v. Sharpe,[1] the plaintiff brought his action against Sharpe and Gilson, partners, on a bill of exchange, under the following circumstances: It appeared that on the day on which the bill bore date Gilson, one of the defendants, brought the bill in question to the plaintiff and requested him to discount it; the plaintiff said he could not do it himself, upon which Gilson answered he could get it done for him, but wished the business to be kept a secret from his partner, Mr. Sharpe, to which the plaintiff assented, and took his bill. The witness then proved that the indorsement, "Sharpe & Gilson," was in the handwriting of Gilson. On this evidence the plaintiff rested his case; but Lord Kenyon nonsuited the plaintiff on the ground that the transaction indicated that the money was for that partner's own use, and not raised on the partnership account; and his Lordship observed that the party who brought the action was himself the person who took the bill with the indorsement by one partner only, and was informed that the transaction was to be concealed from the other.

And where a partnership bill or note is originally negotiated in fraud of the firm, it will not be binding on the firm, even in the hands of a subsequent indorsee, unless he prove himself an indorsee for value, it being a rule that where a note or acceptance has been obtained by felony, fraud, or duress, the indorsee must prove the consideration for which he took it. In Heath v. Sansom,[2] it appeared that Sansom and Evans were partners in alum works, under the firm of Sansom & Co., and that Sansom was also a partner in the Droitwich Patent SaltCompany. Sansom being indebted to the company in £300, and being called upon to pay, gave the company a note of Sansom & Co., at two months, for £310. This note was afterward indorsed by the company to the plaintiff, who brought his action upon it against Sansom and Evans. At the trial of the action, it did not appear why the plaintiff sued the makers whom he did not know,

[1] 2 Esp. 524. It seems, however, that the defrauded partner cannot be relieved *at law*, if in the situation of plaintiff.

[2] 2 B. & Ad. 291. In this case three of the judges, *dissentiente* Parke, J., held that in all cases where, from defect of consideration, the original payee cannot recover on the note or bill, the indorsee, to maintain an action against the maker or acceptor, must prove consideration given by himself or a prior indorsee; and that, although he may have had no notice that such proof will be called for.

rather than the indorsers whom he did know, and who were a solvent and well-known partnership; nor did he show that the note had been indorsed to him for any valuable consideration. Under these circumstances, the Court of King's Bench held clearly, not only that the Droitwich Company could not have maintained an action on the note against Evans (because it must be taken to have been given to them by Sansom in fraud of Evans), but also that the indorsee was not entitled to recover in this action, he having omitted to show, as he was bound to do under the circumstances, that the note had been indorsed to him for valuable consideration.

Bill invalid as to payee valid in hands of innocent holder.

SEC. 502. However, a bill or note negotiated by one partner, which is not binding on the firm in the first instance, by reason of a collusive contract between that partner and the separate creditor who takes the security, may, nevertheless, afterward become binding, in the hands of an indorsee, for valuable consideration.[1]

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[1] *Creditor of a partner receiving obligation of firm.* — On this question the American doctrine conforms to the English, that whenever a separate creditor of one of the partners receives an obligation of the firm in satisfaction of his claim against a separate partner, this is a fraud upon the partnership *per se*, unless authorized, and the separate creditor cannot recover thereon. Clay v. Cottril, 18 Penn. St. 408; King v. Faber, 22 id. 21; Rutledge v. Squires, 23 Iowa, 53; Cassy v. Carver, 41 Ill. 228; Williams v. Brimhall, 13 Gray (Mass.), 462; Davenport v. Runlett, 3 N. H. 386; Greely v. Wyeth, 10 id. 15; Williams v. Gilchrist, 11 id. 535; Miller v. Hines, 15 Ga. 197; Elliott v. Dudley, 19 Barb. (N.Y.) 326; Lansing v. Ten Eyck, 2 Johns. (N. Y.) 300; Livingston v. Rosevelt, 4 id. 251; Dob v. Halsey, 16 id. 34; Foot v. Sabin, 19 id. 154; Whittaker v. Brown, 11 Wend. (N.Y.) 75; Gansvoort v. Williams, 14 id. 133; Wilson v. Williams, id. 146; Rogers v. Bachelor, 12 Pet. (U. S.) 221; Hagar v. Mounts, 3 Blackf. (Ind.) 57; Hickman v. Raineking, 6 id. 388; Darling v. March, 22 Me. 184. And the same principle is applicable where, in consideration of a debt due from one partner, he releases a debt due to the firm. Farrar v. Hutchinson, 9 A. & E. 641; Greely v. Wyeth, 10 N. H. 15; Evernghim v. Ensworth, 7 Wend. (N. Y.) 326; Craw v. Cadwell, 5 Cow. (N. Y.) 489. But there is no absolute presumption of fraud in such cases. It is only *prima facie* evidence of it. This may be removed, as by showing that the act was authorized, or subsequently ratified by the other partners, and which ratification or original authority may be shown by circumstances. Elliott v. Dudley, 19 Barb. (N. Y.) 326; Sternburg v. Callaman, 14 Iowa, 251; Cadwalader v. Blair, 18 id. 420; Carver v. Dows, 40 Ill. 374; Wise v. Copely, 36 Ga. 508; Gansvoort v. Williams, 14 Wend. (N. Y.) 133; id. 146; Jones v. Booth, 10 Vt. 268; Miller v. Hines, 15 Ga. 197; Darling v. March, 22 Me. 184; Corbin v. McChesney, 26 Ill. 231; Warren v. Dickinson, 30 id. 363; Marine Co. v. Carver, 41 id. 66; Casey v. Carver, id. 225. But on this question the courts of England seem to maintain a different doctrine, and to hold that the presumptions are against the partnership in such cases, and that if a partner uses the partnership name or credit to satisfy a private debt, they may be held liable therefor unless there was covin or fraud on the part of the private and individual creditor. See opinion by Spencer, J., in Dob v. Halsey, 16 Johns. (N. Y.) 34; Ridley v. Taylor, 13 East, 175; Ex Parte Agace, 2 Cox, 312; Musgrave v. Drake, 5 Ad. & El. (Q. B.) 185; Ex Parte Bonbonus, 8 Ves. 540; Ex parte Thorpe, 3 Mont. & A. 716; Elliotson v. Deacon, 26 Barb. (N.Y.) 20. The same doctrine would also seem applicable to third persons who take the negotiable paper of a firm, executed by a partner for his private

A Scotch case may here be noticed, in which the partnership was absolved from liability in consequence of the collusion of a separate creditor with one of the partners. Miller lent to Sturrock & Small 500*l.* on their joint acceptance. Sturrock having become bankrupt, Miller received a dividend out of his estate, which reduced the debt to 86*l.* 7*s.* 7*d.* For this sum Small granted to Miller an acceptance, subscribed by the firm of James Ivory & Co., of which firm Small was a partner. The firm of Ivory & Co. having become bankrupt, with the exception of Douglas, one of the partners, Douglas, was sued by Miller. But the Court of Session held that the suit was not maintainable, and adhered to the opinion of the Lord Ordinary, who tried the cause, and who held that, under the circumstances, the acceptance of that company was not given *bona fide.*[1]

In the preceding cases of Arden v. Sharpe, and Blair Miller v. Douglas, there were other circumstances to charge the creditor with fraud, independently of the bare taking of partnership securities. But a series of decisions has shown that, if the separate creditor of a partner take a partnership security toward the discharge of his separate debt, that fact alone, unless explained by particular circumstan-

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benefit, or in fraud of the rights of the partnership, if the third party had knowledge of these facts. He would under such circumstances stand in no better position than the payee. Taylor v. Hillyer, 3 Blackf. (Ind.) 443; Hickman v. Rineking, 6 id. 388; Robinson v. Aldridge, 34 Miss. 352; Hickman v. Kunkle, 27 Mo. 401; Burleigh v. Parton, 21 Tex. 585; Maudlin v. Branch Bk., 2 Ala. 502; Stainer v. Tyson, 2 Hill (N. Y.), 279; Miller v. Manice, 6 id. 115; Baird v. Cochran, 4 S. & R. (Penn.) 397. But this doctrine has no application to the *bona fide* holder of the negotiable paper of a firm, and especially would the law imply authority in a partner to execute such paper in the name of the firm where such authority is necessary for the successful prosecution of the business, or according to the usage of such partnerships; or according to the course of trade of similar partnerships. Walworth v. Henderson, 9 La. An. 339; Gray v. Ward, 18 Ill. 32; Newell v. Smith, 23 Ga. 170; Dow v. Phillips, 24 Ill. 249; Waldo Bank v. Lumbert, 16 Me. 416; Coursing v. Baker, 7 Har. & J. (Md.) 28; Bascom v. Young, 7 Mo. 1; Potter v. Dillon, id. 228; Partin v. Leiterick, 6 Jones' (N. C.) Eq. 341; Monroe v. Cooper, 5 Pick. (Mass.) 412; Livingston v. Rosevelt, 4 Johns. (N.Y.) 25; Mechanics' Bank v. Foster, 19 Abb. (N.Y.) Pr. 47; Bacon v. Hutchins, 5 Bush (Ky.), 595. And a partner has no authority to indorse a note in the name of a firm for the accommodation of a third person without the consent of his copartners, and the latter would not be bound by such an indorsement to one who takes the note with knowledge of the facts. And it has recently been held that the burden of proof in such a case would rest upon the holder to show the authority to indorse the note in this manner. Hendrie v. Berkowitz, 37 Cal. 113. But one who takes in satisfaction of a note against a member of a firm, the note of a third party, running to such member, but in fact the property of the firm, is a *bona fide* holder for value. Kellogg v. Fancher, 23 Wis. 21. And although, as a general rule, a member of a dissolved partnership cannot make a note for the firm, or execute a contract in the name of the firm, still if a note is made under such circumstances, and the act is subsequently ratified by the other, it will then be binding upon the firm. Carter v. Pomeroy, 30 Ind. 438.

[1] Blair Miller v. Douglas, Fac. Coll. No. 41, p. 154.

ces, is conclusive evidence to charge the creditor with fraud, or with gross negligence amounting to fraud; and, consequently, that the firm is not bound by such transaction. In Hope v. Cust,[1] where a partner had given the guarantee of the firm as a security for his separate debt, Lord Mansfield directed the jury to inquire, *first*, whether there was not positive fraud; or, *secondly*, whether there was not gross negligence, amounting to fraud, on the part of the creditor; and in either case to find a verdict against him. The facts were these: Fordyce, who traded very largely in his separate capacity with Hope & Co. in Holland, did, for and in the names of himself and partners, give them a general guaranty for the money due from him in his separate capacity. Fordyce became a bankrupt, and afterward all the partners became bankrupts. And a bill was filed in the Court of Chancery by Hope & Co., in order to have the benefit of this guaranty; upon which the court directed an issue to try the validity of it. There was strong presumptive proof that the partners of Fordyce had no privity in the transaction. Lord Mansfield, in summing up the evidence to the jury, said: "There is no doubt but that the act of every single partner in a transaction relating to the partnership binds all the others. If one give a letter of credit or guaranty in the name of all the partners, it binds all. But there is no general rule which may not be infected by covin, or such gross negligence as may amount to or be equivalent to covin; for covin is defined to be a contrivance between two to defraud or cheat a third. Therefore, the whole will turn on this, whether the taking the guaranty from Fordyce himself, in his own handwriting, without consulting the other partners, or having their privity, is not such gross negligence in the Hopes as will amount to a fraud or covin. Fordyce was acting in two several capacities, having transactions in his own name only for his own separate benefit, and in the names of the partnership for his own benefit. Now, if the fact be clear that Hope & Co. knew that this was done to cheat the partners of Fordyce, there is no question in the cause. But it is manifest that they trusted to it as binding on the partnership. Therefore, this brings it to the second question, whether it be not a gross negligence, especially as they knew at the time that Fordyce was acting in his separate capacity, and this security was intended to indemnify them against his separate debts." The jury having found a verdict for the defendant, Lord Mansfield afterward, in his report to the Court of Chancery, on a motion for a

[1] 1 East, 53.

new trial, said that three things were established to the satisfaction of himself and the jury. *First*, that the transactions between Hope & Co. and Fordyce were wholly on Fordyce's account. *Secondly*, that the partners of Fordyce derived no profit or benefit whatsoever from them. *Thirdly*, that they had no notice of the guaranty, and consequently did not acquiesce in it. And Lord Mansfield said he left it to the jury, whether, under these circumstances, the taking of the guaranty was, in respect of the partners, a fair transaction or covinous, with sufficient notice to the plaintiffs of the injustice and breach of trust Fordyce was guilty of in giving it.

Lord Kenyon decided the succeeding case of Shirreff v. Wilks [1] upon the same principles. An action was brought against the defendants Bishop, Wilks and Robson, on their joint acceptance. The plaintiffs, in October, 1795, sold and delivered a quantity of porter to Bishop & Wilks, who were then partners. Robson became a partner with Bishop & Wilks, in April, 1796, and continued so till the 8th of November following, when their partnership was dissolved. On the 5th of November, immediately before the dissolution, the plaintiffs, for payment of their demands, drew upon the defendants the bill in question, which was accepted by Bishop in the partnership firm of all the defendants, by his subscribing thereon, "Accepted, G. B. & Co." The question was, whether, under these circumstances, the plaintiffs were entitled to recover, and the Court of King's Bench held they were not. "This is an action," said Lord Kenyon, "brought against three persons, Wilks, Bishop and Robson, as acceptors of a bill of exchange. It appears that the acceptance was in fact made by Bishop alone in the name of the firm. The consideration for this bill was some porter, which had been sold by the plaintiffs to Wilks and Bishop only, at a time when Robson had no concern with the house. Then the plaintiffs, knowing this, draw the bill upon all the three partners, and knowingly take an acceptance from one of them to bind the other two, one of whom, Robson, had no concern with the matter and was no debtor of theirs, no assent of his being found, and nothing stated to show that he had any knowledge of the transaction. It is hard enough for one partner in any case to be able to bind another without his knowledge or consent, but it would be carrying the liability of partners for each other's acts to a most unjust extent, if we suffered a new partner to be bound in this manner for an old debt incurred by other persons. The plaintiffs, therefore, ought not in

[1] 1 East, 48.

justice to have taken this security, by which they were to bind one who was not their debtor. The transaction is fraudulent upon the face of it."

The doctrine contained in these cases has, if possible, been carried still farther in more modern decisions. Thus, in the case of Green v. Deakin,[1] A advanced to B 500*l.* to enable him to enter into partnership with C. B repaid to A part of the sum advanced, but being pressed to pay the remainder, he drew a bill in the partnership name payable to A and indorsed it to A, without informing him that it was done without the concurrence of his partner C. In an action on the bill by A against B and C, B having pleaded his bankruptcy, C insisted that he was not bound by this transaction between A and B, which he alleged to be a fraud. Lord Ellenborough was of that opinion, and nonsuited the plaintiff, although C gave no notice of his intention to dispute the consideration.

Again, in Ex parte Goulding,[2] F. A. O'Neil and Martin were partners, trading under the firm of F. A. O'Neil & Co. In June, 1825, a charter-party was executed by the petitioner Goulding, of the one part, and O'Neil, of the other part, by which it was stipulated that the vessel should proceed from Newfoundland to Charlestown, and take in a cargo of timber, which timber was to be taken to Limerick, and there delivered to the agent of O'Neil, who should pay for the same, part in cash, and part in good bills, to be drawn on the house of O'Neil & Co., in London, not exceeding four months. The timber was delivered on the 10th of November, 1825, and Goulding received a bill of exchange in part payment, dated November 10, 1825, drawn by the agent on O'Neil & Co., payable to the order of the drawer four months after date, and indorsed by the drawer to Goulding. On the day in which Goulding received this bill, he took it to the counting-house of O'Neil & Co. early in the business hours, and left it with the proper clerk for acceptance. Some hours afterward, Goulding called and received the bill accepted in the name of the firm. Goulding admitted that the acceptance was in the handwriting of O'Neil, but he denied that there was any previous agreement that it should be accepted by O'Neil, or that there was any collusion with O'Neil in the matter. Upon this evidence, Sir John Leach dismissed the petition of Goulding to be admitted as a joint creditor against the estate of

[1] 2 Stark. 347; and see Jones v. Yates, 9 Barn. & Cres. 532.

[2] Mich. T. 1829; S. C., 2 Glyn & Jam. 118. And see Ex parte Thorpe, 3 Mont. & A. 716.

O'Neil & Co. And upon appeal,[1] his Honor's decision was affirmed. Lord Lyndhurst: "The question is, whether under the circumstances of this case the petitioner can prove under the commission as a joint creditor against the bankrupt's estate. No principle can be more clear than that where a partner and a creditor enter into a contract on a several account, the partner cannot pledge the partnership funds, or give the partnership acceptances in discharge of this contract, so as to bind the firm. In this case Goulding knew it was a several contract. When, therefore, he took a bill drawn by O'Neil on O'Neil & Co., in discharge of that contract, he knew that O'Neil was not liable on his own responsibility. The only doubt I have had arises from the circumstance that the bill was afterward accepted by the firm, that bill being, in the *usual course* of business, left for acceptance, and, after some time, being received, accepted in the name of O'Neil & Co., from the clerk. But, upon further consideration, I think that will not alter the case. Then it is said that it was not known by Goulding, until he saw the acceptance, that the bill had been accepted by O'Neil. That will make no difference, and will not conclude Martin, who was no party to the contract, and was not bound. If the fact of Martin's ignorance were known by Goulding, he can have no claim on the joint estate. The responsibility of ascertaining that fact rested on Goulding. Under these circumstances, I think the estate of the bankrupt is not bound, and that the commissioners were right in their determination. I shall, therefore, affirm the order of the Vice-Chancellor, who affirmed the order of the commissioners."

Other securities, rule as to.

SEC. 503. The same principles which apply to the case of a separate creditor taking the bills or notes of a partnership in discharge of his debt must apply equally where other partnership securities are appropriated to a similar purpose. It was held, therefore, in the case of Snaith v. Burridge,[2] that if one partner in an adventure pledge the bill

[1] At the hearing of the appeal, Bickersteth, for the respondents, contended that "it is incumbent upon a creditor taking a partnership bill from one partner for his separate debt, to give notice to the other partner of this circumstance. On the authority of Ex parte Bonbonus, 8 Ves. 540, the burden of proving the liability of the firm in these cases is on the party holding the papers. It is for him to show that his debtor had the authority of his copartner to bind the firm. The question here is, has the creditor done enough? Clearly not. It was his duty to see that the acceptance of O'Neil was with the authority of the other partner: the authority cannot be implied from the circumstance of the bill being left at the counting-house. It does not even appear that the creditor knew any thing whatever as to Martin's absence or presence at the counting-house." Crompton argued for the appellant, but the author was not in court at that time.

[2] 4 Taunt. 684. The rule is, that one partner has a right to bind his copartner to any extent within the scope of the

of lading of goods which have been consigned to him for the purposes of the adventure, as a security for his separate debt, and the separate creditor have notice of the purposes of such assignment, such pledge will be illegal and void. Kieran & Co., of Dundalk, in Ireland, and Grœme & Metcalfe, of London, jointly engaged in a contract to supply provisions for the navy. Accordingly, Kieran & Co. shipped a cargo of pork from Ireland to Portsmouth, and sent to Grœme & Metcalfe a bill of lading, deliverable to the order of the shipper, and indorsed by Kieran in blank. Kieran & Co. were, independently of this contract, largely indebted to Grœme & Metcalfe, and the latter

firm business. Winship v. U. S. Bank, 5 Pet. (U. S.) 529; Manufacturers', etc., Bank v. Gore, 15 Mass. 75; Stover v. Hinckley, Kirby (Conn.), 147, and, as to trading or commercial firms, a note or bill given in the name of the firm, by one partner, is binding upon the firm in the hands of a *bona fide* holder, no matter how fraudulent the transaction may be upon the part of the partner giving it. Onondaga Bank v. Du Puy, 17 Wend. (N. Y.) 47; Duncan v. Clark, 2 Rich. (S. C.) 587; Collier v. Cross, 20 Ga. 1; Haldeman v. Bank, etc., 28 Penn. St. 440; Rich v. Davis, 4 Cal. 141, and the presumption is that a contract or obligation entered into by one partner in the name of the firm was made on its account, unless the person with whom it was made *knew* the contrary. Rochester v. Trotter, 1 A. K. Marsh. (Ky.) 54; Carrier v. Cameron, 31 Mich. 373; Le Roy v. Johnson, 2 Pet. (U. S.) 198; Blinn v. Evans, 24 Ill. 317; Walworth v. Henderson, 9 La. An. 337; Steet v. Jennings, Cheeves (S. C.), 183. But, where a partnership is limited by articles to a particular business, if one partner make a note in the partnership name *for other than such business*, it lies with the person suing the note to show an assent, express or implied, on the part of the other partners to the transaction; a disclaimer of it, to any other than the party to whom the note was given, cannot be shown in evidence. Waller v. Keyes, 6 Vt. 257. The rule being that, as between the parties to a transaction, the powers of a partner are to be gathered from the nature, scope and extent of the business. Persons dealing with him have a right to rely upon his apparent authority, or upon their actual knowledge of its extent, and must not deal with him in reliance upon the credit of the firm, in excess thereof, Warren v. French, 6 Allen (Mass.), 317; Livingston v. Roosevelt, 4 Johns. (N. Y.) 251, and the knowledge of the payee of a note, or of any person dealing with him, will be inferred from circumstances, Livingston v. Roosevelt, *ante;* as, that it is not within the usual scope of the business of the firm. Davenport v. Runlett, 3 N. H. 390. A note, in order to be *prima facie* evidence of a debt against a firm, must be executed in the firm name, or there must be other circumstances connected with it to warrant the presumption. Cranch v. Bowman, 3 Humph. (Tenn.) 212; Manufacturers' Bank v. Winship, 5 Pick. (Mass.) 14. In all cases where the note of the firm is given by one partner in payment of an individual debt, the payee is charged with notice that it is an obligation in excess of his power to give, and a fraud upon the firm, and the same is true as to any assignee or holder thereof, who takes it with notice or knowledge of the facts. Baird v. Cochran, 4 S. & R. (Penn.) 397; Whitman v. Axford, 6 Wis. 677; Liverson v. Lane, 3 F. & F. 221; Farmers' Bank v. Bayliss, 41 Mo. 287; Dob v. Halsey, 16 Johns. (N. Y.) 38; Adams Bank v. Jones, 16 Pick. (Mass.) 578; Mercein v. Mach, 10 Wend. (N. Y.) 463; Williams v. Gilchrist, 11 N. H. 535. Thus, a firm of merchants is not bound by a ote in the name of the firm given for furniture for his private use, Grey v. Tieman, 18 La. 56, or a firm of wheelwrights, for a firm note given by one partner for diamonds, Leverson v. Lane, 3 F. & F. 221, because in these cases there is apparently a total want of authority to give the note. But the rule holds good only as to those who are affected with notice of such want of authority, except in cases of non-trading firms. Partners in non-trading firms, as physicians, Crossthwaite v. Ross, 1 Humph. (Tenn.) 30; lawyers,

were indebted to the plaintiffs, as their bankers, to the amount of 1,800*l.*, secured by the deposit of two bills of exchange. Upon the receipt of the bill of lading, Grœme & Metcalfe applied to Watson, one of the plaintiffs, for a further advance upon a deposit of the same, and also requested Watson to give up the two bills of exchange, and let the 1,800*l.* remain on the security of the bill of lading. This being agreed to, the bill of lading was indorsed by Grœme & Metcalfe to the plaintiffs, who thereupon gave Grœme & Metcalfe credit for 4,000*l.*, and delivered up to them the two bills of exchange. Grœme & Metcalfe afterward stopped payment. Upon the arrival of the

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Breckenridge v. Shrieve, 4 Dana (Ky.), 375; mechanics, etc., Leverson v. Lane, 3 F. & F. 221; have no power to bind the firm either by bill or note, except by express agreement, and even an innocent holder of a note executed in the name of such a firm cannot hold the firm unless he proves authority expressly given, or an assent thereto by the firm afterward, or that the firm had usually permitted notes to be given by one partner or by the firm. See the cases last cited, also Town v. Hendee, 27 Vt. 258. The acts of a partner or agent, wholly outside the partnership business, *and known to be so by the person dealing with such partner*, are not binding upon the other partners. To determine what acts are within the scope of the partnership business, does not depend entirely upon the partnership articles. The previous dealings, the acts of the partners, and the length of time these acts have continued, may be considered, and the nature and scope of the business is of the utmost importance in determining the question. Clayton v. Hardy, 27 Mo. 596. And persons dealing on the faith of the firm are bound by the apparent authority of each partner. Thus, a law firm was limited to Baltimore city. One of the partnership, without the knowledge or assent of the other partner, received a note for collection in Carroll county from one knowing the terms of the partnership. It was held the innocent partner was not liable for the money collected: 1. Because they were not partners in Carroll county. 2. Because the lawyer who collected the debt in Carroll county was not employed by the Baltimore firm. Kauffman v. Walker, 9 Md. 229. The business of a scrivener is not within the ordinary business of an attorney, and one member of a partnership firm of attorneys cannot render his partner liable simply by receiving money indefinitely, for the purpose of being laid out on such mortgage security as might afterward be obtained. Harmon v. Johnson, 18 Eng. L. & E. 400. An agreement to purchase tobacco as partners does not authorize a purchase of medicines, nor can an agent of the firm purchase medicines. Hazard v. Boyd, 8 Martin (La.), 178. On a claim against stage proprietors as partners, for not delivering baggage at Albany, received at Hartford, on a special contract to carry in a specified time, it was held one of the partner could not bind the others by the cons tract, and that handbills issued by one of the partners, without the knowledge or assent of the other partners, were not competent evidence. Walcott v. Caufield, 3 Conn. 195. So, where an agreement was made to purchase a drove of mules and horses to be driven to and sold in the Southern market, and a drove was accordingly purchased, and one of the partners started with the drove, and on his way purchased other horses, without the knowledge of the other partner, it was held that the partnership was special and the partner on his way had no authority to make new purchases so as to bind the other partner. Bentley v. White, 3 B. Monr. (Ky.) 265. The same rules prevail, as apply in the cases of ordinary agency. Persons may deal with one partner upon the faith of his apparent power, deducible from the usual scope of the business to which the partnership relates. As to any matters in excess thereof, they must establish real authority, or authority deducible from a special usage or a subsequent assent or ratification by the firm. Blinn v. Evans, 24 Ill. 317; Hurd v. Haggerty, id. 171; Town v. Hendee, 27 Vt. 258.

cargo at Portsmouth, the captain refused to deliver the goods to the plaintiffs, and deposited them in a warehouse of the defendants, to be delivered only to his own order, upon which the plaintiffs brought their action of trover for the goods. Mansfield, C. J., at the trial, thought that this transaction was a pledging of the joint property of the partnership, made by one member of it, for their own particular account, with the knowledge of the pawnee that it was partnership property, and that the proceeds were not to be applied for the purposes of the partnership. He accordingly directed a nonsuit, which the Court of Common Pleas refused to set aside.

Where the separate creditor's acts are bona fide.

SEC. 504. It now remains to consider under what particular circumstances the transaction shall be held *bona fide*, in a case where a creditor of one partner takes the partnership securities in discharge of his separate debt. With reference to this subject, it has been observed by Sir John Leach, that although it lies upon a separate creditor who takes a partnership security for the payment of his separate debt, if it be taken *simpliciter*, and there is nothing more in the case to prove that it was given with the consent of the other partners, yet if there be circumstances to show a *reasonable belief* that it was given with the consent of the partnership, it lies upon the partners to prove the fraud.[1] The leading case on this subject is that of Ridley v. Taylor.[2] Ord and Ewbank were linen-drapers and partners. The plaintiffs, in November, 1806, sold a cargo of coal to Ewbank for 34*l.* 11*s.*, and Ewbank in May following gave them 5*l.* in part payment,

[1] Frankland v. M'Gusty, 1 Knapp Priv. C. C. 274. In Caldwell v. Scott, 54 N. H. 414, the court held that, where a partner pays his individual debt with partnership property, the creditor acquired no title thereto as against the other partner, and that it makes no difference in this respect, whether the creditor knew of the existence of the partnership or not. It is *prima facie* a fraud upon the other partner, and, unless the creditor can rebut the effect of this presumption, he must respond to the firm for the property received by him. Williams v. Brimhall, 13 Gray (Mass.), 413; Brewster v. Mott, 5 Ill. 378. The act is an illegal conversion of the fund, and the separate creditor can have no better title to the fund than the individual partner had. Minor v. Gaw, 20 Miss. 322; Bark v. Moseley, 24 id. 170; Cadwalleder v. Kroesen, 22 Md. 200; Baird v. Cochran, 4 S. & R. (Penn.) 397; Wilson v. Williams, 14 Wend. (N. Y.) 144. Assent on the part of the other partners must be shown, and the individual creditor takes the burden of establishing it. Powell v Messer, 18 Tex. 401; Williams v. Walbridge, 3 Wend. (N. Y.) 415; Foster v. Andrews, 2 Penn. 160; Davenport v. Runlett, 3 N. H. 386; Ralston v. Click, 1 Stew. (Ala.) 526. But such assent may be established by circumstances, but the circumstances must be such as to establish it clearly, and it is for the jury to say whether assent was, or was not, given to the particular transaction. Noble v. McClintock, 2 W. & S. (Penn.) 152, and it makes no difference that the partner making the purchase or giving the note stated that it was for the use of the firm, unless it was within the scope of the firm business. Uhler v. Browning, 28 N. J. L. 79.

[2] 13 East, 178.

and a promissory note for the balance. This note was dishonored, and in payment of this balance Ewbank afterward gave the plaintiffs a bill for 40*l.*, drawn and indorsed by him in the partnership name, and accepted by the defendant, Taylor. The bill was drawn, indorsed and accepted, before it was produced to the plaintiffs, and it did not appear that they knew that it had been drawn and indorsed by Ewbank. Ewbank afterward applied to the plaintiffs for the difference between the balance due and the 40*l.*, but they refused to pay it, until payment of the note. This bill was dishonored, and the plaintiffs debited Ewbank for the amount. Ord and Ewbank afterward became bankrupt, and the plaintiffs now sued the defendant as acceptor. A verdict having been found for the plaintiffs, the Court of King's Bench held that such verdict should stand to the amount of Ewbank's debt. Lord Ellenborough—"If this were distinctly the case of a pledging by one partner of a partnership security for his own separate debt without the authority of the other partner; or if there existed in this case evident covin between one partner and the holder of the partnership security upon which the action is brought, in order to charge the other partner without his knowledge or consent, either expressed or implied, for the private advantage of the parties to such covinous agreement, we should have no hesitation to pronounce a bill, drawn and indorsed under such circumstances, void in the hands of the covinous holders, upon the principle laid down in the case of Shirreff v. Wilks. But, upon the facts stated, such does not distinctly appear to us to be the case, nor does it appear that there was any such *crassa negligentia* on the part of the plaintiffs, in not inquiring whether Ewbank, the one partner with whom they dealt, was authorized to dispose of this security (which had originally been partnership property), as his own as to render the transaction on that account fraudulent, and therefore void. This bill had an existence, according to its apparent date, eighteen days before the time of its delivery to the plaintiffs; it was drawn for a sum considerably exceeding the debt; and was not only drawn and indorsed, but accepted also, before it was produced to them; and although it is stated in the case, that in fact the bill was drawn and indorsed by Ewbank in the partnership firm, it does not appear that the plaintiffs knew that it was drawn and indorsed by him. Under these circumstances, it might reasonably be supposed, by the party to whom it was given, to be a partnership security, of which Ewbank,

[1] 1 East, 48.

the partner in possession of it, had for some valuable consideration, or in virtue of some arrangement with Ord, the other partner, become the proprietor, so as to be authorized to deal with it as his own. At any rate the contrary does not either actually or presumptively appear; and it seems to us, in order to deprive the plaintiffs of the benefit of such a security in a case which admits of positive proof to the contrary, that the contrary should appear; and that either actual covin should be shown, or that at least more pregnant evidence to induce that conclusion should have been given on the part of the defendant, than is disclosed upon the face of this case. All that appears here is that a partnership security was applied by the one partner, Ewbank, in satisfaction of his separate debt, without showing that such application was at the time unknown to, or unauthorized by the other partner, Ord (as, by the evidence of either Ewbank or Ord, it was in this case competent to the defendant in point of law to have done), and without laying before the court any other evidence from which the same conclusion ought to be drawn. In the absence, therefore, of any evidence to show that the delivery of this bill to the plaintiffs was covinous, in a case where positive evidence of the covin might have been given, had covin really existed, the court feels itself obliged to give effect to the transfer of the bill, and to say that the defendant, who relied upon covin as his defense, has not satisfactorily established such covin."

It will be perceived that in the preceding case Lord Ellenborough lays great stress on the facts that the bill was drawn for a sum considerably exceeding the debt, and that it was drawn, accepted and indorsed before it was produced to the plaintiffs. Similar circumstances appeared in the case of Ex parte Kirby.[1] Tennant was a partner with Moore and others, and likewise carried on business on his own private account. Kirby supplied goods to Tennant on his separate account, to the amount of 100*l.* Kirby, after the credit for the goods had expired, applied for payment of the 100*l.* Upon this, Tennant sent his clerk to Kirby with a bill of exchange for the sum of 300*l.*, purporting to be drawn by S. & Co. upon and accepted by M. & Co., payable to Moore, Tennant & Co., and indorsed by them, At the same time Tennant requested Kirby to place 100*l.*, part of the bill, to the credit of the goods sold, and to send him a bill for the balance. Kirby accordingly sent a draft for 200*l.*, which was duly paid. The bill for 300*l.* having been dishonored, and Moore, Ten-

[1] Buck, 511.

nant & Co. having become bankrupts, it was held that Kirby had *bona fide* exchanged a separate for a joint security, and was entitled to prove against the joint estate of the bankrupts.

Where money is advanced to one partner and he receives the obligation of the firm.

SEC. 505. We have seen that when money is advanced to an individual partner on his separate security, the fact that such money is afterward carried to the partnership funds, even with the knowledge of the creditor, will not be sufficient to render such contract joint in point of law; and likewise, that where money is advanced under such circumstances, more positive evidence is required to prove that the contract is a joint legal contract, than where goods are furnished to one partner, and applied to partnership purposes. To examine the converse of this position. Where money is advanced to an individual partner, for which he gives the joint security of the firm, the circumstance that such money is carried to the separate account of that partner, even with the knowledge of the creditor, will not alone be sufficient to show that the contract was several in point of fact; and in such case more positive evidence is required to rebut the liability of the partnership, than where, as in the case of Shirreff v. Wilks,[1] goods are supplied to individual members of the firm.

In Ex parte Bonbonus,[2] Rogers was in partnership with Blake and Purnell as insurance brokers, and also in business on his own separate account as merchant. Both trades were carried on at Bristol; but the partnership business was conducted at the Exchange buildings under the immediate control of Purnell, who paid and received all moneys due from and to the partnership, whereas Rogers' business was carried on at his counting-house in Queen street under his sole management. Of course, distinct books were kept of these two concerns. A joint commission of bankrupt having issued against the partnership of Rogers, Blake & Purnell, Messrs. Atwood & Co. proved a large sum as a joint debt against their estate. The debt consisted in a great measure of sums advanced by them to Rogers on partnership bills and notes. A petition was then presented by the joint creditors, praying that the proof might be expunged, on the grounds that all the said bills or notes were drawn by Rogers without the privity of Purnell; that they were all made at the same time, though at different dates, and for a very large sum of money advanced

[1] 1 East, 48. Where goods are supplied, an antecedent debt is more capable of proof. [2] 8 Ves. 540; 2 Mov. Supp. 132.

in a very short space of time, and while Rogers was greatly embarrassed; and that no part of the consideration came to the hands of Purnell, or was applied to the use of the partnership, but that it came exclusively to Rogers. Lord Eldon: "This petition is presented upon a principle which it is very difficult to maintain, that if a partner for his own accommodation pledges the partnership, as the money comes to the account of the single partner only, the partnership is not bound. I cannot accede to that. I agree, if it is manifest to the persons advancing money that it is upon the separate account, and so, that it is against good faith, that he should pledge the partnership, then they should show that he had authority to bind the partnership. But if it is the ordinary course of commercial transactions, as upon discount, it would be monstrous to hold that a man borrowing money upon a bill of exchange, pledging the partnership without any knowledge in the bankers that it is a separate transaction, merely because that money is all carried into the books of the individual, therefore the partnership should not be bound. No case has gone that length. It was doubted whether Hope v. Cust was not carried too far. Yet that does not reach this transaction, nor Shirreff v. Wilks. The question of fact, whether this was fair matter of discount, or, being an antecedent separate debt of Rogers, the discount was obtained merely for the purpose of paying that debt by the application of the partnership funds, which question is brought forward by the affidavits though not by the petition, must lead to farther examination. If the partners are privy and silent, permitting him to go on dealing in this way without giving notice, the question will be, whether subsequent approbation is not for this purpose equivalent to previous consent. Purnell must therefore explain himself upon this; for if he admits all these circumstances to have been in his knowledge, it will be very difficult to say that he is entitled to the benefit of that principle which is established for the safety of partners." His Lordship afterward dismissed the petition, on the ground that, under the circumstances of the case, Purnell, who alone could depose to that effect, could not legally be admitted as a witness to cut down the joint demand.

In the preceding case Lord Eldon remarked upon the necessity of the allegation in the petition, that the several transactions relative to this debt took place without the privity or knowledge of Purnell, observing that although it was likewise represented that the whole consideration for the bills, under which this proof was made, came

exclusively to Rogers, yet in a variety of cases that circumstance alone, though to be attended to, would not decide that the other partners were not to be bound. He added: "In Fordyce's case, Lord Thurlow and the judges had a great deal of conversation upon the law; and they doubted, upon the danger of placing every man with whom the paper of a partnership is pledged, at the mercy of one of the partners with reference to the account he may afterward give of the transaction. There is no doubt now the law has taken this course, that if, under the circumstances, the party taking the paper can be considered as being advertised in the nature of the transaction, that it was not intended to be a partnership proceeding, as if it was for an antecedent debt, *prima facie* it will not bind them, but it will, if you can show previous authority or subsequent approbation, be a strong case of subsequent approbation raising an inference of previous positive authority. In many cases of partnership and different private concerns it is frequently necessary, for the salvation of the partnership, that the private demand of one partner should be satisfied at the moment, for the ruin of one partner would spread to the others, who would rather let him liberate himself by dealing with the firm. The nature of the subsequent transactions therefore must be looked to, as well as that at the time."

What is evidence of collusion.

SEC. 506. We have seen that where an individual partner transfers to his creditor a partnership security, *greater in amount* than his separate debt, this, combined with other circumstances, may serve to rebut the charge of collusion against the creditor, because such evidence at least tends to show that the bill was not drawn or accepted with a view to that particular debt. In this case, however, if the creditor be unsuccessful in other parts of his evidence, the firm will not be adjudged responsible for the separate debt of their copartner. On the other hand, if a partner indebted on his own separate account transfers to his creditor, in payment of that debt, a partnership security greater in amount than the debt, and takes the value for the *difference* as in the ordinary course of the business of the firm, it seems that in this case, whatever be the nature of the transaction as regards the separate debt, and even if that transaction be void against the firm through collusion on the part of the creditor, the firm will, nevertheless, in all cases be responsible for the difference.

Rule in Barber v. Backhouse.

SEC. 507. The case of Barber v. Backhouse[1] is not a direct authority for our position, because there the liability of the partners in the manner we have mentioned was admitted on their own part rather than enforced by the decision of the court. But the doctrine which has just been advanced is well warranted by a singular case decided in the Court of Exchequer, in which it was held that if one partner gives a partnership acceptance in discharge of his separate debt, and the amount of the bill is greater than that of the debt, the difference may be recovered by the separate creditor in an action against the firm on the bill, the fraud of the creditor in taking the bill not vitiating the *whole* transaction.[2]

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[1] 1 Peake, 61. Assumpsit on a bill of exchange against three partners. Brown, one of the partners, suffered judgment by default. The other defendants paid 5*l.* 9*s.* into court, and contended that they were not liable for the remainder. The case was that the 5*l.* 9*s.* paid into court was the amount of the plaintiff's bill for business done as attorney for *all the defendants*. The remainder of the money was for business done for Brown *only*. The bill was drawn by Brown on the partnership, and accepted by him unknown to the other defendants. It was contended for the plaintiff that the 5*l.* 9*s.* could not be paid into court on the count on the bill, and that if the bill was good for part, it was good for the whole. But Lord Kenyon ruled the contrary, and the jury found the verdict for the defendants. Note.—It seems that the *dictum* of Denison, J., in Robinson v. Bland, 2 Burr. 1082, relative to the contract under a *security* being bad *in toto* if part of the consideration is bad, applies only to cases of *illegal* consideration. See Serjeant Peake's notes to Barber v. Backhouse, *supra*.

[2] Wintle v. Crowther, 1 Cromp. & Jerv. 316; 1 Tyr. 210.

The general rule is that one partner cannot employ the partnership funds or property to satisfy his own private debts without the express or implied assent of his copartners. And where such disposition of the partnership effects are made with the knowledge of the private creditor, this might well be considered to be accomplished by the collusion of the creditor, and he be treated as a trustee of the partnership or its creditors, and as holding the funds or property thus transferred in trust for their benefit. Rogers v. Bachelor, 12 Pet. (U. S.) 221; Pierce v. Pass, 1 Port. (Ala.) 232; Burwell v. Springfield, 15 Ala. 273; Nall v. McIntyre, 31 id. 532; Filley v. Phelps, 18 Conn. 294; Bourne v. Woodbridge, 10 B. Monr. (Ky.) 492; Jackson v. Holloway, 14 id. 163; Jones v. Lusk, 2 Metc. (Ky.) 356; Miner v. Gaw, 19 Miss. 322; Dob v. Halsey, 16 Johns. (N. Y.) 34; Purdy v. Powers, 6 Penn. St. 462; McKinney v. Brights, 16 id. 399; Sautry v. Dunlap, 12 Wis. 364; Kelly v. Greenleaf, 3 Story (U. S. C. C.), 93; Croughton v. Forrest, 17 Miss. 131; Yale v. Yale, 13 Conn. 125; French v. Lovejoy, 12 N. H. 458; Shaw v. McDonald, 21 Ga. 395; Saylor v. Mackbie, 9 Iowa, 209; Black v Bush, 7 B. Monr. (Ky.) 210; Solomon v. Solomon, 2 Ga. 18; Perry v. Butt, 14 id. 699. But see Broaddus v. Evans, 63 N. C. 633; Ramey v. McBride, 4 Strobh. (S. C.) 12; Wells v. Mitchell, Ired. (N. C.) L. 484; Evans v. Gibson, 29 Mo. 223; Smith v. Ramsey, 6 Ill. 373; Coding v. Huling, 27 Penn. St. 84. And the heirs of one deceased partner, where the title to the real estate of the partnership is in him, will be treated as a trustee of the surviving partner. Little v. Snedecor, 52 Ala. 167; Hewett v. Ranken, 41 Iowa, 35; Drewry v. Montgomery, 28 Ark. 256. And where two partners purchased real estate, with joint funds taking the title in the name of the wife of one of them, her title is subject to a resulting trust in favor of the individual partners and the rights of their creditors. Price v. Hicks, 14 Fla. 565. See, also, Glynn v. Phetteplace, 26 Mich. 383; Holmes v. Moon, 7 Heisk. (Tenn.) 506; Little v. Snedecor, 52 Ala. 167; Hewett v. Rankin, 41 Iowa, 35; Drewry v. Montgomery, 28 Ark. 256; Murphy v. Abrams, 50 Ala. 293. And the fact that it is partnership property may be estab-

It is, however, to be remarked that in this case *two* partnership acceptances were given, one for 130*l.* 10*s.* 6*d.*, the other for 45*l.* 10*s.*, and no fraud was proved with regard to the latter, a circumstance whith evidently influenced the court in their judgment. The evidence connected with the former did certainly substantiate a case of fraud. The facts were shortly these: Crowther, one of the partners, owed the plaintiffs 80*l.* for which they drew upon him in his individual character two bills which he accepted. One was dishonored, and on the day on which the second became due, Crowther took the bill for 130*l.* 10s. 6*d.*, which was accepted in the name of Crowther & Co. to the plaintiffs. The two separate bills of Crowther were given up to him, and, as appeared very strongly from the evidence, in exchange for the bill for 130*l.* 10*s.* 6*d.* At the time of this transaction, though not before, there was strong presumptive evidence that the plaintiffs knew of the partnership of Crowther & Co. The cause was twice tried. Upon the first trial the jury found a verdict for the defendants, which verdict was set aside. At the second trial the jury found a verdict for the plaintiffs on both the bills, but the plaintiffs consented to reduce the verdict by deducting the sums for which Crowther's separate acceptances had been given, a circumstance amounting to a clear admission of the fraud. The Court of Exchequer, however, held that the plaintiffs were entitled to the residue. Bayley, B., said: "As these sums are given up, is there any fair ground upon which we can consider the verdict as wrong for the residue? There is no evidence applicable to the bill for 45*l.* 10s., and there is nothing to impeach the transaction upon the bill for 130*l.* 10*s.* 6*d.*, except this, that part of the produce was misapplied to Crowther's private debt, and that, *pro tanto*, there was a fraud upon the partnership. But does it follow that the fraud went beyond those two sums? and because there was a *partial fraud* upon one bill does it follow that there was a fraud upon the other? I do not say that the jury might not have drawn such an inference, but can we say that they ought? One jury did draw that inference; the court thought that they

lished by parol. Yook v. Clemens, 41 Iowa, 95; Sherwood v. St. Paul R. Co., 21 Minn. 127. Where real estate is purchased and paid for with corporate funds, but conveyed to one of the partners alone, a trust results in favor of the other partner. McGuire v. Ramsey, 9 Ark. 518. So, property may be pursued in equity by a creditor of the firm, where it has been transferred to another firm composed in part of the same individuals, and where the conveyance was made without any *bona fide* or valuable consideration. Dennis v. Ray, 9 Ga. 449. See, also, Indiana, etc., Co. v. Bates, 14 Ind. 8. And the agent of one partner holding partnership property will be treated in equity as a trustee. Peterson v. Poignard, 6 B. Monr. (Ky.) 570. See, also, Flack v. Charon, 29 Md. 250.

went too far in doing so, and it seems to me that the court was right."

Adoption of a several debt by the firm.

SEC. 508. We will conclude this section by observing, what indeed has already appeared from the case of *Ex parte Bonbonus*, that if the creditor can show that the firm have adopted as a joint debt the debt which was originally several, this is an answer to any charge of collusion against the creditor, and the firm will accordingly be answerable for repayment of the debt. In cases of this nature, subsequent approbation by the firm of the separate act of their copartner will be equivalent to previous consent; and continued acquiescence on the part of the firm, in a series of separate contracts and engagements entered into by an individual partner, will be evidence of subsequent approbation, and will be strong to show that the particular partner engaged in these various transactions is in truth the agent of his copartners. This matter will be further considered in treating of the liability of incoming partners.

CHAPTER XXII.

OF THE COMMENCEMENT OF LIABILITIES.

SEC. 509. The time when partnership begins.
SEC. 510. When treated as commencing from time when goods are ordered.
SEC. 511. Time when joint liability begins.
SEC. 512. Supply of goods to one before partnership begins.
SEC. 513. Rule in Smith v. Craven.
SEC. 514. Liability on antecedent debts.

The time when partnership commences.

SEC. 509. The time of commencement of a general partnership is usually fixed by the partnership deed. But where no time is mentioned, the partnership liabilities will begin from the date of the deed.[1] It is almost unnecessary to add that, as regards third persons, the time of the execution of the deed is immaterial, if the parties commeced their partnership previously.[2]

In adventures, the liabilities must of course commence from the time fixed by the contract, unless before that time the parties have held themselves out to the world as partners.[3] It is often, how-

[1] Williams v. Jones, 5 Barn. & Cres. 108.

[2] Battley v. Bailey, 1 Scott N. R. 143.

[3] It may here be observed once for all, that wherever the partnership agreement is resorted to in order to establish the liability of partners, it is on the supposition that the parties have not held themselves out to the world as partners.

Evidence—What constitutes a partnership is a question of law. But when a partnership commenced, or whether it exists, is a question of fact. Beecham v. Dodd, 3 Harr. (Del.) 485; Gilpin v. Temple, 4 id. 190; Doggett v. Jordan, 2 Fla. 541; Drake v. Elwin, 1 Cai. (N. Y.) 184. To show a partnership acts and declarations may be proved. Scranton v. Rentfrew, 29 Ga. 341; McFarland v. Lewis, 3 Ill. 344. It may be implied from circumstances. Kellcher v. Tisdale, 23 Ill. 405; Martin v. Ehrenfels, 24 id. 187; Williams v. Souter, 7 Iowa, 435; Guilbert v. Whidden, 20 Me. 367; Beall v. Poole, 27 Md. 645; Ripley v. Evans, 22 Mo. 157; Grafton Bank v. Moore, 14 N. H. 142; State v. Wiggins, 20 id. 449; Farr v. Wheeler, id. 569. The partnership may be proved by parol agreement, and, of course, the time of the commencement of it. Bry v. Weston, 16 Me. 261; Gilbert v. Whiddon, 20 Me. 367; Dixon v. Hood, 7 Mo. 414; Field v. Tenny, 47 N. H. 513; Howell v. Brodie, 6 Bing. N.C. 108; Grant v. Watts, 10 Paige's Ch. (N. Y.) 82; Ingraham v. Foster, 31 Ala. 128; Beaman v. Whitney, 20 Me. 413. But evidence of general reputation is not admissible to prove either the time of commencing or the fact of a partnership. Sinclair v. Wood, 3 Cal. 98; Brown v. Canfield, 11 Conn. 92; Grafton Bank v. Moore, 13 N. H. 99; Inglebright v. Hammond, 19 Ohio, 337; Scott v. Blood, 16 Me. 192; Holliday v. McDougal, 20 Wend. (N. Y.) 81; Smith v. Griffith, 3 Hill (N. Y.), 333; Carlton v. Ludlow Woolen Mills, 27 Vt. 496.

ever, a matter of much doubt under what circumstances the promoters of an undertaking shall be deemed liable as partners for goods supplied, or work and labor done, in the course of establishing the undertaking before the partnership business has actually commenced. Questions of this nature generally arise in regard to joint-stock companies, where the business is of a very public and extensive nature, but they may also occur in more private undertakings. Thus, in Howell v. Brodie,[1] the plaintiff, who was a builder, brought his action for work and materials, against the defendant, a conveyancer, as a partner with one Wilson, in the building of Portman market. It appeared that Wilson projected the market, and had, on his own credit, employed the plaintiff in the erection of it, and was sole tenant of it under Lord Portman. In 1829, Wilson applied to the defendant professionally to draw an act of Parliament for establishing the market, and from that time till 1833 the defendant, who knew that it was to be a partnership concern, advanced various sums toward its erection, and was consulted at every stage. It did not appear that previously to 1833 any distinct proposal was made as to the particular share the defendant was to take, though, in the course of the transaction before that year, something was said as to his taking half a share in such market as might come to 6,000*l.*, which suggestion was subsequently abandoned. The amount of the sums advanced before October, 1833, was 14,000*l.* On these the defendant received no interest, nor did Wilson ever render any account, although profits to the amount of 1,500*l.* had been received from the market before 1833. In October, 1833, an agreement was entered into between Wilson and the defendant, under which it was settled that the market should be valued and the defendant have a seventh share. It was held by the Court of Common Pleas that the defendant was not a partner till October, 1833.

In the preceding case it was said by Bosanquet, J., that in order to constitute a partner it is not necessary that the amount of his share should be distinctly ascertained, but that the omission to ascertain it is a strong circumstance to show that no partnership exists. It will be seen presently that this circumstance was much relied upon by Lord Kenyon, in Saville v. Robertson, as a ground for holding that no partnership existed in that case.

When treated as commencing from time when goods are ordered.

SEC. 510. In adventures relating to the purchase and sale of goods,

[1] 6 Bing. N. C. 44.

it commonly happens, from the tenor of the agreement, that the partnership liabilities are deemed to commence from the time when the goods are ordered. But to arrive at this conclusion, we must be satisfied that the person ordering the goods was, at the time of such order, the *agent* of all the adventurers.

If this principle be kept in mind, we shall readily distinguish the following cases.

In Gouthwaite v. Duckworth,[1] the question was, whether the plain-

[1] 12 East, 421. Mr. Lindley gives the rule as to when liability commences, thus:

"*The time of the commencement of a partnership.* — *Prima facie* articles of partnership, like other instruments, take effect from their date; and if they are executed on the day of their date, and contain no expression indicating when the partnership is to begin, it must be taken to commence on the day of the date of the articles, and parol evidence to show that this was not intended is not admissible. Williams v. Jones, 5 B. & C. 108. If the articles are not dated, parol evidence is admissible to show that they were not to take effect from the time of their execution. See Davis v. Jones, 17 C. B. 625. It occasionally happens that it is expressly declared by the partnership articles that the partnership is to date from a specified time either prior or subsequent to the day on which the articles are executed. The effects of such a declaration, as between the parties to the articles, and as between them on the one hand and third persons on the other, are by no means the same. As between the parties themselves the time specified is that from which the accounts of profits and losses are to date; but as between those parties and third persons the time in question is of little if any importance, for an agreement that a partnership shall date from a time past does not inure to the benefit of creditors, Vere v. Ashby, 10 B. & C. 288; and an agreement that it shall date from a time future does not prejudice them, if, in fact, the parties act as partners before such time arrives. Battley v. Lewis, 1 Man. & Gr. 155. It occasionally happens that an agreement for a partnership is drawn up and signed, but a more formal instrument is intended to be executed. If in a case of this sort the execution of the formal instrument is delayed, the commencement of the partnership is not necessarily delayed also. Whether it is or is not must depend on the terms of the preliminary agreement; for by that agreement the parties are bound, and its terms will regulate their rights and obligations *inter se*, so long as the more formal instrument is unexecuted. See England v. Curling, 8 Beav. 133.

In order that partnership may be the result of an agreement to share profits, it is necessary that the parties to the agreement should have mutually assented to the same propositions, otherwise there is no contract at all, but merely a treaty from which each party is at liberty to retire. If, therefore, A proposes to B that a partnership shall be formed between them on certain terms, and B accepts the proposition on other terms than those offered, A and B are not yet agreed and no partnership subsists between them. Nor is B bound by his qualified acceptance, for that is merely a counter offer on his part which he is at liberty to retract until A has assented to all its terms without qualification. These propositions, elementary as they are, may be usefully illustrated by reference to one or two decisions. In Duke v. Andrews, 2 Ex. 290, see, too, Wontner v. Shairp, 4 C. B 404; Vollans v. Fletcher, 1 Ex. 21, and compare Hutton v. Upfill, 2 Ho. Lo. Ca. 674, a person requested the committee of a railroad company to allot him a certain number of shares in the undertaking, and agreed to accept that or any less number, and to pay the deposit thereon, and to execute the parliamentary contract and agreement when required. The committee accordingly allotted shares to the applicant, but with the qualification "not transferable," and it was held that this was not such an acceptance of his proposal as to constitute a contract between him and the committee. So, where the secretary of a company wrote to a provisional committeeman to say that shares had been allotted

tiffs, in an action for goods sold and delivered, could recover against Duckworth, as a partner with Browne and Powell, under the following circumstances: Duckworth had various transactions in business with Browne and Powell in 1808, and was a creditor of theirs for advances on the joint account of all three. In September, 1808, he entered into an agreement with Browne to be jointly concerned in an adventure to Lisbon with him and Powell, of which adventure Duckworth was to have one-half share. Browne and Powell were to purchase

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to him, and asking whether he would accept them, and in answer the allottee requested that the shares in question might be "reserved for him," an issue was directed to try the question whether the answer amounted to an acceptance of the offer or not. Onion's case, 1 Sim. (N. S.) 394. See, too, Mainwaring's case, 2 De G. M. & G. 66. And where a person applied for one hundred shares, and he was requested to accept twenty five shares, it was held that no contract had been entered into. Robert's case, 1 Drew. 204. Again, a prospectus issued by the promoters and directors of companies inviting the public to take shares is in the nature of an offer by the promoters or directors to allot shares in such an undertaking as is described in the prospectus, and upon such terms as are therein mentioned. The prospectus forms the basis of the contract which the promoters or directors say they are ready to enter into with those who may take shares. See Pulsford v. Richards, 17 Beav. 87; Jennings v. Broughton, id. 234, Fox v. Clifton, 6 Bingh. 776; and compare Gerhard v. Bates, 2 E. & B. 476. Hence, if a person applies for shares in a company upon the faith of a prospectus issued by its promoters or directors, and he receives in answer to his application an allotment of shares in a company to which the prospectus does not apply, he is at liberty to decline to accept such shares, they not being what he asked for or agreed to take. Fox v. Clifton, 6 Bingh. 776; Ex parte Rye, 3 Jur. (N. S.) 460. Nor will even payment of a deposit by him upon the shares allotted be conclusive evidence against him of an assent by him to take the shares allotted, for he is entitled to assume that he has received what he asked for, and unless it can be shown that when he paid the deposit, he did not act on that assumption, he is, notwithstanding such payment, entitled to say he has entered into no binding contract. Blackburn's case, 3 Drew. 409. This case was reversed on appeal (see Hutchinson's case, 25 L. J. Ch. 722), but the principle on which it was decided by the Vice-Chancellor remains unimpeached. On the appeal additional evidence was adduced, and the court was satisfied that when Blackburn paid his deposit he must have known what shares he was taking. Ex parte Rye, 3 Jur. (N. S.) 460, and was decided on the principle acted on by the Vice-Chancellor in Ex parte Blackburn, which may be usefully referred to on this head. There a prospectus was issued by the promoters of a company described in the prospectus as the "Amazon Life Assurance and Loan Company, and Sick Benefit Society." An applicant for shares in it received in answer a letter headed "Amazon Life Assurance and Loan Company," and stating that in compliance with his application shares had been allotted him. He paid the deposits, and he received a certificate of shares in the Amazon Life Assurance and Loan Company. Afterward, and before he did any thing else, he discovered that so much of the original scheme as related to a sick benefit society had been abandoned, and he repudiated the contract. It was held that he was entitled so to do, no binding contract ever having been entered into by him. In answer to the argument that the letter of allotment being headed only Amazon Life and Loan Company, gave him notice of the change in the nature of the company, and that when he afterward paid the deposit he accepted shares in the new company, it was held that notwithstanding the omission from the letter of the words "Sick Benefit Society," he might well believe that the company, the shares of which had been allotted, was the same company as that for whose shares he had applied. He had a right to take it and might well take it for granted, that what he had applied for he had obtained, and it was incumbent on those who offered him

goods for the adventure, and to pay for them, and the returns of such adventure were to be made to Duckworth, and to go in liquidation of his demands on Browne and Powell. In consequence of this agreement, Browne purchased goods from different persons, and, amongst others, from the plaintiff Gouthwaite. If any loss were to arise on the sales of the adventures, Duckworth was to bear his proportion, and was also to receive his share of the profits, if any, after reimbursing himself his previous advances. Duckworth at the same time pur-

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what he had not asked for to draw his attention to that circumstance. Again, an offer which is not accepted within a reasonable time is considered as declined. and several instances are to be found in the books where an application for shares has been held not to oblige the applicant to take them in consequence of their not having been allotted to him until after the lapse of a considerable period of time. Carmichael's case, 17 Sim. 163; Mathew's case, 3 De G. & S. 234. See, too, Conway's case, 5 De G. & S. 150. In the cases now under consideration, there is no partnership, because there is no contract, and there is no contract because there has never been a mutual assent to the same proposition. Such cases must not be confounded with those in which a valid contract has been entered into but which, not having been performed on the one part, is not binding on the other. These will be considered hereafter. It is important to distinguish between actual and contemplated partnerships. Persons who are only contemplating a future partnership, or who have only entered into an agreement that they will at some future time become partners, cannot be considered as partners before the arrival of the time agreed upon. Per Parke, J., in Dickinson v. Valpy, 10 B. & C. 141, 142. It is not always easy to determine whether an agreement amounts to a contract of partnership or only to an agreement for a future partnership. The test, however, is to ascertain from the terms of the agreement itself whether any time has to elapse or any act remains to be done before the right to share profits accrues, for if there is, the parties will not be partners until such time has elapsed or act has been performed. The general principle, that so long as an agreement to form a partnership is executory, no partnership is formed, applies as well to ordinary partnerships as to projected companies, and it will be useful to consider it with reference to each in turn. In Gabriel v. Evill, 9 M. & W. 297, and Car. Marsh. 358; see, too, Ex parte Turquand, 2 M. D. & D. 339, which turned on the same agreement, it was agreed between the defendant and two others, that the defendant should enter into partnership with them and bring in 1,000*l.* in cash and 1,000*l.* in goods, and that the partnership should date retrospectively from the 1st of January; but the defendant reserved to himself the option of determining at any time within twelve months from that day whether he would become a partner or not. The defendant advanced the 2,000*l.* and several other acts were done in execution of the agreement, but within the twelve months the defendant declared his option not to become a partner, and it was held that he never did in fact become one, and that he had not incurred any liability as if he had. Compare this case with Jefferys v. Smith, 3 Russ. 158. There A agreed to purchase B's share in a firm; A acted and was treated as a partner by the other members, but afterward rescinded the contract with B; it was held that a partnership nevertheless subsisted between A and B's copartners. In Howell v. Brodie, 6 Bing. N. C. 44, the defendant, intending to become a partner in a scheme for making and letting out a market place, advanced considerable sums of money, and ultimately, on the completion of the market, took one-seventh share in it. It was sought to make him liable for the expense of erecting the market, on the ground that he was a partner with those by whom the plaintiff had been employed, but the court held that there was no partnership between them and the defendant until the share was taken by him. In Osborne v. Jullion, 3 Drew. 596 (The agreement in this case was long and unusual in its provisions, and even if the later clauses had come into operation, it would prob-

chased and sent out goods in his own name, and Browne was to receive a share of the profit, and to bear a proportion of the loss on the sales of these last-mentioned goods. Duckworth afterward received from the supercargo, on account of the adventure, 186*l.*, though, from what particular set of goo ds this arose, Duckworth could not tell. This sum Duckworth applied in reimbursing himself the advances he had made to Browne and Powell on account of the adventure. On consideration of these facts, the Court of King's

ably have been holden that a partnership did not exist) the plaintiff and the defendant agreed to work some patented inventions for their joint benefit. But it was agreed that experiments should be made to satisfy the plaintiff as to the utility of the patent, and that if the plaintiff should be satisfied with the result of the experiments (such satisfaction to be testified by writing, signed by him) then the remaining clauses of the agreement should take effect, but not otherwise. The patents were worked for some time. There was nothing to show whether the plaintiff was satisfied or dissatisfied with the result, but it appeared that he was not sufficiently satisfied to insist on the agreement, and it was held that no partnership existed. In Burnell v. Hunt, 5 Jur. 650, Q. B. where the real point was whether B had any interest in the goods, which he clearly had not, and would not have had even if there had been profits to divide, an agreement was come to between A and B, that A should take premises and purchase machinery and materials to carry on the business of a silk lace maker, and that B should manage the business and receive half the profits as soon as any accrued, and should, in the meantime, be paid 2*l.* a week. It was held that so long as the 2*l.* per week continued payable, there was no partnership. See, too, Ex parte Hickin, 3 De G. & S. 662. On the other hand, where two persons agreed to become partners from a subsequent day, upon certain terms to be embodied in a deed to be executed on that day, it was held that the partnership began on the day mentioned, although the deed was not executed until afterward, and although alterations were made in it immediately before its execution. Battley v. Lewis, 1 Man. & Gr 155; and see Wilson v. Lewis, 2 id. 197. In this case a partnership did begin on the day named, and it was wholly immaterial (as regarded the question before the court) what the terms of it were.

Application of the principle to joint-stock companies. — Promoters of companies are not partners. They are, it is true, engaged in a common object, and that object is ultimately the sharing of profits, but their immediate object is the formation of a company, and they are only in the position of persons who intend to become partners after the company is formed. It was indeed said, in Holmes v. Higgins, 1 B. & C. 74, that the projectors of a railway were partners, they being associated for the purpose of procuring the Act of Parliament necessary to form the company and subscribing money for that purpose; and, in Lucas v. Beach, 1 Man. & Gr. 417; (Bartlett v. Lambert, 10 Jur. 416, was a similar case), the court held that persons associated for the purpose of passing a Turnpike Act, and who had subscribed for shares in the proposed road, were partners. But in each of these cases the real question was, whether the plaintiff was, by virtue of any implied contract, entitled to recover from the defendants any remuneration for services rendered by him for the joint benefit of himself and them. It was held that he was not, and if the court had likened the case to one of partnership, instead of saying that the plaintiff and the defendants were partners, there would be no room for criticism. As it is, however, the cases are apt to be considered, and are sometimes cited, as authorities for the proposition that persons engaged in passing through Parliament, bills to authorize the establishment of a company, are partners. In Lucas v. Beach it was asked in argument, "What is there to prevent a number of individuals from entering into a partnership with the limited object, in the first instance, of procuring an act of Parliament, and with an ulterior object in view when the act has passed?" See,

Bench were of opinion that the defendant Duckworth was a partner in this transaction, and that the verdict which had been obtained against him should stand. Lord Ellenborough said — "It comes to the question, whether, cotemporary with the purchase of the goods, there did not exist a joint interest between these defendants. The goods were to be purchased, as Duckworth states in his examination, *for the adventure:* that was the agreement. Then, what was this adventure? Did it not commence with the purchase of these goods for

too, per Lord Brougham, in Hutton v. Upfil, 2 Ho. Lo. Ca. 691. The answer is, that to call persons so associated partners is to ignore the difference between a contract of partnership and an agreement to enter into such a contract, and to hold persons to be partners although they have not yet acquired any right to share profits. It cannot be contended that the right to share profits would, under such an agreement as is supposed, accrue before the passing of the act, and if not, how can the parties to such an agreement be *partners* at an earlier period? Upon this principle it is conceived that Holmes v. Higgins and Lucas v. Beach cannot be relied upon as authorities on the question of partnership or no partnership. They are authorities for the point actually decided, viz., that a person doing work for the joint benefit of himself and others cannot recover compensation from them by virtue of any *implied* promise to pay him. Nor are they on this question reconcilable with later decisions. In Reynell v. Lewis and Wyld v. Hopkins, 15 M. & W. 517, in which the question was much discussed, it was held that no partnership subsisted between persons who had subscribed for the purposes of forming a railway company and of procuring the necessary act of Parliament; and this, which is the correct doctrine, was also distinctly stated by Lord Cranworth in Capper's case, 1 Sim. (N. S.) 178, and has been recognized on many other occasions. Batard v. Hawes, and Batard v. Douglas, 2 E. & B. 287; Walstab v. Spottiswoode, 15 M. & W. 501; Forrester v. Bell, 10 Ir. Law R. 555; Hutton v. Thompson, 3 Ho. Lo. Ca. 161; Bright v. Hutton, id. 368; Hamilton v. Smith, 5 Jur. (N. S.) 32; Norris v. Cottle, 2 Ho. Lo. Ca. 647; Besley's case, 3 M. & G. 287; Tanner's case, 5 De G. & S. 182. It is a necessary result of the principles established above that persons associated for the purpose of forming a joint-stock company are not partners. Wood v. Argyll, 6 Man. & Gr. 928; E. C. L. R. 46; Hamilton v. Smith, 5 Jur. (N. S.) 32; Hutton v. Thompson, 3 Ho. Lo. Ca. 161; Bright v. Hutton, id. 368. They clearly are not partners in the company to be formed, and for reasons already given they cannot be considered as members of a partnership formed to start the company. It also follows from the same principles that, if persons have entered into an agreement to take shares in a company formed for certain purposes and upon certain conditions, those persons are not partners in a company formed for different purposes or upon certain other conditions. This class of cases is closely allied to that already alluded to as illustrating the proposition that partnership is not the result of an unconcluded agreement. Nothing is more common than for a company to be advertised as having a large capital divisible into a multitude of shares, and for the promoters to find that subscribers for the full number of shares cannot be obtained; nor is any thing more common than for a company thus situate to commence operations with such capital as may have been subscribed without consulting those who have subscribed it. But the subscribers have a right to say, we did not agree to join a concern of this kind and we decline to do so, and until a subscriber has assented to become a partner on these altered terms, no partnership as between him and the others can be said to subsist. Most of the decisions illustrating this proposition relate to the right of the subscribers to recover their subscriptions and to their liability to be made contributories, and will be referred to when that right and liability are considered. In the meantime the following cases may be noted as illustrating the principle in question: Beardshaw's case, 1 Drew. 226; Capper's case, 1 Sim. (N. S.) 178; Carrick's case, id. 505; Maunslay's case, 17 Sim. 157;

the purpose agreed upon, in the loss and profits of which the defendants were to share?"

But if it can be shown that the person who made the order was not at that time the agent for the others, they are not liable on such contract of sale, and no subsequent bare acknowledgment of such contract will make them liable. This was decided in a case where there was a stipulation that the orders given for the goods were to be each separately paid, and that one should not be bound for any goods

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Hutton v. Thompson, and Norris v. Cooper, 3 Ho. Lo. Ca. 161. In Bourne v. Freeth, 9 B. & C. 632, (see, too, Vice v. Anson, 7 B. & C. 409), a prospectus was issued containing the terms on which it was proposed to form a company; the prospectus was signed by the defendant, and shares were allotted to him. But the advertised capital was never obtained; the defendant had done nothing more than agree to become a partner in the concern upon certain terms, which were never complied with; he had never assented to any variation in those terms; no partnership was therefore formed, and the defendant had not held himself out as a member of any existing company. In Fox v. Clifton, 6 Bing. 776 (Perring v. Hone, 4 Bing. 28, so far as it decided that persons become partners by subscribing to an inchoate company, must be regarded as overruled by Fox v. Clifton), it was held that the defendants who had applied for shares in a company had had them allotted, and had paid a deposit in respect of them, were not partners with the projectors of the company, inasmuch as the company in which alone the defendants had agreed to become partners was never in fact formed. The capital was never subscribed, the shares were not nearly all ever taken up, the deed was only signed by a comparatively few persons, and by one only of the defendants. The time fixed for its execution had elapsed, and it was expressly declared in the prospectus of the company, and which prospectus was held to form the basis of the contract into which the defendants had entered, that every person who should neglect to execute the deed within the time fixed should forfeit all share and interest in the company. In answer to the argument that the defendants had become shareholders in a *de facto* existing company by payment of the deposits, it was observed by the court:

"The paying of the deposits must undoubtedly be taken to imply an assent to the terms of the advertisement, that is, an assent to become partners in a company raising a capital of 600,000*l.*, consisting of 12,000 shares, and to be governed by a deed which should contain the clauses and conditions to be agreed on in future; but we think it implies nothing more and that it cannot be construed as an assent to the terms of a partnership already formed."

"When, therefore, instead of an allotment of 12,000 shares, the utmost that were ever allotted scarcely exceeded 7,500; when, out of that number, no more than 2,300 ever paid the first installment; when not half the latter number paid the second installment, and only sixty-five subscribers signed the deed, we think the subscribers were at liberty to say, — this was not the trading company upon which we paid our deposits; neither the capital nor the number of shares bearing any reasonable proportion to the original plan and project. And this the more especially, because, by the terms of the advertisement, they were taught to expect that the utmost risk which they encountered was the loss of all share and interest 'in the concern' upon their refusal to execute the deed; which loss they appear to have submitted to."

In Pitchford v. Davis, 5 M. & W. 2, the prospectus of a projected company stated that the proposed capital was to be in 10,000 shares of 25*l.* each. The defendant applied for shares and they were allotted to him; he paid the deposit on them, and he afterward paid a call. He knew the company had begun operations, but he was held not to be a partner, inasmuch as not more than 1,400 shares had been taken, and there was nothing to show that he assented to the carrying on of the business before all the shares had been placed out. The foregoing cases may be usefully compared with Tredwen v. Bourne, and

or stores ordered or shipped by the other. Thus, in Saville v. Robertson,[1] which was an action for goods sold and delivered, brought under certain orders of the Lord Chancellor, made upon the petition of the plaintiff and others in the bankruptcy of the defendant, it appeared that the defendants and one Samuel Pearce, since deceased, and William Robertson, since a bankrupt, entered into the following (amongst other) articles of agreement: "Articles of agreement, made, etc., between J. Robertson and J. Hutchinson, of London, merchants and copartners, as well on the part and behalf of themselves as of others who have or shall subscribe their names on the back of these presents, of the one part, and S. Pearce, of, etc., merchant, of the other part, etc. Whereas the said S. Pearce is the sole owner and proprietor of the ship Triumph, etc.; and whereas the said J. Robertson, J. Hutchinson, S. Pearce, and others, who have subscribed their names on the back of these presents, have mutually *agreed upon a joint undertaking and risk as to profit and loss in a certain voyage* or maritime adventure, about to be performed under the direction of the said parties, who have or shall have a majority of interest therein, or of a committee appointed by them: Now these presents witness, that they, the said J. R. and J. H., on behalf of themselves and all others who have or shall subscribe, etc.; and the said S. P., for himself, in consideration of the trust which they severally repose in each other, and also in pursuance of the said agreement, have and do, each for himself, his heirs, executors, etc., mutually covenant and agree with each other, etc.; 1st. That the said ship Triumph, whereof the said S. Pearce is sole owner, shall, from

Peel v. Thomas, in which a partnership was held to have been created. In Tredwen v. Bourne, 6 M. & W. 461. (See, too, Steigenberger v. Carr, 3 Man. & Gr. 191; London, etc., Ass. Co. v. Redgrave, 4 C. B. N. S. 524), the prospectus of a mining company stated that its capital was to be 30,000*l.* in 3,000 shares of 10*l.* each. The defendant took 100 shares. Only 2,000 altogether were ever taken. But the defendant was held a partner in a *de facto* company, he having acted as a shareholder by signing requisitions to the directors to call a meeting, and having impliedly authorized the carrying on of the concern upon terms different from those which originally formed the basis of his contract. Lindley on Part. p. 638, also pp. 21–30. In Peel v. Thomas, 15 C. B. 714, two meetings, at which the defendant and others were present, were held, and it was proposed and resolved to form a cost-book mine in 60,000 shares, which were all allotted. It was also resolved to begin work, and that the capital required for the operations of the mine, for six months *from* that day, should be found by three of the promoters. It does not appear from the report whether all the allotted shares were paid for or not, but the defendant had paid for his and was aware that the mines were being worked. The defendant contended that no partnership had in fact been created or was intended to be created until six months had elapsed; but it was held that the right to share profits accrued when it was agreed to begin work, and that a partnership did therefore subsist from that time.

[1] 4 T. R. 720.

the day of the date, and until her return from her intended voyage, be at the disposal, direction, and risk of all the parties hereto, jointly, at the valuation of 3,750*l.*, etc. 2d. That the said J. R. and J. H., by themselves and others, who have or shall subscribe, etc., shall and will, on or before the 24th August next, procure and provide a cargo of goods for the said intended voyage, to the value of between 22,000*l.* and 25,000*l.*, and *which goods shall, in the judgment and opinion of the majority of the parties to these presents, be deemed eligible* and proper for the voyage and markets, etc., etc.; and that they, the said J. R. and J. H., and other the persons who subscribed, etc., shall and will prepare and ship the said cargo, at such time and in such manner as the majority of the said concerned, or their committee, shall direct. 4th. That, in case the said S. Pearce shall be desirous to increase his interest in the *said joint concern*, he shall be permitted so to do, by shipping, on *the joint account*, as many goods, over and above the goods to be shipped by the said J. R., J. H., and others, who shall subscribe, etc., as he may think proper; but the said goods so to be shipped by the said S. Pearce are to be *such articles as the majority of the concerned, or their committee, shall approve of* as proper for the voyage and market. 5th. That the said 3,750*l.*, together with the amount of the additional outfits to be advanced by the said S. Pearce, the amount of half of the premiums of insurance to be made by the said S. P. on the said ship, freight, and cargo, and such amount of goods as the said S. P. may ship on the joint account, as above mentioned, shall be considered *as the said S. P.'s share or capital in the said joint undertaking;* and he, the said S. P., shall be entitled to receive the profit or bear the loss thereon, in the exact proportion as the amount of all such sums shall be to the remainder or other part of *the said joint concern;* and that the said J. R. and J. H., and the subscribers, etc., shall receive the profit, or bear the loss, in the like proportion as to the sums set opposite to their several names." On the 28th July, 1787, the following memorandum was indorsed on the articles by the same persons: "Notwithstanding what may be understood to be the meaning of the foregoing articles, it is hereby declared by all the parties that, etc.; and that each party whose name is hereunto subscribed is to hold no other share or proportion in the said concern than the amount of what each separately orders and ships, and which interest will be hereafter declared, agreeably to the true intent and meaning of this agreement. And it is further declared that the orders given for the cargo and outfit of the

ship are to be each separately paid; and that one is not bound for any goods or stores ordered or shipped by the other; and that the said S. Pearce has free liberty to ship what goods are suitable for the voyage over and above the ship and outfit, leaving room clearly for those ordered by Robertson and Hutchinson, and W. R. And it is to be understood that the ship is made over in trust for the general concern."

In May, 1787, the plaintiff, by the order of Pearce, supplied copper to sheathe and repair the ship Triumph, to the amount of 482*l.* In August, 1787, the plaintiff, by the orders of Pearce, delivered copper on board the said ship, to the amount of 938*l.* 3*s.* 3*d.*, which formed part of the cargo thereof. In October, 1787, the ship sailed from London for Ostend, and proceeded from thence to the East Indies, with the goods so furnished by the plaintiff, and other goods on board. In January, 1788, Pearce became a bankrupt, and Saville proved his debt under the commission against him, and in February, 1788, William Robertson also became a bankrupt. The ship returning in 1789, the defendant Robertson went on board, and, without sending advice to Pearce's assignees, took her clandestinely to Ostend, and sold her for his own and Hutchinson's benefit, because (as he admitted), "he and his partner were liable to pay the whole debt for ship and cargo." In January, 1790, the defendants became bankrupts.

Upon the argument of the case before the Court of King's Bench, it was admitted that the plaintiff was entitled to recover for the copper for sheathing, but upon the question whether the defendants were liable for the rest of the goods, as partners, on the construction of the articles, coupled with their subsequent acknowledgment and their acceptance of bills of exchange drawn for the very goods, the court held they were not liable, and founded their decision on the reasons urged by the defendants' counsel, namely, that the defendants were not partners at the time when the contract was made, and that, though their subsequent acts might explain the original contract, if it were doubtful at the time, they could not alter the original contract, against the intention of the parties, as expressed in the articles. Lord Kenyon: "My difficulty arises from the form of this action, which is for goods sold and delivered; for I do not see how any act which passed subsequent to the delivery of the goods can have any retrospect so as to alter the nature of the contract, which was not doubtful. It might have been evidence to explain it to be a partner-

ship contract, if the contrary had not expressly appeared. The facts of the case are shortly these: several persons who had no general partnership, nor any connection with each other in trade, formed an adventure to the East Indies. The outfit of the vessel was a joint concern of all the partners; and that delivers the case from one consideration, namely, the parcel of copper for sheathing the ship, which is admitted to be a partnership concern. But beyond that I see no partnership between the parties till all the parcels of the cargo were delivered on board, and that made it a combined adventure between all the parties. It was very properly asked, in the argument, if they were partners when the cargo was delivered, what share had Pearce? By the articles, he was not to bring in any definite aliquot part of the cargo; but the agreement only was that he should share in proportion to the part he should bring in; it was optional in him whether or not he would bring in any goods, and by another part of the agreement,[1] if he were under any difficulty in bringing in the money, the others were to lend him credit. It is true that it was to be determined by a majority of those concerned in the adventure, whether the goods which were to be sent to market were or were not proper, and so far they all looked to each other's acts; but each of them was to bring in his share only; and I cannot distinguish this case from that put at the bar, where several persons were to contribute their separate quota of money, and they appl ied to different scriveners to procure it; they could not all be liable for the capital which each should borrow. At the time when this copper was furnished, Pearce stood in no relation whatever to the other persons, but he alone bought the copper in his own name, without carrying to market the name of any other person but his own.[2] Suppose the plaintiff had brought an action for this copper the instant it was delivered on board, against whom must the action have been brought? Pearce only, for he alone was answerable at that time. I cannot, therefore, see how it can be

[1] The 11th article.

[2] This, however, would have been immaterial, had the parties been actual partners at the time, according to the general principles of our law of partnership, *ante*, p. 259. The point, if it needed decision, was expressly settled by Lord Ellenborough in Gouthwaite v. Duckworth. "There seems," said his Lordship, "to have been some contrivance to keep out of general view the interest which Duckworth had in the goods, the other two defendants were sent into the market to purchase the goods of which he was to have a moiety, and though they were not authorized, he says, to purchase on the joint account of the three, yet, if all agree to share in goods to be purchased, and in consequence of that agreement one of them go into the market and make the purchase, it is the same for this purpose as if all the names had been announced to the seller, and therefore all are liable for the value of them."

said that these goods, which were sold to Pearce only, and on his sole credit and account, were sold and delivered on the partnership account. Afterward, indeed, these defendants were to gain or lose by the joint cargo, when the other goods were brought in, the partnership arose, but each was to bring in his own particular stock. But in this case I think that the question stops short of affecting the defendants, and I cannot see how the plaintiff can have a right to call on the defendants, as partners, for the value of these goods, on a supposed contract, when the real contract between the buyer and seller was consummated before the joint risk began." [1]

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[1] Where parties have had some talk about forming a partnership, but have never in fact perfected their arrangement, no partnership is formed. If an article is to be signed, and inventory to be taken of the stock held by one partner, no partnership exists until the agreement is consummated, even as to third parties. Hubbell v. Wolf, 15 Ind. 204. Thus in Glover v. Tuck, 24 Wend. (N. Y.) 158, an action of covenant was brought for a breach of a copartnership agreement to have timber cut on certain tracts of land owned severally. The plaintiff was to devote his whole time to the prosecution of the plan, which was to build a steam mill on the premises. The other parties agreed to accept his drafts for not exceeding eight thousand dollars. The plaintiff covenanted immediately to proceed in his duties and devote himself exclusively to the performance of them. The mill or any part of it was never erected, nor did any one ever take any step in the progress of the concern. It was held that the plaintiff must allege the performance of the parts he was bound to perform in order to put the defendants in default. He was bound specifically to set forth what he had done so as to show he had performed all precedent conditions. In Kerrigan v. Kelly, 17 Mo. 275, money was paid by one person upon an agreement to form a partnership in an ice house owned by one partner and in the ice business. The owner of the lot and ice house refused to deed any part of the ice house lot. It was held that as the contemplated partnership was not consummated, the party advancing the money under the expectation of a partnership might recover it back by action. The conditions precedent must all be performed, Mc Graw v. Pulling, Freem. Ch. (Miss.) 357; Beale v. Pool, 27 Md. 453, and a mere executory agreement is not enough. Wilson v. Campbell, 15 Ill. 402; Atkins v. Hunt, 24 N. H. 208. Where a partnership was intended in the building of a market house, and defendant advanced moneys from 1829 to 1833, and in October, 1833, by a written agreement it was settled the market house should be valued and defendant should have a seventh share, it was held that the defendant was not liable as a partner till October, 1833, notwithstanding profits had been made but not accounted for before that time, because a mere intention to become a partner does not constitute a partnership. Howell v. Brodie, 6 Bing. N. C. 96. So, one who has merely paid the deposit on her shares in a mining company, and has not held herself out as a partner, is not liable for labor and goods in working the mines, she not being interested as owner in the mine. Vice v. Anson, M. & M. 96.

Where parties by written contract agreed to construct and put in operation mills of a certain description, each party furnishing materials, machinery and money therefor; and after the mills should be completed, the defendant to run and operate them on joint account, each party furnishing one-half the funds necessary and receiving one-half the profits, it was held that the parties were tenants in common of the mills. Just before the mills were finished this agreement was modified, and the other party operated the mills; afterward both parties operated the mills jointly. It was held that the partnership originally contemplated had never been consummated, the original company having made an assignment before the mills were finished; therefore there were no partnership accounts to settle. Moody v. Rathburn, 7 Minn. 98, 104. In Rice v. Shuman, 43 Penn. St. 42, it appeared that on the 20th of February, 1861, an agreement of co-

The two cases of Saville v. Robertson, and Gouthwaite v. Duckworth, are clearly distinguishable, still, it will be proper to state their points of difference in the words of two learned judges. Lord Ellenborough, in Gouthwaite v. Duckworth, says: "The case of Saville v. Robertson does indeed approach very near to this; but the distinction is, that there each party brought his separate parcel of goods, which were afterward to be mixed in the common adventure, on board the ship, and till that admixture the partnership in the goods did not arise. But here, the goods in question were purchased in pursuance

partnership was entered into between Joseph D. Simonton and Bixler, by which it was agreed that Simonton should pay one thousand two hundred and fifty dollars for half of a tannery. The agreement stipulated that the partnership had commenced on December 1, 1860, but no time was fixed for the payment of the one thousand two hundred and fifty dollars. On March 18, 1861, a purchase of goods was made by Bixler, in the name of the firm, on six months' credit. At this stage of the proceedings, Simonton refused further compliance with the terms of the agreement. The court held "the agreement between Bixler and Simonton is, on its face, merely an *executory one*, and it was never executed. The only act done by Simonton in pursuance of it was to allow Bixler to buy one hundred hides in their joint names, and immediately afterward he repudiated the contract to become a partner." It was held the copartnership agreement was not perfected. In Raboul v. Chalker, 27 Conn. 130, the parties had agreed to be partners for three years from May 1, 1855; the purchase of goods before that time did not make them liable as partners. The court say it is quite clear that until that time (May 1) it was in the power of either party to refuse to go on with it. It was like any other executory contract which either party may refuse to carry out. In Hubbell v. Woolf, 15 Ind. 209, the court held that where the agreement for partnership was *not consummated*, the relation of partnership did not exist, although money had been advanced with a view to form a copartnership.

When no time is agreed upon, and there are no conditions precedent to be performed, the partnership commences from the date of the agreement. Particularly if the terms have been accepted and acted upon. Hunter v. Whitehead 42 Mo. 526; Burns v. Rowland, 40 Barb. (N. Y.) 369; Raboul v. Chalker, 27 Conn. 114; Azel v. Betz, 2 E. D. S. (N. Y. C. P.) 190; Ingraham v. Foster, 31 Ala. 123; Goddard v. Pratt, 16 Pick. (Mass.) 426. In Aspinwall v. Williams, 1 Ohio, 94, three persons, Chase, Williams and Gardner, entered into a written agreement to erect a distillery for the distillation of grain, jointly to share and share alike the cost of the establishment to be erected on the ground of Williams. Williams agreed to lease the ground, with a stream of running water, for fifteen years, to the concern, from the date of the agreement, and immediately to erect the necessary buildings. Gardner and Chase agreed to provide the stills and worms of the establishment. It was understood that a store of goods should be established, to be furnished by Gardner and Chase. After the establishment was completed with goods and stills on the spot, an equal proportionate amount was to have been paid by each. The whole establishment, goods, etc., etc., is to be equally owned by the three. After making the contract, Chase went to New York with letters from Cincinnati merchants, stating the character and responsibility of Williams, but without the knowledge of Williams, and purchased of Aspinwall a quantity of goods and executed a note for the same in the name of Williams, Chase & Co. None of the goods came to the use of Williams, and the business of distilling was never commenced. Under this state of facts, Williams claimed he was not liable on the note, that the partnership had never commenced, and that Chase and Gardner were bound to furnish the goods before the partnership took effect, but the court held that a partnership existed from the date of the agreement. Thurston v. Perkins, 7 Mo. 33; Austin v. Williams, 2 Ohio, 64.

of the agreement for the adventure, of which it had been before settled that Duckworth was to have a moiety." And Mr. Justice Bayley observed that, "in Saville v. Robertson, after the purchase of the goods made by the several adventurers, there was still a further act to be done, which was the putting them on board the ship in which they had a common concern, for the joint adventure, and until that further act was done, the goods purchased by each remained the separate property of each. But here, as soon as the goods were purchased, the interest of the three attached in them at the same instant, by virtue of the previous agreement."

In the case of Post v. Kimberly,[1] the leading facts of which have been already stated, it was held that there was no partnership between A & B and C & D in the outward cargo, except, perhaps, so far as related to the transport and selling of it, for that, although the whole cargo was shipped on board the same vessel, yet it was clear that each house purchased and put on board its aliquot part without the concern or responsibility of the other.

Time when joint liability commences.

SEC. 511. It is clear, from the preceding cases, that a person who supplies goods which are intended to be appropriated to the purposes of a joint adventure, may, under certain circumstances, have no legal remedy for his debt, except against the individual adventurer with whom he deals. But this will only be the case where, at the time when the goods are ordered, the partnership between the parties is not consummate, and the creditor has not acted on their joint credit. On the contrary, where several persons agree to become partners in a particular adventure, and there is no stipulation between them that the partnership shall not be consummate until after the order of the goods, then, whether the order be given by one or more of the adventurers, their joint interest in the goods will commence from the moment of the order, and their joint liability to the seller from the time of the delivery. Therefore, where three persons engaged in a joint speculation for the purchase and importation of corn, but no partnership fund was raised for the speculation, and the parties met the expenses in thirds, and two only of the three had the management of the speculation, one of these two being the consignee, and the other the salesman of the corn, it was nevertheless very truly said that if there had been a claim in that case by the seller of the corn, no

[1] 9 Johns. (N. Y.) 470.

doubt he would have been entitled to proceed against all the parties, and might have called upon them all for payment.[1] Upon the same principles, where A and others agreed to become partners in the purchase of fifteen shares of a copper adventure, and, in pursuance of the agreement, A alone, and in his own name, contracted for the purchase of the shares and paid a deposit, to which the others contributed, it was held that the others, as well as A, were bound by this contract, and that upon an action and verdict against A, for the non-performance of it, the others were bound to contribute their proportion of the damage and costs.[2]

So, where A & B, stationers, ordered certain paper-makers to supply paper to C & D, printers, for the purpose of printing certain specified works, and upon the bankruptcy of A & B, the paper-makers discovered that C & D were partners with A & B in the publication of those works. At the trial of an action brought by the paper-makers against C & D, to recover the value of the paper, Lord Denman, C. J., told the jury that if they thought that, at the time when the goods were furnished, the defendants were partners in the concern, for whose benefit they were furnished, the jury were to find for the plaintiffs. The jury did so find, and the Court of King's Bench refused to grant a new trial.[3]

Supply of goods to one before the partnership commences.

SEC. 512. If the separate supply of goods to one of several adventurers, before the partnership is consummate, creates no joint demand by the seller on the firm, it is still more easy to see that the separate loan of money to one of several adventurers, for the purpose of founding the partnership, will not constitute the firm the joint debtors of the lender. In the case of Saville v. Robertson, the judges continually referred to this principle as the foundation of their judgment in that case. "I cannot," said Lord Kenyon, "distinguish this case from that put at the bar where several persons were to contribute their separate *quota* of money, and they applied to different scriveners to procure it, they could not all be liable for the capital which each should borrow." And again, "Suppose several persons agreed to open a banker's shop, and it was agreed that each partner should bring into the house a certain sum of money as his share, it could not be contended that, if one of them were to borrow money for his share, all

[1] Per Bayley, B., Smith v. Craven, 1 Cromp. & Jerv. 500.

[2] Browne v. Gibbons, 5 Bro. P. C. 491.

[3] Gardiner v. Childs, 8 C. & P. 345.

the others would be liable for it." Again, per Grose, J., "I cannot distinguish this case from that put in argument of several persons agreeing to enter into partnership, each bringing in a stipulated sum of money, and each borrowing his proportion of different persons, in which case it is impossible to say that the persons advancing could maintain actions against all the partners for the several proportions lent to each."

Rule in Smith v. Craven.

SEC. 513. The law on this subject is well settled by the case of Smith v. Craven.[1] There, Thompson, Craven & Wharton, separate traders, engaged in a joint speculation for the purchase and importation of corn. For this purpose they employed Wharton's clerk, Rodbartus, as their agent, whom they dispatched to Lubeck. Rodbartus was instructed, in a letter from Wharton, that he was to draw upon him, Wharton, for what moneys he might want, Rodbartus being at the same time informed that the speculation was on the joint account of the three. Accordingly, in the course of this speculation, which lasted through several months, and consisted of various consignments to Wharton, bills were regularly drawn by Rodbartus on Wharton, and accepted by him and were duly honored by the plaintiffs, the bankers of Wharton, on his account, and by his instructions. No partnership fund was raised for this speculation, and it was agreed that the parties were to meet the expenses in thirds, and the defendant Craven regularly contributed his proportion of the expenses. Wharton having become insolvent, the plaintiffs, who had no knowledge of the corn speculation during the time of these transactions, brought their action for money lent against the defendants, Craven and Thompson. Thompson having suffered judgment by default, the question was, whether, under these circumstances, the action was maintainable against Craven. And the Court of Exchequer held that it was not. Lord Lyndhurst: "It was agreed that each of these three persons should contribute a third for the purposes of this joint speculation. It is expressly found by the case that Craven did contribute his share. Nothing is stated on the case which tends to show that Craven knew how the other two-thirds were raised by Wharton and Thompson, his partners in this transaction. How could he know that they did not meet their shares with funds of their own? He might suppose that Wharton, to whom the

[1] 1 Cromp. & Jerv. 550.

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corn was consigned, might raise his share on the security of the proceeds. In point of fact, Wharton raised the money from the plaintiffs on his own credit, but it does not appear that he had Craven's authority for so doing, nor is it found that Craven had any knowledge of his proceedings in this respect." Bayley, B.: "If I supply my agent with money, which he misapplies, and raises money elsewhere, can the person from whom he obtains the money sue me for the amount? Wharton having given collateral security, the plaintiffs, as his agents, and on his credit, not knowing any thing of the other parties, pay the money, and pay it in discharge of that which is the individual debt of their principal, and of him alone. As agents, they had no notice that they made the payment except on the individual behalf of Wharton; he only was trusted, and the advances were made on his credit alone; the plaintiffs were not deluded by the prospect of a partnership security, and the claim must be restricted to Wharton alone."

When they become liable for an antecedent debt. Saville v. Robertson—Greenslade v. Dower.

SEC. 514. Where goods or money are supplied separately to one of several adventurers before the partnership is consummate, but they *all* draw a bill or give an acceptance for the value of the supply, the contract which was originally separate becomes joint under the security, and they who are parties to the security become in consequence jointly liable. In Saville v. Robertson,[1] the defendants accepted two bills of exchange for the amount of the cargo of copper supplied by the plaintiff, and the court held clearly, that though the action was not maintainable for goods sold and delivered, yet there was a good consideration for the bills, and the plaintiff might have recovered upon them.

But to render all the drawers or acceptors liable on a bill or note so given before the commencement of the partnership, all must join in the security, for in such case one has no more implied authority to bind the rest by bill than he has to bind them by a mere order for goods. In the case of Greenslade v. Dower,[1] A and B agreed to take a farm, and pay W, the former occupier, for fixtures, stock, crops, etc., by bills at three months. W afterward, without the knowledge or consent of A, took from B bills for the amount payable at six and twelve months, accepted by B for himself and A. The Court of King's Bench held that the latter could not be sued on the bills.

This case, it is true, might have been decided on the sole ground

[1] 7 Barn. & Cres. 635; 1 Man. & Ryl. 640.

that one of two joint occupiers of a farm has no implied authority to bind the other by bill of exchange, and Holroyd, J., rested his judgment entirely on this consideration. But two of the other judges were evidently of opinion that the partnership in a farm is not consummate until the joint occupation, and consequently that a bill accepted before that period by one of the intended partners of a farm in the name of the two is not binding on the other. "I think," said Lord Tenterden, "that the mere joint occupation of the farm cannot operate by relation, so as to render these bills binding upon A, they having been given contrary to the terms of the original contract, and without his assent." Bayley, J.: "If several persons are in trade together, a bill accepted by one in the names of the partnership, and in the course of their trading, binds them all. But there is a great difference between such a bill and one drawn for the purpose of founding the partnership. Originally, each partner would have to bring in his proportion of the capital, and it would be very unjust to let the acceptance of one for the capital bind all the others; no authority of that nature can be implied, nor does it arise by operation of law, the debt not being a partnership debt."

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